LIBERTY, THE PUBLIC INTEREST, AND MANDATORY HELMET USAGE LEGISLATION: AN APPLICATION OF JOHN STUART MILL

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Is there an arena of individual behavior which should be immune to State interference? John Stuart Mill, in his classic work *On Liberty*, maintained there is such an arena. This thesis examines Mill's principle of liberty to find what value, if any, it holds in determining the legitimacy of what is often referred to as "paternalistic legislation." Specifically, the thesis applies Mill's principle to mandatory helmet-usage legislation.  

Other questions are addressed along the way. How far should the State reach in order to insure personal safety? What criteria should be used to determine what individual behavior becomes the legitimate concern of others? Is Mill's two-sphere model of individual behavior, consisting of self-regarding and other-regarding behavior, a worthwhile model for analyzing paternalistic legislation?
Chapter I lays out the relevance of this work, arguing that Mill's essay raises very important issues that presently exist in our society. Chapter II examines *On Liberty*, concluding the two-sphere model of Mill's is a beneficial model for analyzing such legislation. Chapter III is an overview of the history of mandatory helmet-usage legislation. Chapter IV is the application of Mill's principle to the helmet-usage legislation, along with a summation of the specific strengths and weaknesses of his argument. I conclude that Mill would likely oppose such legislation, and is correct in doing so. Thus, Mill's principle of liberty is found to be a valid tool for examining the limits of State interference in "paternalistic" matters. Finally, Mill's principle is found wanting, for it is ultimately based upon certain fundamental assumptions, specifically those supportive of a market economy, which promote the extension of the State into the very arena Mill said should be immune to interference.
TABLES

Table

III.1. Motorcycle Fatalities and Registrations, 1958-1979 ............... 42

III.2. Numbers of States Implementing Helmet Laws by Year ............... 45

III.3. Status of Helmet Requirements in Repeal States by Year of Repeal ............ 46

III.4. Fatal Head Injuries per 1,000 Crash-Involved Riders (Pre-Repeal vs. Post-Repeal) ............ 48

III.5. Most Severely Injured Body Location per 1,000 Crash-Involved Riders ............ 49

III.6. Fatal Head Injuries per 1,000 Crash-Involved Riders (Helmeted vs. Nonhelmeted) ............ 50

III.7. Preliminary Results From a Survey of 95 Accident-Involved Riders in South Dakota ............ 51

III.8. Hospital Data for Motorcycle Accidents Which Occurred During 8/28/76 Through 8/28/78 ............ 51

III.9. Seventy-One Motorcyclists' Hospital Bills ............ 53
CHAPTER I

INTRODUCTION

What individual behavior, if any, should be immune to State action? Should the State be allowed to mandate individual behavior designed for the primary purpose of self-protection? How far should the State reach in order to insure personal safety? What criteria should be used to determine what individual behavior becomes the legitimate concern of others? Specifically, is the State using legitimate power in implementing legislation requiring motorcycle riders to wear protective headgear?

These questions are important enough to investigate, and therein lies the focus of this thesis. The thesis will consist of four chapters. The first is this introduction, which offers a brief summation of John Stuart Mill's general argument presented in On Liberty, a case in favor of the relevance of his argument to mandatory helmet usage legislation in particular, and to paternalistic legislation in general. I will also address Mill's place in the history of classical liberal thought, and provide a preview of the rest of the thesis.
Chapter II will be an analysis of Mill's argument presented in *On Liberty*. There will be included various interpretations and critiques of his argument. The analysis of Mill's work will consist of five central questions. What was Mill's view of human nature? To appreciate or understand any great political theorist, we must examine the theorist's most fundamental assumptions concerning human behavior. Why did Mill place such great value upon individuality, and does individuality deserve such prominence? Why did Mill place great value upon liberty, as he defined it? Next, can human behavior be so divided into the self-regarding and other-regarding spheres Mill presented to us? Finally, why did Mill seek to restrict State authority?

Chapter III will be an analysis of mandatory helmet usage laws for motorcyclists. Included will be an overview of the political history behind such legislation, as well as the consequences of its implementation, and subsequent repeal in many states. Chapter IV will be an application of Mill's principle of liberty to the mandatory helmet usage laws. Does his principle, or some amended version of it, call for such legislation?

John Stuart Mill set forth an argument in his classic *On Liberty* that there is a sphere of human behavior which deserves immunity from State action.
Mill maintained human behavior can be divided into two separate spheres: that which concerns others, and that which concerns only oneself. The State has the right to enter the former, but must be prohibited from entering the latter. The primary purpose of this thesis is to investigate the validity and relevance of this argument by one of the most important political thinkers of classical liberalism. To evaluate the applicability of his argument to the existing conditions of American society, I will use his theory to examine the mandatory motorcycle helmet usage laws that presently exist in twenty-two states. This particular type of legislation directly addresses many of the issues Mill raised in his argument.

This thesis will focus on two essential components of Mill's argument. First, he placed a value of primacy in individuality, and argued that a society is only as good as the individuals in it. Second, Mill maintained that the most essential condition in which the individual and society can grow and prosper is liberty. He defined liberty as the freedom to choose one's life plan in a manner which does not harm others.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.
It was Mill's contention liberty was becoming increasingly threatened during his time, and the forces of public opinion, as well as the growth of State authority, were the primary culprits. Thus, Mill set out to establish limits of State authority in the area of individual behavior.

Mill divided human behavior into two general spheres. One sphere is that which Mill called "self-regarding." This sphere consists of all individual behavior which concerns only the agent. The other sphere is usually referred to as "other-regarding" behavior. This is behavior which does affect persons besides the agent. The major contention of On Liberty is a "simple principle": the State should never enter the self-regarding sphere in a coercive fashion. The only occasions in which State coercion is justified are times when the agent's actions affect others. Mill began his essay stating precisely this point.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action or any of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others.\textsuperscript{2}
Protection from coercion is essential to promoting liberty, and it was Mill's contention that such protection was more necessary than ever before: "... the worth of a State, in the long run, is the worth of the individuals composing it. . . ."\(^3\)

How relevant are the issues addressed in Mill's essay to present American society? Is there a trend toward less individual liberty, as Mill maintained? Is individuality increasingly threatened by public opinion, as well as State coercion? Mill asserted the threat of tyranny by the majority is very real, even in a representative government. How accurate was this assertion? It is my contention that these issues, and others presented in Mill's argument, are quite relevant to our present society.\(^4\)

It is not necessary to determine whether the threat to liberty and individuality is greater today than in Mill's time, or to evaluate the relative restrictions of life in nineteenth century Europe, and twentieth century America. It is sufficient to state there is much evidence to assert individuality and liberty are encroached upon, by the forces of both private and public institutions.\(^5\)

Mill was quite concerned about the degree of conformity he witnessed in his time. In fact, he stated
the mere act of non-conformity is of such value that it is to be admired and supported, simply because it has become so rare a commodity. The pressures of conformity in present America can be witnessed in numerous ways, but only two will be presently addressed. The influence of a consumption-oriented capitalist society upon individuality expresses itself in a variety of ways. The constant bombardment of advertising places great pressure, much of it successful, to consume the identical products, in order to achieve identical results. Thus, to a large extent, how we actually define individuality is through the clothes, food, or other consumer goods we obtain.  

Second, the State systematically promotes and protects the two-party system: through restrictive ballot requirements, incumbent privileges, and shared federal fundings, there exist many barriers for individuals with different viewpoints from those of the mainstream Republican and Democratic parties. Thus, an obvious homogeneity of political leaders emerges in the form of white, well-to-do males with fundamentally status quo ideologies. The few exceptions to this political mold do not alter the point that individuality is actively opposed by the present two-party State.
Mill was not only concerned with the lack of individuality. He was also alarmed at the degree of encroachment upon individual liberty. Once again it is not important to determine whether Americans have more liberty than did Mill's English citizens. We need only present evidence that liberty is being restricted and threatened, and such evidence is not difficult to find. We can begin with the obvious examples of encroachment upon freedom of speech, religion, and the press which is part of the daily news report. Individual civil liberties are being constantly threatened, by both the private sector and the State. The abuse of governmental wiretaps, the increase of legislative mandates, and the sheer number of court actions brought against the press and individuals who challenge the status quo—all these examples support the argument that individual liberties are in jeopardy.

This thesis will investigate a piece of legislation that can be placed in a category which concerned Mill in his argument: paternalism. Paternalism is the idea of restricting (or mandating) certain behavior deemed not to be (or to be) in the best interests of the person so directed. We are seeing this type of legislation being passed in ever-increasing numbers. Mandatory helmet usage for motorcyclists is required in twenty-two
states. New York, New Jersey, and Illinois have just passed a mandatory seat-belt usage law, and other states are considering similar legislation. It is the purpose of the thesis to examine Mill's theory, and to determine whether it is worthwhile to apply his theory to such paternalistic legislation. Mill's argument is certainly relevant to present American society, not because it is flawless, but because the issues it addresses exist, and are deserving of investigation.

Liberalism developed from a variety of historical conditions, not all of them economic. The ideological roots of liberalism were founded in the Revolutionary Era of the eighteenth century. The political ideals of this era were freedom of thought, of expression, and of association. Also included in the ideology were the security of property and the control of political institutions by an informed citizenry. What means were necessary for these ideals to be realized? A society had to establish a government that would work within limits set by law. It was necessary to adopt a form of constitutional government. Furthermore, the political authority should include some form of representation. Significantly, these political ideals were posited as self-evident natural rights.
Though rooted in these political ideals, classical liberalism was not a revolutionary ideology. The fear among its proponents, caused in part by the excesses of the French Revolution, resulted in a more moderate strategy for implementing these ideals. The growth of empiricism, including utilitarianism, eventually overshadowed the belief in self-evident natural rights. Perhaps most importantly, as the position and influence of the commercial and industrial middle class became more assured, revolution became less desired. George Sabine states:

This class everywhere formed the spearhead of liberal political reform in the nineteenth century, and the trend of industrial and commercial development made the expansion of its political power a foregone conclusion.\textsuperscript{10}

The emergence of this new political base coincided with the decline of the landed gentry, and the growth of unorganized wage earners. As time went on, liberal political reform passed out of the region of ideology, and into that of pragmatic reform. The liberal reformers sought administrative reorganization, reforms in legal procedures, and regulations in areas of commerce and social welfare. Its philosophy tended to become utilitarian instead of revolutionary.

Liberalism transformed itself into an intellectual bridge between the individualism of its earlier period, which was its heritage from the philosophy
of the Revolutionary Era, and a recognition of the reality and the value of social and communal interests, which tended in general to put themselves forward in anti-liberal forms.\textsuperscript{11}

Finally, the economic theory of liberalism was based upon the works of Adam Smith and David Ricardo, and most liberal theorists supported the ideological assumptions of market capitalism. Certainly, beginning with John Locke, laissez faire economic freedom provided a solid foundation for promoting political freedom for individuals, primarily those of property. The liberal thinkers expanded and transformed the ideology, which C. B. MacPherson has labeled "possessive individualism," and the relationship between capitalism and liberalism is both intimate and dynamic.\textsuperscript{12}

John Stuart Mill's position in liberal thought can be viewed as one of transition. His theories were important for liberalism, for he helped lead liberalism from the egoism of utilitarianism towards a theory that assumed social welfare is a matter of concern to all citizens. Mill also presented freedom, integrity, self-respect, and individuality as intrinsic goods apart from their contribution to utilitarian happiness, though he never fully acknowledged this departure from Benthamite utilitarianism. According to Sabine, Mill's contributions to liberal philosophy can be summed up in four
general statements. First, Mill rescued utilitarianism from its dead-end calculation of pleasures and pains. Second, Mill accepted political and social freedom as intrinsic goods, not because they contributed to an ulterior end, but because freedom is the proper condition of a responsible human being. To pursue one's life in one's own way is not a means to happiness, but is a substantive part of happiness. Next, Mill argued that liberty is not only an individual good, but a social good as well. The claims of individual right and public utility are closely connected. Finally, the function of a liberal state in a free society is not negative but positive. It cannot make its citizens free merely by refraining from legislation or assume that the conditions of freedom exist merely because legal obstacles have been erased.13

Mill's On Liberty is his most characteristic and most lasting contribution to political thought. It can be argued that it represents the noblest statement of liberal thought, for it successfully argues that individuality is not only to be a vice tolerated by an enlightened society, but to be given a positive value and be viewed as an essential ingredient of a good society.
NOTES--CHAPTER I


2 Ibid., p. 72.

3 Ibid., p. 170


11 Ibid., p. 674.


CHAPTER II

CRITIQUE OF ON LIBERTY

There will be five general aspects of On Liberty addressed in this chapter. First, what was Mill's view of human nature? Second, why did Mill place such importance upon individuality? Next, why did Mill assign primacy to his own brand of liberty? I will also investigate the validity of Mill's two-sphere model concerning human behavior. Finally, the concluding part of this chapter will examine Mill's assumptions and attitude towards State action.

What was Mill's view of human nature? Mill definitely believed in the capacity of human beings to be rational, but not equally or perfectly so. A component of his argument opposing State action rests on the assertion that an individual best knows his own interests. Similarly, Mill's defense of freedom of thought, and freedom of expression, would be absurd, if Mill did not view human beings as capable of being rational creatures. Thus, rationality is a characteristic Mill assigned to human beings that have reached what he referred to as a "certain level of development"
Utilitarianism assumes at least certain people are capable of being rational, for the calculations necessary to determine the maximization of the greatest pleasure for the greatest number is a form of linear rationality. Inherent in the utility principle is an assumption that happiness is somehow achievable and even calculable. While Mill offered his own unique brand of utilitarianism, it is evident he also assumed happiness is obtainable for human beings.

Finally, it should not be assumed that Mill's view of human nature was simple or unduly optimistic. Indeed, this interpretation of Mill has been the focal point of criticism of Mill's principle by a number of scholars. Mill's view of human nature is attacked by various critics, primarily on the grounds that he presented a human being with characteristics not found in the average person. H. J. McCloskey states:

Mill wrote as if members of civilised societies are completely rational and responsible, and this although elsewhere he showed often enough that he knew that they are not.¹

Similar criticism is offered by H. L. A. Hart, who attacks Mill for his conception of a normal human being, which does not correspond to the real world.

Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts. Mill, in fact, endows
him with too much of the psychology of a middle-aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences; who knows what he wants and what gives satisfaction or happiness, and who pursues these things when he can.2

Another area of criticism concerning Mill's view of human nature consists of his emphasis upon individualism. For example, David G. Ritchie opposes Mill's concept of "self-regarding action" because he sees Mill as proposing a "negative" view of human behavior; one in which the "self" is pitted against others.3 It is true Mill, like most liberal thinkers, placed great value on individualism, at the expense, some would say, of the communal traits human beings exhibit. Certainly, his emphasis upon individuality is partially based upon disdain for the judgment of the masses. Mill assumed the masses would inherently be comprised of conformists, with a desire to impose their more likings and dislikings on others. It was this pervasive tendency on the part of the masses to conform and abdicate the more positive aspects of human behavior which gave Mill much of the impetus to establish his liberty principle. He warns us early in the essay that "majority tyranny" is becoming increasingly a threat to individual liberty.

It is important, however, not to lose sight of the general intent of Mill's argument. Mill sought to
establish a foundation for restricting social and political interference. He was certainly aware of the fallibility of human beings, both individually and collectively. He presented numerous examples of errors in judgment made by individuals, society, and the State. He did not argue most people have an abundance of rationality, tolerance, wisdom, and independence. Rather, he seems to say to us that since all of us have flaws in our character, it is better for us to make our own errors, according to the life plan we choose, than to have the errors forced upon us by the flaws found in others. A major element in Mill's argument was his belief that the clash of errors freely chosen is more likely to produce truth than will the enforcement of one group's errors upon another group. Mill maintained that a person generally knows his own interests best, not because he absolutely knows them, but because he is more likely to know what his interests are than is anyone else.

Ritchie's interpretation presents Mill's concept of a civilized person in a far too negative and exaggerated form. Mill did not attempt to isolate one person from all others. He readily admitted, and even advocated, the social aspect of human behavior. In fact, it can be argued that Mill's liberty principle is a
fundamental ingredient in building a society in which people beneficially interact with one another. Mill might agree with Ritchie's assertion that one can find "self" in community, but only if he is allowed to choose freely his own life's plan. Mill asserted that the worth of a society can be found in the worth of the individual. He made no attempt to isolate human beings. Rather, his concern was how to build a society consisting of rational, creative, and happy individuals. Recognition of individual rights is absolutely essential to the society Mill envisioned.

Why did Mill place such great value upon individuality, and does it deserve such prominence? Let us remember Mill's assumption concerning the actions of the masses. He observed a tendency of the masses to adhere to conformity and blind obedience. In such a society, Mill asserted "great achievements" are rarely, if ever, obtained.

Mill presented an elitist, but not aristocratic, argument in advocating the position that exceptional individuals should be nourished and supported in a good society. Mill was an elitist in the sense that he argued certain people were more rational, intelligent, and creative than others. Acknowledging such differences exist among citizens, Mill presented his principle
as a means of benefitting society by allowing such
gifted people the liberty to reach their full potential.
Mill's principle does not rest on the assertion that all
citizens are capable of great deeds, if given a wide
degree of liberty. Rather, the wide range of liberty
Mill proposed will directly benefit the few citizens
capable of great deeds, thereby bettering the rest of
society. It is important to note that Mill did not
support the idea that such gifted people are the exclu-
sive domain of the wealthy class or of a hereditary
aristocracy.

Interestingly, Mill's strongest argument for
individuality lies in his assertion that society ulti-
mately benefits from such individuals. It is to the
benefit of all citizens, not merely the exceptional
individuals, for society to promote a wide range of
individual behavior. In this "free market" of life-
styles and behavior, the great reservoir of untapped
human potential can be explored and uncovered. Citizens
will reap the rewards of unbridled genius. The medi-
ocrity of the majority will be elevated by the tolerance,
and even the promotion, of those exceptional individuals
who have the courage to be different. Mill stated that
in other times, it was necessary for such individuals to
be not only different, but better. For Mill, because of
the pervasive trend towards conformity, the mere act of non-conformity is a service to society. "... In this age, the mere example of non-conformity, the mere refusal to bend the knee to custom, is itself a service." 

Mill did more than assert that diversity is inherently beneficial. He forcefully argued that blind obedience must be fought against, because it always destroys character. Thus, individuality is important to Mill because it builds character. Mill did not absolutely oppose custom or tradition, but it was blind obedience to them which he absolutely rejected.

Sir James Fitzjames Stephen, among others, has criticized Mill for assuming diversity in human behavior is inherently good. In general, these critics view Mill as a proponent of eccentricity, rather than positive individuality. They interpret Mill as arguing that differences are better simply because they are differences. It is evident Mill did place a great deal of value in individuality and diversity. He believed that only by exploration and experimentation can man begin to reach his potential:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human
life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. 6

Does individuality deserve the importance Mill assigned to it? I think it does, for the very reasons Mill presents. There is a direct corresponding relationship between the quality of the state, and the quality of the citizens. It is a dynamic relationship, in which each side shapes and defines the other. But it is not a simple "chicken or the egg" riddle. Society is comprised of individuals, and Mill did not place individuals outside of society. 7 Instead of pitting the individual against society, Mill stated the rights of an individual have primacy over the mere desires of the rest of society. Thus, he centered the argument around rights and preferences, rather than individuals and society. This point is often ignored or misunderstood by those critics of Mill who attack him for placing the individual above society. His principle gave primacy to individual rights, and presents us with a conflict Mill was unsuccessful in resolving: the conflict between the values of individual liberty and social utility. While Mill can be rightly accused of being an inconsistent utilitarian,
to assign to him the responsibility of advocating selfish individualism is to make a serious error in interpretation.

Why did Mill place such great value upon liberty, and does liberty deserve such prominence? Mill is quite explicit in defining liberty:

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.  

This is a negative view of freedom, because it is a "freedom from" interference, rather than a freedom for certain rights and benefits. Isaiah Berlin explains this negative view.

By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom. This is certainly what the classical English political philosophers meant when they used this word.

The question remains concerning why Mill believed this brand of liberty was so essential to a good society. Mill presented a similar argument on behalf of liberty to that concerning individuality, i.e., there is a direct relationship between the degree of liberty a society can be assigned and the degree of liberty the citizens enjoy:

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified.
Mill was certain liberty is essential to building good character in people. Liberty promotes independence of thought and action by requiring people to take more control over their lives. Freedom promotes a wide range of human behavior, and thereby creates a conducive marketplace for great achievements. Liberty is also important to Mill for providing a democratic government, which ultimately depends upon responsible individual acts. Liberty will help prevent a passive acceptance of custom, and will thereby reduce the number of rules based merely on preference or likings. Finally, Mill presented an efficiency argument in favor of liberty. He stated that even if there are certain legitimate reasons for interfering with one's "self-regarding" behavior, it might be wise not to do so, since one knows one's own interests best. For all of these reasons, Mill gave liberty great value.

Mill has been attacked by numerous critics for placing too high a premium on liberty. These critics argue there are many characteristics essential to a good society, with liberty being merely one of them, and not necessarily the primary one. Mill is also criticized for his negative view of liberty. Ritchie, for example, argues that men have struggled for liberty on grounds much more substantial than being left alone.
this is too narrow a view of Mill's conception. Ronald Dworkin provides a convincing defense of both Mill's principle, and his definition of liberty. According to Dworkin, there are generally two types of liberty: liberty as license, and liberty as independence. Liberty as license is the degree to which a person is free from social or legal constraint to do what he might wish to do. This is an indiscriminate concept because it does not distinguish among forms of behavior. In essence, every prescriptive law diminishes a citizen's liberty as license: good laws, like those preventing murder and theft, diminish liberty in the same way, and possibly to a greater degree, than bad laws. Liberty as independence is not the same type of indiscriminate concept. It is the status of a person as independent and equal rather than subservient. Dworkin maintains Mill is using liberty as independence, not as license. He is right in stating Mill did not advocate an absolute freedom or license; in fact, Mill conceded any act, no matter how personal, may have important effects on others. Dworkin explains why liberty as independence was of value to Mill.

Mill saw independence as a further dimension of equality; he argued that an individual's independence is threatened, not simply by a political process that denies him an equal voice, but by political decisions that deny him equal respect. Laws that recognize and protect common interests,
like laws against violence and monopoly, offer no insult to any class or individual; but laws that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They make him intellectually and morally subservient to the conformists who form the majority, and deny him the independence to which he is entitled. Mill insisted on the political importance of these moral concepts of dignity, personality, and insult. It was these complex ideas, not the simpler idea of license, that he tried to make available for political theory, and to use, as the basic vocabulary of liberalism...

Liberty deserves the primacy Mill gave to it, if one is constructing a good society. There are, however, situations in the real world in which it might be necessary to place other conditions ahead of it. Certainly, in time of crisis, such as war or famine, the freedom from interference Mill advocated might, out of necessity, be restricted. This acknowledgment of certain conditions existing which would preempt liberty does not discredit Mill's principle. A society, to be of the sort Mill desired, must have liberty from interference. I would not wish to construct a good society without guaranteeing liberty. It is important to remember, and Mill was certainly aware of this, that there must also be guarantees of other characteristics, such as enough food and shelter, for a society to be considered good. In fact, Mill should have argued these characteristics are essential conditions for liberty to flourish. He did
this implicitly, because he would have realized starving persons or those who have no means of sustenance, forfeit their freedom in a very serious manner.

Can human behavior be placed within the self-regarding and other-regarding spheres Mill presents? The issues raised by this question are the essence of Mill's essay, for if distinctions cannot be made between the two spheres, then his assertion that the State is forbidden from entering the self-regarding arena is meaningless. If the two spheres can be identified as separate areas of human behavior, then it is possible to examine the value of Mill's principle in evaluating State action.

Mill had no doubt that certain human behavior can be considered "self-regarding." Throughout the essay, Mill referred to individual behavior which either concerns no one but the agent, or concerns others only in an indirect manner.

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which only concerns himself, his independence is, of right, absolute.15

But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.16
It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.\textsuperscript{17}

Assuming such self-regarding behavior exists, what constitutes it? To determine what self-regarding behavior is, we must introduce here another concept used by Mill in the essay. Mill's answer to what constitutes "self-regarding" behavior seems to be "that behavior which does not harm others." Thus, it is essential that we define what constitutes "harm to others," before we can determine if Mill's two-sphere model is of any practical value. It is obvious Mill considered such harm to others as more than only physical harm.\textsuperscript{18} Certainly, we can be harmed emotionally and spiritually by actions inflicted upon us by others, either collectively or individually. What actions beyond physical harm would travel from the self-regarding sphere into the other-regarding arena? Mill gives us some helpful, but not extensive, and far from conclusive guidelines for determining such actions.

I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a [distinct and assignable obligation] to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term. . . . Whenever, in short, there is a [definite damage], or a [definite risk of damage], either to an individual or to the
public, the case is taken out of the province of liberty, and placed in that of morality or law. 19

We are getting closer to defining harm to others, but we are not quite there. It remains necessary to define "distinct and assignable obligation." How do we know what "definite damage" or "definite risk of damage" consists of? Once again, Mill seems to define these terms by what they are not, rather than what they are. What clearly does not constitute harm to others is something affecting their mere likes and dislikes, what Mill referred to as "preferences" of the person being "harmed." Therefore, simply because Mr. Jones may be offended by the actions of Mr. Smith, Jones has no right to impede Smith's actions. Mill maintained that no real harm has been inflicted upon Mr. Jones, because the only negative consequences which exist are the result of Jones' likes and dislikes, rather than Smith's actions. For example, Mill today would argue that one's homosexuality should not be open to State action, because the only harm it does is to offend certain persons' likes and dislikes, and according to Mill, this is insufficient warrant for restricting what he views as "self-regarding" behavior.

For harm to exist, a person must violate a "distinct and assignable" obligation to someone else.
What is such an obligation? Certainly, Mill would include the providing of basic necessities of life for dependents. Thus, while drunkenness, in itself, may be purely self-regarding, if it results in failing to provide food and shelter for one's family, then it becomes "other-regarding," and thereby open for State interference. Likewise, if one's individual pursuits, such as gambling, prevent the agent from fulfilling contractual or monetary obligations, such action enters the "other-regarding" sphere. It is essential to note, however, that the "harm to others" is not the action of gambling or drunkenness, but the irresponsibility promoted by them. What causes these acts to be considered "other-regarding," and thus open to discussion, is the fact they have led to the failure to carry out certain "distinct and assignable" obligations.

A "distinct and assignable" obligation must be one that is both direct and verifiable. It can be determined if bills are being paid, food is being provided, or contracts are being honored. It cannot be precisely determined to what degree one is "offended" by certain actions which might be considered immoral or improper. Further, there is no "assignable obligation" among citizens not to offend others, for social mores and values are continually changing. The first person
in town to wear a new hairstyle, or dress in a certain fashion, will inevitably offend someone's sensibilities, but this offense is not justification for interfering with such behavior.

What does Mill mean by "definite damage" and "definite risk of damage"? It is not possible for Mill, or anyone else, to list completely all the actions which constitute "damage," for what is considered harmful in one society, during one era, might be considered acceptable and proper in another. The examples of child labor and slavery come immediately to mind as such actions. The importance of Mill's terminology lies in the term "definite," rather than "damage." The term "definite" implies something measurable and specific. It might be calculated statistically, such as the number of fatalities caused by drunk drivers. If it can be shown that drunkenness, when combined with driving, poses a "definite risk of damage" to others, then Mill would consider such action as other-regarding. As is the case with "distinct and assignable obligation," there must be certain verifiable "harm" inflicted upon "specific" individuals, for individual action to be considered other-regarding.

Some of Mill's harshest critics have disputed the existence of Mill's self-regarding behavior.20
According to such criticism, all human behavior, either directly or indirectly, affects others. Therefore, no significant distinctions can be made concerning the right of the State or society to interfere in individual action. This concept of "Social Rights" emphasizes the interaction and interdependence of human beings, and places obligations and duties upon individuals for their behavior. Thus, if a person drinks too much, he can be held accountable to others, for he is neglecting his duty of being a fine citizen. It matters not whether he is directly hurting others, for his mere example of drunkenness is cause enough for society to interfere with his actions.

Mill readily admits self-regarding acts are not absolutely removed from affecting others.

The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow-creatures generally; perhaps becomes a burthen on their
affection or benevolence; and if such conduct were very frequent, hardly any offence that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead.\footnote{21}

Mill attacked this theory, because it, in essence, gives the State and society the right to interfere with any action of the individual. This concept of social rights correctly implies that we are definitely a product of our environment, and the individuals we come into contact with during our lives affect us in many ways. Thus, by witnessing what is considered to be "wrong" or "evil" behavior, innocent individuals may be corrupted. The proponents of such social rights give justification for questionable actions carried out with either the force of state action or that of public opinion. For instance, in certain localities it might be considered by the majority of the people to be harmful to have an interracial marriage, because of the influence such action might have upon the majority of citizens. Thus, an interracial couple would be setting a "bad example" for the community, and according to the social rights proponents, action could rightfully be restricted.

Second, this social rights theory ignores the fact that nearly all individual behavior results in both
beneficial and harmful behavior. For example, a person who consumes a great deal of alcohol might definitely set a bad example for certain citizens. However, his consumption of alcohol may very well benefit farmers who raise grain, or the individuals he might befriend in the local saloon and buy a round of drinks for. It might even be argued that by being of such character, he provides an excellent topic for a preacher's Sunday sermon. The thrust of these examples is to emphasize the consequences of asserting self-regarding behavior does not exist. If no such behavior exists, then it would be permissible for the State to interfere in all matters of individual behavior. The criteria for such interference would be relative, and the result of certain values. Mill's principle is designed to protect against such prejudicial interventions by making certain behavior absolutely immune to state interference, beyond the realm of discussing the possibility of intervention. It might well be argued that Mill's definition of self-regarding behavior is insufficient in its specifics. But I believe his intention was to construct a principle which simply says to the State and to Society "thou shalt not enter into this arena." What that arena specifically consists of is the basis for much debate, but to deny such an arena exists is to give to the State, or popular opinion,
whether in a democracy or a totalitarian regime, all it needs to inflict tyranny, and discriminatory tyranny at that, upon individuals.

Why did Mill assign such a negative aspect to State action? His use of the term "interference" implies the State is going beyond legitimate boundaries of action. Throughout the essay, Mill placed the State and the individual in a partly adversarial relationship.

Gertrude Himmelfarb states:

"Society," therefore, was the chief antagonist in On Liberty, the great adversary of the individual... The threat as Mill conceived it was formidable: it came from the total social as well as legal and political pressure exerted by the collective whole known as "society." And because that threat was so massive, because the whole of society and all the resources of society were ranged against the single individual, the solution had to be equally drastic.  

It must be remembered that Mill did not deny the legitimacy or the necessity of the State in a good society. He was most definitely not an anarchist, or even an orthodox laissez-faire theorist. Indeed, he argued that erroneous arguments opposing state interventions are as likely to be heard as erroneous arguments supporting state intervention. What he attempted to do was to set up guidelines determining what State action is acceptable. He presented an arena of self-regarding behavior, into which the State is forbidden to enter,
and he offered guidelines on when the State should enter the other-regarding sphere.

We need to have a working definition of coercion, for it is this specific type of State action which Mill sought to prevent in self-regarding actions. For our purposes, coercion will be considered to be the exercise of force to obtain compliance. Mill opposed coercion on two different levels, one theoretical and the other pragmatic. Theoretically, he opposed coercion concerning self-regarding behavior because it prevents individuals from becoming the complete human beings they should be. Coercion limits spontaneity, and restricts the choices of the agent. Mill believed individuals learn and grow in the degree to which they are independent, self-reliant human beings. By letting the State make decisions which concern only the individual, society denies the individual an important aspect of life, and the strength of his character will be diminished.

Once it is determined, however, that one's actions are not purely self-regarding, but do, in fact, affect others, then Mill stated the issue of State interference is open for discussion. Note, that even in the other-regarding sphere, Mill was still quite cautious about supporting State action. His criterion
for determining if the State should become involved in other-regarding behavior is utility. The questions which must be answered affirmatively, in order to justify State interference, are ones of practicality and efficiency. Are the proposed means sufficient to achieve their end? For instance, would a law that is difficult to enforce, and one in which compliance is extremely low, justify the degree of intrusion it permits the State? Mill would argue that State action which has little or no chance of achieving its stated goals should be denied.

Furthermore, even if the objectives of the interference are good, and even if they are obtainable, are they important enough to justify the degree of restraint proposed? What legitimate actions should the State implement to reduce the number of drunk drivers? What are the guidelines for determining what measures can be implemented in the name of national security? Mill provided us with a valuable principle in determining the legitimacy and efficiency of State action in matters in which he allowed such interference. Mill presented three main objections to government interference in this arena.

The objections to government interference, when it is not such as to involve infringement of liberty, may be of three kinds. The first is, when the thing to be done is likely to be better
done by individuals than by the government. Speaking generally, there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it. The second objection is more nearly allied to our subject. In many cases, though individuals may not do the particular thing so well, on the average, as the officers of government, it is nevertheless desirable that it should be done by them, rather than by the government, as a means to their own mental education—a mode of strengthening their active faculties, exercising their judgment, and giving them a familiar knowledge of the subjects with which they are thus left to deal. The third and most cogent reason for restricting the interference of government is the great evil of adding unnecessarily to its power. Every function superadded to those already exercised by the government causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party which aims at becoming the government.

His last point is his most powerful argument against State interference. Any amount of power the State is allowed to accumulate runs the risk, a very great one at that, of feeding an institution inherently amenable to corruption and abuse. This risk is as applicable to the most democratic State in existence, as it is to the most authoritarian. Restrictions must be placed upon all governments, and that is the intention of Mill's principle. In self-regarding matters, the State is forbidden. In other-regarding matters, the State has the right to enter, but we should be quite vigilant in allowing it to interfere in even these matters. We know our own interests best, not because
the government is inherently inept and misdirected. Rather, because all things being equal, it is beneficial for us to learn about our own interests by making our own mistakes, or creating our own successes, rather than submitting to the State. The dangers of collective coercion, according to Mill, may easily outweigh the errors committed by individuals.
NOTES--CHAPTER II


6 Mill, Utilitarianism, On Liberty, and Considerations on Representative Government, p. 120.


8 Mill, Utilitarianism, On Liberty, and Considerations on Representative Government, p. 75.


Ibid., p. 263.

John Stuart Mill, Utilitarianism, On Liberty, and Considerations on Representative Government, p. 73.

Ibid., p. 75.

Ibid., p. 115.


Stephen, "Liberty, Equality, Fraternity."


CHAPTER III

MANDATORY HELMET-USAGE LEGISLATION: AN OVERVIEW

What was the primary force behind mandatory helmet usage laws in the United States? Why did the various state governments deem it necessary to require motorcyclists to wear protective headgear? By the mid-1960s, there was concern among certain members of Congress, as well as within the Department of Commerce, about the increasing number of motorcyclist fatalities and injuries (see Table III.1). The Highway Safety Act of 1966 authorized the DOC to set minimum standards for state highway safety programs. The Act also authorized the DOC to withhold 10 percent of Federal highway construction funds and all Federal highway safety funds from any state which failed to comply with these standards. In 1967, the Secretary of Commerce issued thirteen safety standards, one of which pertained to motorcycle safety. One part of the motorcycle standard required states to enact mandatory helmet use laws.

There were several reasons for this particular standard. First, only seven states required any special education for motorcyclists. Educational and
TABLE III.1
MOTORCYCLE FATALITIES AND REGISTRATIONS, 1958-1979

<table>
<thead>
<tr>
<th>Year</th>
<th>Fatalities</th>
<th>Registered Vehicles</th>
<th>Fatality Rate Per 10,000 Registered Vehicles</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>720</td>
<td>521,290</td>
<td>13.8</td>
</tr>
<tr>
<td>1959</td>
<td>850</td>
<td>565,308</td>
<td>15.0</td>
</tr>
<tr>
<td>1960</td>
<td>790</td>
<td>574,032</td>
<td>13.8</td>
</tr>
<tr>
<td>1961</td>
<td>740</td>
<td>595,613</td>
<td>12.4</td>
</tr>
<tr>
<td>1962</td>
<td>810</td>
<td>660,517</td>
<td>12.3</td>
</tr>
<tr>
<td>1963</td>
<td>940</td>
<td>786,541</td>
<td>12.0</td>
</tr>
<tr>
<td>1964</td>
<td>1,240</td>
<td>985,744</td>
<td>12.6</td>
</tr>
<tr>
<td>1965</td>
<td>1,650</td>
<td>1,381,956</td>
<td>11.9</td>
</tr>
<tr>
<td>1966</td>
<td>2,230</td>
<td>1,753,178</td>
<td>12.7</td>
</tr>
<tr>
<td>1967</td>
<td>2,170</td>
<td>1,953,022</td>
<td>11.1</td>
</tr>
<tr>
<td>1968</td>
<td>1,940</td>
<td>2,089,060</td>
<td>9.3</td>
</tr>
<tr>
<td>1969</td>
<td>1,870</td>
<td>2,315,708</td>
<td>8.1</td>
</tr>
<tr>
<td>1970</td>
<td>2,280</td>
<td>2,824,098</td>
<td>8.1</td>
</tr>
<tr>
<td>1971</td>
<td>2,650</td>
<td>3,343,695</td>
<td>7.9</td>
</tr>
<tr>
<td>1972</td>
<td>3,030</td>
<td>3,759,879</td>
<td>8.1</td>
</tr>
<tr>
<td>1973</td>
<td>3,230</td>
<td>4,371,011</td>
<td>7.4</td>
</tr>
<tr>
<td>1974</td>
<td>3,370</td>
<td>4,966,399</td>
<td>6.8</td>
</tr>
<tr>
<td>1975</td>
<td>3,189</td>
<td>4,964,070</td>
<td>6.4</td>
</tr>
<tr>
<td>1976</td>
<td>3,312</td>
<td>4,933,332</td>
<td>6.7</td>
</tr>
<tr>
<td>1977</td>
<td>4,104</td>
<td>4,881,150</td>
<td>8.4</td>
</tr>
<tr>
<td>1978</td>
<td>4,572</td>
<td>4,858,707</td>
<td>9.4</td>
</tr>
<tr>
<td>1979</td>
<td>4,850*</td>
<td>4,984,000*</td>
<td>9.7*</td>
</tr>
</tbody>
</table>

*Estimates--Registered Vehicles (FHWA)
Fatalities (NHTSA)

training programs on motorcycle safety were either not available, or not promoted. Next, with voluntary use of helmets, 25 percent of motorcyclists used helmets. The United States Public Health Service estimated in 1966 that 100 percent helmet usage would reduce motorcyclist fatalities by 40 percent. Finally, the voluntary programs being implemented were deemed by the DOC as too expensive, and ineffective. After reviewing existing mandatory usage laws in New York, Georgia, and Michigan, the newly created Department of Transportation determined the greatest single measure to produce rapid short term effects was mandatory helmet laws.

By the close of 1969, forty states had adopted legislation requiring protective headgear. The following is the statute passed by Colorado, and it is representative of legislation passed by other states.

Colorado Revised Statute 13-5-159
Minimum safety standards for motorcycles and motor-driven cycles.--
No person shall operate any motorcycle or motor-driven cycle on any public highway in this state unless such person and any passenger thereon is wearing securely fastened on his head a protective helmet designed to deflect blows, resist penetration, and spread the force of impact; nor shall any such vehicle be so operated unless the operator and any passenger shall have in place on his helmet a face shield or shall wear covering his eyes goggles or eye glasses made of safety glass or plastic lens. Each such helmet shall be coated with a reflectorized substance, or have attached thereto a reflectorized material, on both sides and the back thereof, with a minimum
of four square inches of such coated substance or attached material in each of such locations.  

The number of states adopting helmet legislation continued to grow and by 1975, helmet use was required of all motorcyclists in forty-seven states, the District of Columbia and Puerto Rico (see Table III.2). In 1975, the Department of Transportation was considering whether the three states without such legislation should have their safety programs disapproved, thereby losing federal funds. Before final decisions were made, the Congress passed the Highway Safety Act of 1976. Section 208(a) of the Act removed the DOT's authority to require the states to adopt helmet laws, thereby preventing the Department from imposing financial sanctions on any state that repealed its law. This section also removed from DOT the authority to withhold 10 percent of a state's highway construction funds for failing to implement any of the standards promulgated under the Act. State legislatures responded quickly to this lifting of sanctions by Congress. By 1979, twenty-seven states had either fully repealed their helmet laws, or revised them so that only motorcyclists under eighteen were required to wear helmets (see Table III-3).  

From 1976 to 1979, the number of deaths from motorcycle accidents increased from 3,312 in 1976 to
### TABLE III.2

**NUMBERS OF STATES* IMPLEMENTING**

**HELMET LAWS BY YEAR**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>1</td>
</tr>
<tr>
<td>1967</td>
<td>20</td>
</tr>
<tr>
<td>1968</td>
<td>16</td>
</tr>
<tr>
<td>1969</td>
<td>3</td>
</tr>
<tr>
<td>1970</td>
<td>1</td>
</tr>
<tr>
<td>1971</td>
<td>3</td>
</tr>
<tr>
<td>1972</td>
<td>2</td>
</tr>
<tr>
<td>1973</td>
<td>1</td>
</tr>
<tr>
<td>1974</td>
<td>1</td>
</tr>
<tr>
<td>1975</td>
<td>1</td>
</tr>
</tbody>
</table>

*Includes the District of Columbia and Puerto Rico.

**Implementation date of legislation was usually from one to six months after enactment and date.

### TABLE III.3

**STATUS OF HELMET REQUIREMENTS IN REPEAL STATES**

**BY YEAR OF REPEAL***

<table>
<thead>
<tr>
<th>Year of Repeal</th>
<th>Current Helmet Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976 (9)</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>Provisional License Holders Only (Generally Minors)</td>
</tr>
<tr>
<td>Arizona</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Connecticut</td>
<td>None</td>
</tr>
<tr>
<td>Iowa</td>
<td>None</td>
</tr>
<tr>
<td>Kansas</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Only under 18</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Only passengers</td>
</tr>
<tr>
<td>1977 (13)</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>None</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Indiana</td>
<td>None</td>
</tr>
<tr>
<td>Maine</td>
<td>None</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Montana</td>
<td>Only under 18</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Only under 18</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Oregon</td>
<td>Only under 18</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Texas</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Utah</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Washington</td>
<td>None</td>
</tr>
<tr>
<td>1978 (4)</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>Only under 19</td>
</tr>
<tr>
<td>Idaho</td>
<td>Only under 18</td>
</tr>
<tr>
<td>Ohio</td>
<td>Under 18 and first year novice</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Only under 18</td>
</tr>
<tr>
<td>1979 (1)</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Only under 18</td>
</tr>
</tbody>
</table>

*August 1979

4,850 in 1979. This represents an increase of 46 percent over 1976 (see Table III.4). In response to this increase, the Congress required the Department of Transportation to study the impact of the repeals, and issue a report.  

This report was transmitted to Congress in early 1980. In summary, it was based on a study of four states: Colorado, Kansas, Oklahoma, and South Dakota. These findings were presented in the report. Compliance with the legislation varied between 95 and 100 percent. Helmet use following repeal of the legislation ranged between 40 and 60 percent. Head injuries were twice as great for nonhelmet riders (see Table III.5). Fatal head injuries ranged from three to nine times greater for nonhelmet riders (see Table III.6).

Furthermore, the report stated that laws requiring only riders eighteen years or younger to wear helmets are relatively ineffective. Unhelmeted riders sustain more severe head injuries, which require longer hospitalization. This creates greater medical care costs, which in turn places a substantial economic burden on society in terms of insurance, emergency medical care, hospital, rehabilitation, and welfare costs (see Tables III.7, III.8, III.9).
<table>
<thead>
<tr>
<th>State</th>
<th>Pre-Repeal</th>
<th>Post-Repeal</th>
<th>Critical Level of Difference (p)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>16</td>
<td>73</td>
<td>.0001</td>
</tr>
<tr>
<td>South Dakota</td>
<td>15</td>
<td>24</td>
<td>.1335</td>
</tr>
<tr>
<td>Kansas</td>
<td>6</td>
<td>28</td>
<td>.0091</td>
</tr>
</tbody>
</table>

TABLE III.5
MOST SEVERELY INJURED BODY LOCATION PER 1,000 CRASH-INVOLVED RIDERS

<table>
<thead>
<tr>
<th>Location</th>
<th>Colorado Helmet</th>
<th>Colorado Non</th>
<th>Oklahoma Helmet</th>
<th>Oklahoma Non</th>
<th>South Dakota Helmet</th>
<th>South Dakota Non</th>
<th>Kansas Helmet</th>
<th>Kansas Non</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head</td>
<td>64</td>
<td>229*</td>
<td>47</td>
<td>171*</td>
<td>43</td>
<td>100*</td>
<td>61</td>
<td>142*</td>
</tr>
<tr>
<td>Face</td>
<td>50</td>
<td>40</td>
<td>15</td>
<td>46</td>
<td>11</td>
<td>6</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Neck</td>
<td>9</td>
<td>9</td>
<td>15</td>
<td>14</td>
<td>9</td>
<td>9</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Chest</td>
<td>70</td>
<td>50</td>
<td>32</td>
<td>40</td>
<td>20</td>
<td>32</td>
<td>18</td>
<td>6</td>
</tr>
<tr>
<td>Abdomen</td>
<td>24</td>
<td>15</td>
<td>49</td>
<td>37</td>
<td>16</td>
<td>25</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Pelvis</td>
<td>30</td>
<td>19</td>
<td>15</td>
<td>11</td>
<td>13</td>
<td>3</td>
<td>150</td>
<td>79</td>
</tr>
<tr>
<td>Extremities</td>
<td>328</td>
<td>274</td>
<td>497</td>
<td>403</td>
<td>186</td>
<td>91</td>
<td>150</td>
<td>79</td>
</tr>
<tr>
<td>Total</td>
<td>575</td>
<td>636</td>
<td>670</td>
<td>722</td>
<td>298</td>
<td>276</td>
<td>255</td>
<td>237</td>
</tr>
</tbody>
</table>

NOTE: Kansas combines Head and Face, Pelvis and Extremities.

*Difference in head injury rates between helmeted and nonhelmeted riders are statistically significant at p < .0005 level.

TABLE III.6
FATAL HEAD INJURIES PER 1,000 CRASH INVOLVED RIDERS
(HELMETED VS. NONHELMETED)

<table>
<thead>
<tr>
<th>State</th>
<th>Helmeted</th>
<th>Nonhelmeted</th>
<th>Critical Level of Difference (p)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>9</td>
<td>23</td>
<td>.0146</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>11</td>
<td>63</td>
<td>.0001</td>
</tr>
<tr>
<td>South Dakota</td>
<td>13</td>
<td>38</td>
<td>.0150</td>
</tr>
<tr>
<td>Kansas</td>
<td>6</td>
<td>41</td>
<td>.0038</td>
</tr>
</tbody>
</table>

### TABLE III.7

PRELIMINARY RESULTS FROM A SURVEY OF 95 ACCIDENT-INVOLVED RIDERS IN SOUTH DAKOTA

<table>
<thead>
<tr>
<th></th>
<th>Helmet</th>
<th>No Helmet</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Temporary Medical Costs</td>
<td>$1,947.10</td>
<td>$2,590.69</td>
<td>Consists of costs by doctor, emergency room, initial hospital stay, follow-up treatment for 12 months</td>
</tr>
<tr>
<td>Average Temporary Work Costs</td>
<td>$1,067.63</td>
<td>$1,249.35</td>
<td>Consists of salary lost due to missing days work from existing job, incapacitation preventing looking for a new job or still unemployed</td>
</tr>
<tr>
<td>Motorcycle Repair Costs</td>
<td>$619.60</td>
<td>$474.25</td>
<td>Costs of repairing damage resulting from accident</td>
</tr>
</tbody>
</table>

NOTE: It is interesting to note that average medical costs incurred by nonhelmeted drivers is one and one-third times that of helmeted drivers. Similarly, work costs for nonhelmeted drivers is about one and one-fourth that of helmeted drivers.

### TABLE III.8
**HOSPITAL DATA FOR MOTORCYCLE ACCIDENTS WHICH OCCURRED DURING 8/28/76 THROUGH 8/28/78**

<table>
<thead>
<tr>
<th>Item Descriptor</th>
<th>Dallas County</th>
<th></th>
<th>Harris County</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pre-Repeal</td>
<td>Post-Repeal</td>
<td>Pre-Repeal</td>
<td>Post-Repeal</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>110</td>
<td>156</td>
<td>82</td>
<td>90</td>
</tr>
<tr>
<td>Hospital Disposition:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Received treatment and released</td>
<td>46</td>
<td>68</td>
<td>59</td>
<td>36</td>
</tr>
<tr>
<td>Hospitalized</td>
<td>45</td>
<td>57</td>
<td>8</td>
<td>24</td>
</tr>
<tr>
<td>Dead on arrival</td>
<td>7*</td>
<td>20*</td>
<td>13**</td>
<td>30**</td>
</tr>
<tr>
<td>Dead within 30 days</td>
<td>9</td>
<td>10</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Unaccounted</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Duration of Hospitalization:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 5 days</td>
<td>79</td>
<td>118</td>
<td>76</td>
<td>77</td>
</tr>
<tr>
<td>5 days but &lt; 10 days</td>
<td>12</td>
<td>13</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>10 days but &lt; 15 days</td>
<td>2</td>
<td>10</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>15 days but &lt; 20 days</td>
<td>5</td>
<td>6</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>20 days but &lt; 25 days</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>25 days but &lt; 30 days</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>30 days or more</td>
<td>7</td>
<td>5</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td><strong>Average Duration (days)</strong></td>
<td>6.8</td>
<td>5.7</td>
<td>3.6</td>
<td>4.4</td>
</tr>
<tr>
<td>Cost of Accident:*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$ 520</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2,190</td>
<td>32</td>
<td>39</td>
<td>33</td>
<td>21</td>
</tr>
<tr>
<td>4,350</td>
<td>28</td>
<td>50</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>8,055</td>
<td>25</td>
<td>28</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>86,955</td>
<td>2</td>
<td>4</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>192,240</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Undetermined</td>
<td>22</td>
<td>33</td>
<td>16</td>
<td>32</td>
</tr>
</tbody>
</table>

*Statistically significant increase in percent DOA in the post-repeal period at p = .0359 level.
**Statistically significant increase in percent DOA in the post-repeal period at p < .0001 level.

**NOTE:** In 1977, the first full year after the mandatory use of motorcycle helmets was repealed, the Bexar County Hospital in Bexar County, Texas received 28 motorcycle patients with head injuries for a total cost of $42,189.31 of which only $3,353 was collected and the balance remained a debt to the public at large. This was reported to the NHTSA through the docket 79-07 by the Neurology Clinic of that hospital.

### TABLE III.9

**SEVENTY-ONE MOTORCYCLISTS' HOSPITAL BILLS**

<table>
<thead>
<tr>
<th>Financial Responsibility</th>
<th>Dollars</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Insurance</td>
<td>17,919</td>
<td>11.0</td>
</tr>
<tr>
<td>Blue Cross</td>
<td>37,607</td>
<td>23.1</td>
</tr>
<tr>
<td>Medically Indigent Fund</td>
<td>40,942</td>
<td>25.5</td>
</tr>
<tr>
<td>Workmen's Compensation</td>
<td>6,530</td>
<td>4.0</td>
</tr>
<tr>
<td>Patients</td>
<td>5,591</td>
<td>3.4</td>
</tr>
<tr>
<td>Medicaid</td>
<td>1,438</td>
<td>.8</td>
</tr>
<tr>
<td>Unpaid</td>
<td>52,436</td>
<td>32.2</td>
</tr>
</tbody>
</table>


According to the Department of Transportation, voluntary programs are ineffective and more costly than mandatory laws. There are no data which support the argument that helmets cause accidents or injuries. Finally, the Department of Transportation maintained these findings are consistent with thirty years of research. The position of the report was clearly stated—the law is considered to be the single most effective action that a State can take to reduce motorcyclists' deaths and serious injuries.

There seems to be little doubt that mandatory use of helmets for motorcyclists results in a decrease of the number of fatalities and injuries of riders. The law does exactly what it was intended to do, which is make motorcycle riding more safe. The question still remains, however, concerning the "right" of the government to impose such legislation.

An overview of the various court cases concerning the legitimacy of mandatory helmet usage legislation reveals the issues raised by Mill's principle to be the ideological rationale for both the opponents and supporters of such legislation. In essence, the debate concerning the legitimacy for such legislation is centered upon whether riding a motorcycle without a helmet is self-regarding or other-regarding action. Where
the courts determined it was other-regarding behavior, they concluded the State had legitimate power to pass such legislation. In all but two instances, the legislation was upheld as legitimate use of State police power. There were two general arguments presented in support of the statutes: the first will be referred to as the "flying object" argument, and the second will concern the direct and indirect "social costs" resulting from accidents involving unhelmeted riders.

The "flying object" argument can be summarized in this manner: a motorcyclist is vulnerable to "flying debris," be it dirt, leaves, sticks, stones, or other matter, which may adversely affect the control of the motorcyclist. This, in turn, can result in loss of control of the motorcycle, and cause "harm to others" by crashing into other motorists. Thus, the use of protective headgear protects others by providing clear vision and protection from "flying objects." The courts of Wisconsin and New Jersey presented this argument as a means of establishing the legislation as a legitimate exercise in providing for the general welfare and safety of the public, thereby making it constitutional.

The second argument in support of such legislation concerns the costs inflicted on others by the unhelmeted riders involved in accidents. These costs
include the medical costs for victims, who often end up in municipal hospitals; the increase in insurance premiums resulting from the increased length of time spent in hospitals; along with the severity of injuries incurred by unhelmeted riders, particularly when compared to helmeted riders. Furthermore, the Wisconsin Supreme Court presented an additional argument for a state with comparative negligence.

In a comparative negligence state, with heavy responsibilities as to lookout and control placed upon all vehicle operators, the very real possibility of being held at least partially responsible for an accident gives every user an interest, on other than humanitarian concerns, in provisions that lessen the probabilities of death or disability as an outcome of a highway encounter. (Bisenius v. Karns 42 Wis 2d 42, 165 N.W. 2d 377, 381-82 (1969)).

Another example of social cost concerns "wards of the state," which could plausibly include either the severely injured rider, or the dependents of certain fatalities. The District Court of Massachusetts extended the social costs to other functions as well.

From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned. (Simon v. Sargent 346 F. Supp. 277, 279 (Mass. 1972)).
Thus, the social costs argument is quite simple and straightforward: individual behavior resulting in the use of funds, facilities, and personnel supported by the taxpayers is, inherently, "other-regarding" behavior, and becomes subject to legitimate police power.

There is a great deal of irony in reviewing the legislative history of the legislation. The intention of the Department of Transportation could not be clearer: it sought to decrease the number of fatalities and injuries on the public highways, and determined mandatory helmet usage legislation for motorcyclists would do precisely that. They were correct, for the legislation does just that.

The intent of the various state legislature is more varied, but it can be argued forcefully that those which repealed the law were not primarily concerned with either protecting the motorcyclists or other motorists, or reducing the impact on the public treasury. Based upon the quickness of their repeals, following the lifting of sanctions by Congress, we can conclude that part of the motivation for passing the legislation originally was to avoid losing federal funds.

Finally, the courts utilized the argument that self-protection was not justification for such legislation. The courts allowed such legislation primarily
because they deemed riding motorcycles without a helmet constituted "harm to others." Therefore, the courts emphasized the "flying object" argument and the "social costs" argument as the rationale for such legislation.

What is significant about the rationale of the courts is it places Mill's principle squarely at the center of the legislation. The courts acknowledged that two spheres of behavior do exist. They also acknowledged the only justification for restricting individual behavior is when it affects others in a negative manner. They therefore developed arguments that went beyond the obvious self-protection intentions of the Department of Transportation, in order to justify such legislation.

Mill's principle is of primary importance to such legislation for these reasons. The courts acknowledged the existence and validity of distinguishing between self-regarding and other-regarding behavior. The courts overwhelmingly determined the legislation concerned itself with other-regarding behavior. It is important to determine if Mill would disagree with this position, and this question will be one of the issues addressed in the next chapter.
NOTES--CHAPTER III


6 Ibid., p. IV-5.

7 AMA v. Davids, 11 Michigan. App 351, 158 N.W. 2d 72 (1968). The Court of Appeals of Michigan rejected the argument of the Michigan Attorney General that the State has an interest in the viability of its citizens and can legislate to keep them healthy and self-supporting. The court maintained this line of reasoning could lead to unlimited paternalism. A summary of the ruling:

"Proceeding requesting a declaration of rights as to the constitutionality of statutory amendment requiring motorcyclists and riders to wear crash helmets. The Circuit Court, Inham County, Richard E. Robinson, J., upheld the amendment, and appeal was taken. The Court of Appeals, Miller, J., held that amendment requiring motorcyclists and riders to wear crash helmets was unconstitutional since it had no relationship to the public health, safety and welfare."

This ruling was later reversed.

See, e.g., People v. Fries 42 Ill. 2d 446, 350 N.E. 2d 149 (1969). In this case the Illinois Supreme Court ruled the mandatory helmet-usage statute violated the Fourteenth Amendment. A summary of the ruling:

"Defendant was convicted in Circuit Court, Madison County, A. A. Matoesian, J., of operating motorcycle without wearing protective headgear and he appealed. The Supreme Court, Kluczynski, J., held that statute
requiring operators of motorcycles and every passenger thereon to wear protective headgear has as its purpose the safeguarding of the person wearing the headgear and involves essentially a matter of personal safety is beyond police power of legislature and is violative of Fourteenth Amendment."

8Bisenius v. Karns 42 Wis. 2d 42, 165 N.W. 2d 377 (1969). The Supreme Court of Wisconsin offered support for the "flying object" argument as justification of mandatory helmet-usage legislation.

"The very term, 'protective headgear' implies protection of the head of the wearer. It must be conceded that this particular statute is intended primarily to diminish the severity of the accident upon the victim, himself. But can we say that such safety requirement does not affect or concern all other users of the public highway?"

"Anything that might cause a driver to lose control may well tragically affect another driver. If the loss of cyclist control occurs on a crowded freeway with its fast-moving traffic, the veering of a cyclist from his path of travel may pile up a half-dozen vehicles. So, as to the helmet requirement law, one question that arises is whether the presence of a protective helmet would, in some cases and under some circumstances, make less likely the diverting of attention or loss of its driver."

A summary of the ruling:

"Declaratory judgment action brought by motorcyclist challenging validity of certain safety statutes relating to the operation of motorcycles. The Dane County Circuit Court, W. L. Jackman, Circuit Judge, upheld the statutes, and an appeal was taken. The Supreme Court, Robert W. Hansen, J., held, inter alia, that sole purpose, effect and result of safety statutes in question was not to protect the motorcyclists, riders or both against themselves; rather, the statutes concerned or benefited other persons, particularly other users of the public highways; accordingly, enactment of the statutes were not outside scope of state's police power authority."


"At first glance, a requirement of protective headgear seems aimed only at protection of the individual. However, serious thought indicates otherwise. The general public has a right to be protected from
the accidents which might result from a blow on the head received from objects kicked up from the highway. The blow, however slight, might be just enough to distract a motorcyclist and cause him to lose control and become a menace to other vehicles or pedestrians on the highway."

A summary of ruling:
"The defendant was charged with operating a motorcycle without wearing an approved protective helmet. The Municipal Court of Jersey City rendered judgment, and defendant appealed. The County Court, Duffy (Paul J.), J.C.C., held that statute requiring motorcyclists to wear approved protective helmets bears reasonable, real and substantial relation to public health, safety and welfare and is constitutional as valid exercise of police power of State."

The ruling was affirmed.

9 Simon v. Sargent 346 F. Supp. 277 (Mass. 1972). The United States District Court based its support for mandatory helmet-usage legislation on the fundamental grounds that the public has an interest in minimizing the impact upon the public treasury. A summary of the ruling:
"Action for declaratory judgment that a state cannot constitutionally require unwilling motorcyclists to wear protective headgear. The three-judge District Court held that Massachusetts statute requiring motorcyclists to wear protective headgear is not violative of due process, notwithstanding claim that police power does not extend to overcoming right of an individual to incur risks that involve only himself, since public has an interest in minimizing resources directly involved, in that from moment of injury, society picks the person up off the highways, delivers him to a municipal hospital and municipal doctors, provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if injury causes permanent disability, assumes responsibility for his and his family's continued subsistence."

See, e.g., State v. Anderson, 3 N.C. App. 124, 164 S.E. 2d 48 (1968). The Court of Appeals of North Carolina argued that riding a motorcycle without a helmet adversely affected insurance premiums for others, therefore, the statute was valid.

"In North Carolina, by reason of our Motor Vehicle Safety and Financial Responsibility Act, G.S., Chap. 20, Art. 9A, most operators of motor vehicles in our State are required to carry motor vehicle liability
insurance at a heavy annual premium cost. Any statute which can reasonably be expected to reduce that premium cost necessarily affects the welfare of the public at large. Reducing the number of deaths and the severity of injuries to riders of motorcycles on the streets and highways of our State and the consequent reduction in liability insurance premium costs does, therefore, affect not alone that limited class of persons who ride motorcycles, but also directly and beneficially affects all operators of motor vehicles in our State."

See, e.g., Love v. Bell 171 Colorado 27, 465 P.2d 118 (1970). The Supreme Court of Colorado argued in favor of such legislation, based upon the social costs of riding motorcycles without protective headgear.

"It is, of course, part of romantic tradition that an individual ought to be able to lead an adventurous and swashbuckling existence without regard to his own safety and without interference from the King. But when that individual as a result of this freewheeling activity seriously injures or kills himself, the ultimate result is unfortunately not always borne by him alone. Today our society humanely accepts as one of its functions the responsibility for relieving the economic suffering of its members. The evidence in the record here clearly shows a higher frequency of serious head injury and death among motorcyclists wearing helmets. Persons often become public charges because of their prolonged hospitalization for serious injury, and families are often required to be supported by public welfare as a result of the death of their breadwinner. We would point out that this Court has held that the police power relates not merely to the public health and public physical safety, but also to public financial safety, and that laws may be passed within the police power to protect the public from financial loss.


CHAPTER IV

MILL AND PATERNALISM: SPECIFIC IMPLICATIONS AND FAILINGS

We have examined Mill's essay, along with an analysis of mandatory helmet-use legislation. What value can be found in Mill's principle in determining the legitimacy and wisdom of this type of legislation? What criteria should be used in determining the wisdom of State interference in behavior which might be regarded as primarily self-regarding? Finally, does our analysis of helmet legislation suggest there are certain improvements and amendments which would strengthen Mill's argument, as it applies to mandatory helmet-use legislation? These are the primary questions and issues to be addressed in this chapter.

Does Mill's principle of liberty support mandatory helmet usage legislation? First, it is necessary to determine if riding a motorcycle without a helmet constitutes self-regarding behavior, for if it does, then Mill would certainly oppose such legislation.¹

The mere act of riding a motorcycle without a helmet, in itself, does not harm others. It can be
considered harmful to others only upon the event of an accident. Because the harm is therefore an indirect consequence of the initial action, Mill might well consider such harm as "contingent injury," and therefore immune to interference. Yet, there are other criteria Mill wanted us to consider. He stated that behavior which presents a definite damage or definite risk of damage to others can be legitimately regulated.

There is a definite, though numerically undetermined, risk of having flying debris strike the rider, thereby causing loss of control of the motorcycle, and creating a real danger for other motorists or pedestrians. This being the case, Mill would recognize the possibility of considering the action of an unhelmeted rider as other-regarding.

The other manner in which such behavior affects others is the social costs passed on to the public treasury. The data presented in Chapter III are convincing enough to conclude that the costs to the public treasury, while undetermined, do constitute a degree of harm to others. Based upon the social costs and risk of harming others, Mill would most likely conclude that riding a motorcycle without a helmet is other-regarding behavior, and is properly open for discussion concerning interference.
Having concluded that riding a motorcycle without a helmet is other-regarding behavior, Mill would then determine the propriety of interfering with such behavior. In the Applications section of his essay, Mill presented three main objections to government interference with other-regarding behavior. The first two objections would not directly apply to the legislation, but the third one does. This third objection reflected Mill's concern about adding unnecessarily to the power of the State. I believe Mill would consider the act of riding a motorcycle without a helmet to be other-regarding behavior, but be opposed to the mandatory helmet usage legislation. It would be clear to Mill that the primary consequence of such legislation was to protect the motorcyclists from their own willful action.

Certainly, the arguments concerning "flying objects," and "social costs" are worth considering, and they have provided a rationale to the courts for legitimizing the legislation. The DOT, however, had one primary intention when it proposed such legislation, and that was to reduce the number of fatalities and injuries, not to other motorists, but to the riders of motorcycles. The legislation does exactly that, and at a minimal cost to the treasury. The benefits to others
are only secondary consequences of the legislation, but Mill would acknowledge such benefits, and give them due consideration.

Mill, however, was quite clear in stating that a person is sovereign over his own mind and body. He rejected the right of the State to interfere in one's behavior for his or her own good. Mill believed a person knows his own interests best, and he should have the right to make errors of judgment.

If the errors adversely affect the public treasury, does the State have the right to interfere? Mill would argue the State has the right to interfere, but should not automatically do so. He would argue it would depend upon the degree of impact upon the treasury. For example, Mill would acknowledge that any State has a limited amount of resources, both human and fiscal. Therefore, if the costs to the public treasury are substantial, then a situation might well arise in which certain basic needs, such as the feeding and housing of the disadvantaged, are not being met because the resources are being spent upon less beneficial services. Thus, it might be argued that by allocating public resources to injured motorcyclists the "liberty" of others to enjoy the basic necessities of a decent living is being restricted.
This argument is valid, but it is essential to determine at what point a liberty should be restricted because of its cost to the public treasury. If the figure is $5 billion, for example, a strong case can be made for restricting such behavior. This figure would exceed the total amount spent by the federal government in 1984 for mass transportation. It would be approximately five times the amount the federal government spent that same year on the National Cancer Institute. There is no one magic number which can determine at what point individual behavior should be restricted. I use this figure only to make the point that social costs might, on their own, be justification for interference, for the public resources are limited.

It should be noted, however, that Mill rightfully argued against what he referred to as the "social rights" argument. As noted in Chapter II, proponents of the "social rights" theory maintained no human behavior can be considered self-regarding, since all individual action, in some manner, ultimately affects others. Mill warned that this type of reasoning would give the State unlimited freedom to enter all aspects of individual behavior. I agree with Mill's concern, and believe it equally applies to those who use the public treasury as justification for passing paternalistic legislation, on
the grounds that such laws save the taxpayers money. If this argument is carried to its extreme, then the State might well be justified in sterilizing poor people, in order to reduce the number of children on welfare. It might well restrict the consumption of sugar, alcohol, tobacco, and preservatives, to reduce the medical costs to the public treasury. It has been acknowledged that in cases in which the costs to the treasury are substantial, interference might be justified. It should also be acknowledged that if we are not vigilant about distinguishing between that action which is substantial and that which is only significant or even minimal, we are vulnerable to unlimited interference on the grounds that it saves tax dollars.

There is no inherent right for citizens to have their taxes reduced by restricting individual behavior, especially when the society has decided to provide certain benefits, which could be influenced, directly or indirectly, by almost all human behavior. Mill's criteria for such interference could be posed as a question. Does the collective harm of such action outweigh the collective gain? This is a most difficult question to answer, for we are often forced to determine collective harm on monetary grounds, and balance them with the immeasurable but, Mill would argue, quite
substantial benefits society reaps from allowing its citizens the liberty of making errors of judgment.  

Mill would maintain that legislation primarily designed for protecting people from their own actions, no matter how foolish, should not automatically be allowed, simply on the secondary grounds that it will possibly protect the safety of others, or reduce the impact upon the public treasury. Certainly, if the costs to the public treasury are great enough, then this alone might justify interference. It is not clear that this is the case with unhelmented cyclists. It would appear that the twenty-two states which repealed the legislation did not consider such costs to be so extraordinary as to justify the interference.  

Mill would be greatly concerned about the danger of adding to the power of the State, and he would take a strong stand against this type of paternalistic legislation. He would want us to be constantly on guard against adding needlessly to the power of the State. He would probably not be convinced the harm done to others, through "flying objects" or costs to the public treasury, outweighs the negative consequences of this addition to State power, including the denial of cyclists' liberty to wear or not wear helmets. Specifically, Mill would examine the primary intent and the primary consequence
of the legislation, and he would probably conclude that it is fundamentally designed to protect the rider. On the grounds that citizens are sovereign over their own body and mind, Mill would likely oppose the legislation.

I have concluded that Mill would oppose mandatory helmet usage legislation. Is he right in doing so? I agree with Mill's hypothetical conclusion, for I find value in his criteria for determining the legitimacy of such legislation. First, as stated earlier, the value of his two-sphere model is great. We must be constantly on guard whenever we expand the power of the State, especially when it is primarily designed to protect one from one's own actions. Mill's principle provides us with a workable model, first in determining what behavior is rightfully considered other-regarding, and then in determining if that behavior should be interfered with.

Furthermore, it is essential that other criteria be introduced into the process, beyond a monetary one. Merely because an individual's behavior costs the public treasury money, it should not automatically be interfered with. There are certain benefits to society which cannot be measured in dollars, such as the enjoyment of liberty. We must weigh the benefits of diversity and individuality, before the decision is made.
How do we determine at what point the behavior should be interfered with? This is not an easy task, for the degree of cost is vital. It would be arbitrary and subjective to determine a specific level of monetary costs, which would be the determining point for interference. It is vital, however, that whatever level of costs is used, it represent a substantial amount, for there will always be those who argue that any drain on the public treasury is justification for interference.

What essential principles should be brought forth in considering such interference? First, we must address the issue of liberty. What particular liberty is being restricted? This is important, for not all liberty is of equal value. For example, the liberty to enjoy the basic necessities of sustaining life is more essential than the liberty to act upon a whim or ride helmetless. Mill forcefully argued that liberty has intrinsic value and is not only beneficial to society, but essential to any good society.

The next principle to consider is that of the general welfare. To what extent is the welfare of others enhanced? The emphasis here is upon enriching the general welfare to a significant degree. How are others directly benefited by such interference? State coercion should not be viewed lightly, and any addition
to it should be significantly beneficial to the general welfare of others. The term "enhanced" is used, for it emphasizes that the erasing of behavior that is merely inconvenient or somewhat costly is not necessarily wise. Positive benefits for others should be measurable and definite, if we are to seriously consider such legislation.

The third principle to consider is state authority. To what degree does the interference expand the authority of the State and is this authority already too great? Is the interference a proper, legitimate, and wise expression of the power of the State? This is essential to consider, for in helmet legislation we have already concluded that the state has a legitimate right to consider interference, but would be unwise to interfere.

Beyond these three general principles, other questions should be asked as well. First, we must closely examine the primary intent of the legislation. Is it to reduce the social costs to the public? If so, is mandating self-protection the best means of doing so? Second, before we pass such legislation, great care and effort should be put forth in determining the actual costs to others, resulting from the individual behavior. Since little individual behavior
is purely self-regarding, we must address the complex issue of individual liberty vs. public interests, on a case by case basis, with the aid of utilizing these principles and concerns.

Having established these principles and guidelines, we may apply them to mandatory helmet-usage legislation, in order to provide an example of their value. What liberty is being restricted with the implementation of such legislation? The liberty of diversity. This is the freedom to be different; to choose one's own path; to, in essence, have the liberty to be foolish and unwise.

To what degree is the general welfare enhanced by such legislation? The lives of productive citizens are saved, and the drain upon the public treasury is reduced. These benefits are not easily calculable, for in the former, many of the rewards are intangible ones assigned to family and friends. The latter, as noted in Chapter III, are difficult to measure, or at least have not heretofore been calculated.

To what degree is the authority of the State expanded? This is most certainly a judgment call, but there can be little doubt that this type of legislation is becoming more common, as can be witnessed by the increase of mandatory seat-belt laws.
What is the primary intent of the mandatory helmet-usage legislation? We have concluded the primary intent is self-protection of the motorcyclists. If the primary intent was to reduce the impact upon the public treasury, then this legislation is not the best means of achieving the goal. It would be more desirable and effective to require sufficient insurance for all motorcyclists to cover all the medical costs incurred by the State. This would make the privilege of riding a motorcycle more expensive, and would discriminate against those riders with meager incomes. Still, it is a superior alternative, for it places the cost upon the particular motorcyclist, rather than upon the public treasury. This additional cost to the rider is quite comparable with similar expenses incurred by hunters, boaters, and other recreational participants.

Finally, as noted in Chapter III, the actual cost to the State is undetermined. Therefore it is difficult to judge whether the costs are substantial enough to justify interference, on social costs alone.

Mill has presented us with a reasonably definitive model for analyzing paternalistic legislation. He developed a convincing argument on the value of liberty in a good society. Yet, there remains an important contradiction, indeed the primary weakness,
in Mill's essay that needs to be addressed. Mill had three assumptions upon which his principle of liberty was based. The first is liberty, which Mill placed great value upon. The second is social utility. The thrust of *On Liberty*, in fact, lies in Mill's contention that liberty has greater social utility than does State authority. Third, Mill, while never being in the orthodox capitalist camp, basically supported the market economy. Therein lies the basic contradiction.

The contradictions and forces inherent in capitalism are often at odds with both social utility and individual liberty. Capitalism, by allowing the excesses of certain individuals, creates conditions under which excessive governmental intrusion and regulation become necessary. For example, much of the growth of government, be it at the local, state, or federal level, has been in the areas of providing certain basic goods and services for those who are not benefiting from the system.

Likewise, the growth of regulatory agencies serves as another example of how the forces of capitalism create the necessity for regulating its excesses. While it is not exclusive to capitalism to create a powerful government, certainly the growth of State power has corresponded with the growth of the Market.
Mill placed his admirable principal of liberty within an economic system which is internally at odds with the very liberty he promoted. Certainly, there is a wealth of evidence to support the argument that the Market restricts liberty for many of its citizens. There are countless examples of sexism, racism, and imperialism throughout the history of capitalism. In general, the market mechanism restricts the life options of the losers in the economic, social, and political war of all against all. I do not assert that these forces are unique to capitalism; rather, they seem to be integral characteristics of it, and in order to achieve the degree of liberty Mill sought, we need to recognize the inherent conflicts within the Market, and develop a society more conducive to equal liberties for all.

The purpose of this thesis, however, is an analysis of paternalistic legislation, not a radical analysis of Mill's principle.

One may ask, what does the Market have to do with this type of legislation? What is the connection between paternalistic legislation and the Market? Paternalistic legislation is often the consequence of the excessive regulatory government that has resulted from the development of capitalism. As Mill warned, the State is an accumulative institution, and as it reaches
into our lives to provide basic human needs and services for those disadvantaged by the Market, it increasingly feels comfortable to go further and protect its citizens, not just from the greed and excesses of others, but from their own foolishness as well. Perhaps more ominously, the extensive government feels free to go further to protect and extend its own powers.

Second, the market has made the citizens and political leaders highly sensitive to social costs and government spending, particularly since the federal deficit is so high. Therefore, paternalism is often justified as a way to cut governmental spending, and to have us focus on minimal matters, when more fundamental issues need to be addressed. The amount of money saved by mandating motorcyclists to wear helmets is a mere fraction of what we might save, if, for instance, we explored the savings of conserving our natural resources or reducing our military expenditures. Yet, it is easier for politicians to require motorcyclists to wear a helmet, than to stop the exploitation of our land or the growth of the military-industrial complex. Likewise, it seems easier for the political leaders to mandate the mandatory use of seatbelts, rather than mandate passive restraint systems, such as the air bag, which would place the burden upon the manufacturer.
In a final analysis, what might we do to utilize the strengths of Mill's principle, while avoiding the weaknesses of his argument? First, we can do more within our existing conditions to achieve more liberty. Mill gave a strong argument in favor of the freedom of thought and opinion. Not only would this be beneficial throughout all aspects of our society, but education programs and information distribution could be better utilized instead of paternalistic legislation. If we do not wish for citizens to act foolishly, it is better, whenever possible, to change their behavior through education, rather than coercion.

Rather than legislating individual behavior, it would be more desirable to mandate the safety of products, and place the responsibility upon the manufacturer, rather than the consumer. Obviously, there will be a limit to the effectiveness and reasonableness of doing so, for certain products, like the automobile, inherently contain the risk of death or injury. Still, in matters such as seat belts or air bags, it would be better to address the issue of safety at the point of manufacture, rather than consumption. Why? To mandate safe products is not restricting the liberty of individuals to act wisely, or unwisely. It is simply requiring the manufacturer to sell a safe product. As
with any such additional expense, it either reduces profits if the market is competitive or is passed on to the consumer if the market is oligopolistic. Upon occasion, these additional costs to producers or consumers may be prohibitive. I find no certain means of escaping this dilemma, but nevertheless, maintain it is preferable to paternalistic legislation. (More vigorous regulation against oligopoly would shift the added cost to the rich rather than the poor or middle income consumers.)

The education of the citizens about the true nature of the deficit, and its main culprits, would also be helpful in slowing the trend towards paternalism. If the citizens were better informed about far more substantial means of cutting government spending, besides making motorcyclists wear helmets, they would likely be more tolerant of others' behavior, no matter how foolish it might be. Along with this more clear-sighted approach to cutting spending, I would add the need to be constantly vigilant against the "social rights" proponents. We must not allow social costs to be used as automatic justification for restricting behavior and mandating self-protection.

There are fundamental changes which must be implemented, in order to promote the liberty Mill
persuasively argued for. Individual liberty will always be at odds, on occasion, with the general welfare and the society. To argue that once capitalism is discarded for some other system, these conflicts will disappear, would be quite foolish. Yet, it does seem feasible to develop a society based upon cooperation and altruistic characteristics, rather than capitalism, which promotes selfishness and competition. The areas and points of conflict between individual liberty and the general welfare would be substantially fewer than in our present system. Enough time, over 130 years, has passed since Mill asserted the benefits to society by the Market outweighed the disadvantages.\(^{17}\) It is certainly arguable that not only does everyone not benefit from the market, in terms of liberty, but the degrees of liberty enjoyed by those who do derive benefits, are substantially unequal.\(^{18}\)

Thus, we must take the wisdom of Mill's principle, complete with the two-sphere model, and place it within a society more conducive to liberty and the common good. A society based upon cooperation and tolerance would be an example of such a society. Such a society would be more hesitant to restrict individual behavior, or mandate self-protection, because it would have less need to do so. It is not unique to capitalist
societies to mandate self-protection, but there are inherent, entropic forces within them which promote such legislation, and to get the wisdom and benefit from Mill's principle, it is necessary to go beyond his own flawed foundation.

2 Ibid., p. 138. Mill stated:
"But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom."

3 Ibid.


5 Ibid., p. 73. Mill stated:
"In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

"That the only purpose for which power can be rightfully exercised over any member of a civilised 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."

6 Ibid., p. 125. Mill stated:
"There is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."
For example, in 1977 the legislative hearings in Colorado to consider repeal of the mandatory helmet-usage law, contained expert witnesses testifying that the costs to the public treasury were "substantial." One witness quoted the social cost of each fatality to be $225,000. Senator Ralph Cole, agreeing with this line of opposition to the repeal, stated that the public has a stake because it picks up the bill. Yet, other senators supported repealing the law on the grounds that, "there is no way you can legislate safety in every facet of a person's livelihood. Responsibility is going to have to start somewhere." While no specific reasons were given by each legislator on the primary motivation behind his or her vote, it can be assumed, at the very least, that the social costs were not "substantial" enough to justify continuing the legislation. The law was repealed during the 1977 legislative session.


For examples: Robert Blauner, Alienation and Freedom (Chicago: University of Chicago Press, 1964);


17 Ibid., p. 150. Mill stated: "Again, trade is a social act ... But it is now recognised, though not till after a long struggle, that both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty asserted in the Essay. Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil; but the restraints in question affect only that part of conduct which society is competent to restrain, and are wrong solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine."


