

John Stuart Mill and Unassimilated Subjects

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Mill's harm principle declares that one's liberty of action may be interfered with by the state only if one has caused harm to others. Cases of culture clash involve unassimilated subjects, be they citizens, aliens, immigrants or national minorities, who violate the law while engaging in a practice that is a prevalent and legitimate part of their native culture or religion and which they do not regard as harmful. A Millian approach to the punishment of unassimilated subjects is explored by examining Mill's views on whether there is an objective standard of harm and Mill's discussions of free will, moral responsibility and the respect due to native cultures.

Mill, Unassimilated Subjects and Culture Clash

John Stuart Mill defends the liberty of individuals to do as they please no matter how erratic or odd their choices, so long as they do not harm others (OL 1:9).¹ Although there is some dispute as to whether Mill would allow the state to coerce me only if I cause harm to others or to coerce me to prevent harm even that I do not cause, as when the state taxes me to fund institutions that prevent harm caused by others, on either reading, Mill's permissiveness ends where I harm others (Lyons, 1997; but see Brown, 1972). One difficulty in applying Mill's principle is discerning whether the disagreeable affects of one's actions constitute 'harm'. One reasonable interpretation of what Mill means by his harm principle is that actions merely causing moral distress do not count as causing harm (Waldron, 1987); and actions causing harm must violate interests or rights (Rees, 1960). But what if the difficulty lies someplace else: suppose you see what I see as causing harm as beneficial, because we belong to different cultures and have different understandings and values? Philosophers have debated how we are to delineate 'self-regarding' acts that Mill's principle leaves free from state interference, from 'other-regarding acts' that may be regulated; and whether the harm principle permits the state to compel people to undertake acts that benefit others. But the harm principle raises another interpretive problem that has been relatively neglected, one that is of special interest given the recently emerging problem of culture clash.

Cases of culture clash involve people who violate the law to which they are subject while engaging in a practice that is a prevalent and legitimate part of their native culture or religion. There is no precise word for this category of people who may be citizens or aliens, immigrants or national minorities; they are 'outsiders' in a way, but they may well be loyal citizens or even national minorities with perhaps a greater moral claim to the land than the governing power. I shall refer to them as unassimilated subjects. In deciding what punishment the government should inflict on unassimilated subjects who violate the law, should any allowance

be made for the fact that their actions are an accepted part of their culture? Examples abound. As part of a demon-cleansing ritual, a Korean Christian missionary, aided by another Korean missionary, stomps his wife to death while acting 'with the best of intentions'.² Mr. Kargar, an Afghani living in Portland, Maine, is charged with gross sexual assault for kissing the genitalia of his 19-month old son, a normal practice in Afghan culture with no sexual implications.³ Ms. Kimura, a Japanese mother living in California, attempts *oya-ko shinju*, or parent-child suicide, after learning that her husband had a mistress. She is rescued by passersby, but her 6-month-old baby girl and 4-year-old son are killed, and she faces possible imprisonment for life for murder. In Japanese culture, spousal infidelity can bring great shame and often leads to suicide, which is considered an honorable way of dying. The children are believed to join the mother in a better afterlife, avoiding the social stigma suffered in Japan by children of a parent who has committed suicide.⁴ In these cases, actions that government officials charged with upholding the law regard as clear violations of the harm principle may not be regarded by the unassimilated subject as harmful at all; on the contrary, they are intended to benefit the so-called victim. How should such persons be punished?

Obviously, Mill wants to prohibit harmful conduct. Even though he encourages experiments in living (OL 1:12, 3:1), he insists that individuals have the opportunity to make their own choices, and action foreclosing this possibility may be proscribed. But Mill's way of dealing with issues of culture clash cannot be as simple as it first appears. I shall focus on two complicating issues. Those who practice exorcism or *oya-ko shinju* may well believe that they are benefiting, not harming, those we call their victims. They might claim that where we see harm, they see cure or salvation. (1) Does Mill morally judge the practices of other cultures by applying objective standards of harm, or does he hesitate to inquire into the truth or falsity of an unassimilated subject's beliefs that what they do is not harmful? Mill's harm principle does not require punishment. It tells us only when punishment is permitted (Brown, 1972, p. 136; Gray, 1983, p. 68; 1991, p. xix). To decide whether and how much to punish, Mill must turn to some other principle(s) or considerations. (2) Does Mill think we should punish unassimilated subjects if their behavior is determined by their cultural upbringing?

Mill explicitly discusses the problem of punishing unassimilated subjects only briefly in the context of discussing British rule in India. The question of how Mill applies his harm principle in cases of culture clash is largely counterfactual, really being 'how would Mill apply it?' But Mill addresses extensively a number of subsidiary issues that bear on the problem, and one aim is to shed light on some interpretive difficulties in Mill that have not received sufficient attention by turning to these texts. We shall need to carefully distinguish the question of how Mill addresses the subsidiary issues from the question of how a Millian liberal is to apply the principles that Mill develops to particular cases.

The problem of culture clash is an instance of a more general problem of conflict given the diversity of values and lack of consensus in liberal societies that exists even without immigration or the presence of indigenous groups. I focus on clashes involving unassimilated subjects, because they raise unique problems concerning

criminal accountability, as will be apparent when we turn to Mill's accounts of free will, moral responsibility and how our culture shapes our character.

Does Mill's Harm Principle Apply to the 'Uncivilized'?

Some of Mill's works suggest that he does not think the harm principle even applies to cultures he regards as backward or uncivilized. Mill, a loyal employee of the East India Company and a supporter of colonization (Packe, 1954, pp. 224–5; CW 2:236, 376; CW 12:74–88), was a moral imperialist. He believed in human progress and envisions the improvement of humankind's capacity for individuality and the enjoyment of higher pleasures (OL 3:10; Rel pp. 422–3, 426–7; CW 1:145–6). Mill supports the use of coercion to improve societies in Ireland, Asia and Africa, which he deems uncivilized (RG pp. 567–8; Parekh, 1994a). In his essay on 'Non-Intervention' of 1859, Mill writes that 'it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect' except where the other party 'is of a lower degree of civilization', in which case 'the rules of ordinary international morality' do not apply, for these rules involve reciprocity and 'barbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort'; thus, it is likely 'for their benefit that they should be conquered and held in subjection by foreigners'(CW 21:118–21).⁵ Some interpreters of Mill imply that this idea of civilizing or pedagogical coercion means that the harm principle applies only to the civilized and mature (Parekh, 1994b, p. 94; Souffrant, 2000, pp. 8, 70). If this is correct, Mill's moral imperialism and defense of pedagogical coercion might be incompatible with a position of toleration toward unassimilated subjects, at least those from cultures Mill regards as backward.

One reason to resist this conclusion is that while Mill supports pedagogical coercion in his works defending imperialism, he insists, at the same time, that due respect be given to the customs and values of native cultures. Mill's moral imperialism diverges from a standard view of imperialism as the imposition of force out of the self-interested desire for domination, hegemony and self-aggrandizement (Sullivan, 1983, pp. 608–13). Motivated by his utilitarian goal of improving humankind, he is more inclined to oppose arbitrary treatment of colonial dependents than are imperialists unconcerned with the well-being of all human beings. Mill, in defending pedagogical coercion, opposes self-rule for uncivilized peoples (RG pp. 570–4; CW 30:49–51, 65). But it is an unwarranted leap to conclude that his harm principle does not apply at all to them; they can be coerced to become civilized in a number of ways, but Mill does not think they are without rights, or that they could, for example, be arbitrarily punished. Mill never defends unprincipled and unconstrained use of force in India (Compare RG 395: 'not a government of force, but one of guidance'; CW 16:1205–6, 1282). On the contrary, he adopts a position of accommodation to native Indian culture and law and advocates a gentler means of coercion.

Mill is, to be sure, critical of a number of Indian practices such as infanticide, thuggee, suttee, the 'fraudulent pretence' of witchcraft and the 'barbarous practice' of *tragga* (where A has a grievance against B, threatens B that A will kill or wound himself or someone else but not B, thereby entailing B's guilt) (CW

30:122–5). Lynn Zastoupil has argued, however, that Mill, under the influence of both Romanticists and reformers like Elphinstone, came to take a conciliatory position on the issue of whether to respect Indian culture (Zastoupil, 1988, p. 44). Zastoupil notes how Mill developed a lenient position toward banditry in India (bahirwattia), arguing that the custom should be abolished but with as little intervention as possible; and that Mill recognized ‘the impropriety of inflicting severe punishments’ upon people ‘merely for not at once renouncing the habits of their whole lives’ (Zastoupil, 1988, pp. 45–6). He cites a dispatch of May 16, 1838 that Mill wrote for the Company in which Mill recommends reducing the sentences of several men who had gone out on bahirwattia, on the ground that their actions were sanctioned by ‘immemorial custom’. Mill argues that ‘though it is necessary to suppress that custom, the effect of gentle means should have been first tried’ (in Zastoupil, 1994, p. 115). In an 1829 letter, Mill argues that ‘[i]t is ... of little use altering men’s opinions, and it is often very mischievous to unsettle them, until you have brought their minds to that higher state of cultivation, of which better opinions are the natural and almost spontaneous growth. But merely in order to do this, we must not attack their opinions en masse, but fix our attention on what is good in those opinions, and endeavour to lead them from this and through this to something better’ (CW 12:42, cited in Zastoupil, 1999, p. 136). Mill makes a similar argument that just because slavery existed in Louisiana does not mean it should have; but it may indicate that concessions must be made until the people there are taught ‘better things’ (CW 10:196).

Bhikhu Parekh has argued that Millian liberalism is ‘obsessively anti-tradition, anti-prejudice, anti-custom, anti-conformity, [and] anti-community’ (Parekh 1994a; compare Parekh, 2000, pp. 44–7). Yet, Mill does not dismiss existing traditions and customs, even as he welcomes assimilation and the improvement of humankind. Mill, valuing the ‘imagination’ (to be discussed in section 3) and appreciating the importance of nationality and ‘preexisting habits and feelings’ in shaping people, was, unlike his father James Mill, unwilling to disregard India’s past and treat its people as a tabula rasa that could be molded ‘according to utilitarian dictates’ (compare Zastoupil, 1988; Majeed, 1999, pp. 55–6, 63–5; Zastoupil, 1999). Mill thinks that it is neither right nor prudent simply to ignore cultural differences and force English law on Indians. In his ‘Minutes on the Black Law’, Mill rejects the petition of Englishmen living in India who wanted English law on property succession rather than native law to be applied to them. Mill argues that the English must respect native laws, excepting issues that do not affect the ‘interests and rights of the natives’ such as marriage and divorce (CW 30:13–5). In an 1858 Petition of the East India Company supporting its continued rule in India, Mill defends the Company for having abstained ‘from all interference with any of the religious practices of the people of India, except such as are abhorrent to humanity’, and he praises the Company policy that ‘suits, civil or criminal, against the natives’, should be conducted according to such rules ‘as may accommodate the same to the religion and manners of the natives’ (CW 30:81; compare 125).

Mill appreciates that different standards are appropriate for people of different times and places. In his *Autobiography*, he summarizes his position: ‘all questions of political institutions are relative, not absolute’; ‘different stages of human progress not only will have, but ought to have, different institutions’ (CW 1:168).

Mill recognizes the limits of a mere English standard for judging universal questions and is critical of his father for being so provincial (CW 1:63). Mill assumes that he knows what is best for people whom he regards as uncivilized, and he has been properly criticized both for this assumption and the imperialist theory which rests upon it (Parekh, 1994a, 2000; Souffrant, 2000). But in addressing his views toward unassimilated subjects, it is important to recognize that his moral imperialism, objectionable as it may be, is coupled with sensitivity to cultural differences.

A second response to the view that, as a moral imperialist, Mill would be unsympathetic to the claims of unassimilated subjects is that unassimilated subjects living in countries that Mill regards as civilized are different from subjects of colonial dependencies. Even if Mill, the moral imperialist, did not think a colonial power should be bound by the harm principle in its treatment of dependents – a position that I have challenged – it would not follow that unassimilated subjects of a civilized country are not protected by the harm principle. Mill does not adopt a social contract or consent theory of political obligation, so the fact that the subset of unassimilated subjects who are immigrants choose to reside in a new society, which, for some theorists, signal their waiving of the right to live in their own culture (Kymlicka, 1995, pp. 46, 96), would not, for Mill, imply a promise immediately to shed their cultural heritage and upbringing.

Does Mill Appeal to an Objective Standard of Harm?

Mill's harm principle allows the state to prohibit only acts that harm others. To unassimilated subjects, exorcizing evil spirits or killing one's children so that they may join you in a better afterlife may be beneficial, not harmful. Our willingness to tolerate such practices may depend on whether we are rationalists or skeptics when confronting such claims and on whether these claims can be empirically verified or disproved. Does Mill morally judge the practices of other cultures by applying an objective standard of harm and evaluating the truth of an unassimilated subject's beliefs, shared by others in their culture, that what they do is not harmful? The question of whether Mill appeals to an objective standard of harm has broad implications, because the need to determine what counts as harm also arises in contexts other than cases of culture clash. For example, on some interpretations of Christianity, one can save a person's soul by torturing them or harm a person by aborting a fetus. As I noted earlier, the problem of culture clash is an instance of a more general problem of conflict given the diversity of values in society.

Several philosophers have argued that the harm principle carves out a sphere of self-regarding conduct defined by an objective idea of harm independent of one's subjective likes or dislikes or tastes, and so it is immune to value pluralism (Rees, 1960, p. 125; Donner, 1991, pp. 5–6, 91, 130; Riley, 1991, p. 8; compare pp. 22–3). Richard Wollheim argues that for Mill, the harm principle cannot support state intervention against acts that would not harm others apart from the beliefs of those prejudicially affected: this rules out our regarding mere 'outrage to ethical or religious sensibilities' as 'harm' (Wollheim, 1973, pp. 8–10; compare Waldron, 1987). This requires us to distinguish a belief of harm from harm in fact, or objective harm. Wollheim thinks this is done, for Mill, by appealing to a conception of interests that is not 'determined by local or historical views and sentiments' (Wollheim,

1973, p. 7), although this view is contested (Skorupski, 1989, pp. 320–1; Gray, 1991, p. xviii, but see Gray, 1981, pp. 50–1). If Mill is a skeptic, as Isaiah Berlin has argued, holding that ‘human knowledge was in principle never complete, and always fallible’, could he make the distinction between a belief of harm and harm in fact? (Berlin, 1969, p. 188) If he could not, why privilege the claims of the officials of the state that the unassimilated subject caused harm in fact, against the unassimilated subjects’ contrary belief, grounded as it may be in an objective system of values of their native culture?

Mill thinks we can evaluate beliefs by appealing to observation and experience that conforms to the constancy of the course of nature (SL 849–74; Mill, 1967, 402–23, 428–39). In ‘Whewell on Moral Philosophy’, he harshly criticizes the Cambridge intuitionist for resting morals on feelings, even feelings widely shared. Mill explains, ‘a feeling is not proved to be right, and exempted from the necessity of justifying itself, because the writer or speaker is not only conscious of it in himself, but expects to find it in other people’ (CW 10:179; compare CW 10:401, CW 9:439). Mill doubts the judgment of the majority of humankind based on its poor track record, marked by beliefs in ‘the absurdest superstitions’ such as witchcraft, magic, astrology, oracles and ghosts (CW 10:194). His rationalism is evident in his discussions of religion, which appear in essays published posthumously. Mill, like Bentham and Darwin, being cautious about revealing views that might be construed as blasphemous (Hamburger, 1999, pp. 55–70). In his essay, ‘Theism’, he rejects beliefs in immortality for lack of ‘evidence’ (Rel 463, 483; compare 430–1). People believe in immortality because of the ‘disagreeableness of giving up existence’ and because of public and private teachings that encourage the belief that there is life after death. But, Mill objects, ‘as causes of belief these various circumstances are most powerful. As rational grounds of it they carry no weight at all’ (Rel 463). He adds that this ‘irrational’ confusion of thinking the pleasure of a belief bears on its truth ‘would sanction half the mischievous illusions recorded in history’ (Rel 463–4). Mill also contends that beliefs in miracles lack scientific grounds (Rel 469–72, 476–7), and in a letter to William Carpenter, he accuses ‘Spiritualists’ of lying about their ‘pretended experiences’ (CW 17:1869).

Mill’s commitment to rationalism and ‘empirical proof’ (U 4:3) makes him skeptical of beliefs in an afterlife or in evil spirits. But his commitment is qualified. In ‘The Utility of Religion’, Mill recognizes the utility of beliefs that are not proven true. ‘Religion’, he writes, ‘may be morally useful without being intellectually sustainable’ (Rel 405). In ‘Theism’, Mill introduces the idea of ‘imagination’. Unable to conclude that there is no God, Mill opposes both ‘the dogmatic denial of [God’s] existence’ as well as ‘the denial that there is any evidence on either side’. ‘There is evidence but insufficient for proof and amounting only to one of the lower degrees of probability’, although he does think that there is sufficient evidence to deny that if there is a God, this God is omnipotent (Rel 482). The supernatural, then, becomes a matter of hope, and Mill asks whether ‘the indulgence of hope ... in which there is no prospect that any probable grounds of expectation will ever be obtained, is irrational, and ought to be discouraged’. What is Mill’s answer? After acknowledging that ‘different thinkers are likely, for a long time at least, to decide differently’ on this issue, he writes, ‘[t]o me it seems that human life ... stands greatly in need of any wider range and greater height of aspiration for itself

and its destination, which the exercise of imagination can yield to it without running counter to the evidence of fact' (Rel 483). Mill continues, 'it is a part of wisdom to make the most of any, even small, probabilities on this subject ... I am satisfied that the cultivation of such a tendency in the imagination, provided it goes on *pari passu* with the cultivation of severe reason, has no necessary tendency to pervert the judgment' (Rel 483). Mill concludes that we need not be guided solely by facts. He defends the 'principle that in the regulation of the imagination literal truth of facts is not the only thing to be considered'; 'When the reason is strongly cultivated, the imagination may safely follow its own end, and do its best to make life pleasant and lovely inside the castle, in reliance on the fortifications raised and maintained by Reason round the outward bounds' (Rel 484–5).

Mill is careful not to defend false beliefs. His position is that where we do not know that a belief is false or true, it may well have utility.⁶ Not all beliefs can be empirically verified. Reason is not always determinative, and where it reaches its limits, Mill argues, we need imagination, religion being one shape that the imagination takes. The hope that the imagination affords, he writes, 'is far from trifling' (Rel 485). The utility of such hope lies in its enlarging the general scale of the feelings, bringing 'loftier aspirations, being no longer in the same degree checked and kept down by a sense of the insignificance of human life – by the disastrous feeling of "not worth while"'. The benefit is the 'improvement of character up to the end of life' (Rel 485).

Given his rejection of the evidence for beliefs in immortality and miracles and his classification of magic and witchcraft as the 'absurdest superstitions' and 'false', Mill would surely regard as false the beliefs in evil spirits that underlay practices such as exorcism. A Millian choosing to emphasize a skeptical strand in Mill's works might argue that if Mill is willing to leave open the possibility of a deity in the absence of firm evidence, it is also conceivable that he would say only that we have no evidence that such beliefs are true and conclude that they may provide hope and have some utility. The Millian might point to Mill's position on miracles. After rejecting, on the basis of available evidence, claims that there are miracles and divine revelations, Mill does not conclude that these claims are false:

What can be said with truth on the side of miracles amounts only to this: ... there is nothing so inherently impossible or absolutely incredible in this supposition [that there is some evidence of the reality of a Creator] as to preclude any one from hoping that it may perhaps be true (Rel 481).

Anyone choosing to emphasize this skeptical strand in Mill's thought must confront several obstacles. For one, as a social philosophy that bears on policy decisions, Mill's utilitarian philosophy is this-worldly. The social philosopher seeking to promote social utility must rely on deduction and experience (U 2:2, 5; 5:36n), and there can be no empirical experience of other-worldly pleasures and pains (compare CW 9:449). This is not to say that Mill would not have us consider the happiness of future generations in determining policy, but in doing so, we must rely on experiences that can be empirically assessed. Second, Mill assumes that there is a 'clear intellectual standard of right and wrong' (CW 9:453, 456). The standard is in fact not that clear: wrongs are harmful acts, but the claim that an

act is harmful must be justified to those who do not regard it as harmful. For Mill, an adequate justification must be public and reasonable. Mill is critical not only of specific religious doctrines which lack evidence, but of the way religion appeals to the authority of God instead of to good reasons in educating people to be moral. He also insists that moral doctrines should be open for discussion (Rel 415–7). While Mill praises Christian morality, he criticizes this morality insofar as it is ascribed to a supernatural origin, for ‘that origin consecrates the whole of [the received maxims of morality], and protects them from being discussed or criticized’ (Rel 417). Debates about culture clash ultimately are heard in political forums or courts, and Mill is unsympathetic to arguments that are incapable of public justification. But such justifications, we have seen, must appeal to good reasons based on empirical evidence, not merely whatever reasons that the public is willing to believe in.⁷

Punishing Unassimilated Subjects

An unassimilated subject attempting to justify actions that the state regards as harmful by appealing to beliefs that cannot be given a public justification supported with good evidence would fail to earn Mill’s support even in his skeptical moments. But the question of how we should punish unassimilated subjects is not settled merely by agreeing that their actions caused harm. The harm principle permits, but does not require, legal punishment. Because legal punishment is itself costly, we might think we should invoke it only if doing so serves the general interest; otherwise, we should rely on other forms of punishment to respond to wrongs, such as natural penalties (OL 4:5). Mill notes that ‘there are often good reasons for not holding [a person] responsible – either because it is a kind of case in which he is, on the whole, likely to act better when left to his own discretion ... or because the attempt to exercise control would produce other evils, greater than those which it would prevent’ (OL 1:11; compare U 4:3; Rees, 1960, p. 127; Brown, 1972, p. 139).

Mill’s theory of legal punishment is a relatively neglected topic deserving its own sustained treatment, one that would involve detailed analysis of the complex relation between the harm principle and Mill’s utilitarianism (see Lyons, 1976; Gray, 1981; Berger, 1984; Skorupski, 1989;). I limit my discussion of this topic to a basic question: what does Mill see as the purpose of punishment, and is this purpose realized by punishing unassimilated subjects in cases of culture clash? One reason that there may be so little attention given to Mill’s views on punishment is that it is assumed Mill simply co-opts Bentham’s utilitarian position (Lyons, 1976, p. 106; Ryan, 1990, p. 127). As the harm principle is silent about how to punish, Mill must decide this with some other standard, and the one he seems most inclined to draw on is the principle of utility or a principle of expediency (Gray, 1981), although Mill does not wish to use utility–promotion as a reason for restraining liberty, unless this restraint prevents harm to others.⁸ On the necessitarian theory of free will that he defends, Mill writes, two ends ‘are sufficient to justify punishment: the benefit of the offender himself, and the protection of others’ (CW 9:458; 459–60 fn), the latter end being achieved partly by discouraging future offenders (CW 459 fn). Mill defends hard labor at prison, because imprisonment without labor will not deter poor people from committing crimes (CW 21:104–5; compare

NW, May 19, 1850, p. 1172). He praises a California law against dueling that punishes by depriving the lawbreaker of the ability to run for public office: it will be effective because love of reputation is a root cause of dueling (NW, January 2, 1850). His famous defense of capital punishment rests largely on the need for deterrence and security (CW 28:269–70). When he opposes capital punishment of the Fenian convicts, he does so for reasons of expedience, not justice: to kill them would make them martyrs and sanctify their cause with unhappy consequences for England (NW, May 25, 1857, p. 166). In addition to appealing to utilitarian reasons for punishing, Mill explicitly rejects what he takes to be the retributive theory that ‘wherever there has been guilt, pain should be inflicted’ (CW 9:462). But there is a complexity in Mill’s discussion of punishment, seldom acknowledged, because he also recognizes that while punishment is a useful social practice, the criminal should be ‘justly accountable’ (CW 9:454). Although a Millian is unlikely to regard *oya-ko shinju* or Korean exorcism as justified, the question remains as to whether unassimilated subjects engaging in them deserve to be punished, or whether they had an excuse.⁹

In *Utilitarianism*, Mill attempts to account for the requirement of justice within a utilitarian framework. He argues that the origin of justice rests in part in natural sentiments of revenge, sentiments that are useful for the preservation of society (U 5:19–20; compare Berger, 1984, pp. 138–40). But, he continues, these sentiments are not themselves moral: they become moral when subordinated to the social feeling that has punished us for the greater societal good. That one deserves punishment does not mean one ought to be punished (U 5:14). Still, Mill does not think we can or should ignore these sentiments once subordinated. In a letter he wrote to Florence Nightingale, Mill politely responds to Nightingale’s view that there ought to be no punishment, only reformatory discipline. Although Mill himself refers to punishment as a ‘curative’ and ‘medicine’, in this letter, he says that we still need to regard punishment as a ‘natural’ consequence of guilt and adds that we cannot likely get rid of our sense of strong indignation against wrongdoing (CW 15:711–2; compare CW 21:77, 105–6). In speeches, letters and newspaper writings, Mill portrays punishment not simply as a deterrent or reformative, a means to make society safer or better, but as a means of giving the blameworthy their just desserts. In a number of editorials cowritten with Harriet Taylor, Mill complains when the state failed to invoke ‘condign punishment’ or to make the criminal expiate their guilt ‘by the retribution which the law appoints for such malefactors’ (NW, February 10, 1846, pp. 865–6; NW, March 19, 1850, p. 1169; NW, March 26, 1850, p. 1164; compare NW, November 17, 1846, March 26, 1850 and August 28, 1851). Mill’s concern that the blameworthy get what they deserve, when doing so is consistent with the principle of utility, may be apparent also in his persistent efforts to prosecute Governor Eyre for murder after Eyre’s men brutally put down the 1865 Jamaican uprising (Semmel, 1962; compare Packe, 1954, pp. 470–1). Because Mill does not think that all blameworthy people should be legally punished, I take him to mean in saying that the criminal must be justly accountable that justice is a constraint on the utilitarian: punishment can be invoked for the good of society only upon the blameworthy.

If the behavior of unassimilated subjects is determined by their cultural upbringing, one might think that they could not have acted otherwise or had the

requisite state of mind of a criminal and therefore are not blameworthy. Holding a person morally responsible and blameworthy for their act seems to presume that they acted out of their own free will. But Mill's utilitarian account of punishment rests on a commitment to a version of the doctrine of necessity that seems incompatible with the existence of free will. On the theory of necessity, volitions are effects of antecedent causes. As Mill explains it, 'if we knew the person thoroughly, and knew all the inducements which are acting upon him, we could foretell his conduct with as much certainty as we can predict any physical event' (SL 837). We may speak of an action as the result of a person's character, but for Mill, our character is to a large degree determined by our circumstances (SL 869–70, 898–9; NW, November 9, 1823; Carlisle, 1998, pp. 151–3) and especially by our nationality (RG 546–7; CW 10:99, 105). Packe relates a story of how, before sending him off to France in 1820, James Mill took his son on a walk in Hyde Park and told him that if he's ahead of other boys, it is not from any virtue in himself but from his upbringing; given the same upbringing, any other boy could have gotten to where John Stuart now was (Packe, 1954, p. 40). Robert Owen, the founder of the utopian society at New Lanark, agreed that character is shaped by circumstances and concluded that punishment is an absurdity and glaring injustice. The fault lies not in the criminal but in the system that trains the individual (Owen, 1927, pp. 26–37). Punishment is deserved only when the criminal acts freely, and Owen denied that there is free will. Mill reaches very different conclusions than did Owen about the intelligibility of punishment. While Mill, like Owen, agrees with the doctrine of necessity, he seeks his way out of the difficulty of also regarding punishment as deserved by arguing that moral responsibility is consistent with necessity. He contends that while our character determines our actions and is heavily shaped by circumstances beyond our control, there is a sense in which we can control the kind of character we have, and this makes us responsible: 'our character is formed by us as well as for us' (SL 840).

One way we shape our own character, Mill argues, is by responding to the threat of punishment. In 'On the Freedom of the Will' in *An Examination of Sir William Hamilton's Philosophy*, Mill writes:

Whoever cultivates a disposition to wrong, places his mind out of sympathy with the rest of his fellow creatures, and if they are aware of his disposition, becomes a natural object of their active dislike. He not only forfeits the pleasure of their good will ... but he also renders himself liable to whatever they may think it necessary to do in order to protect themselves against him; which may probably include punishment ... In this way he is certain to be made accountable, at least to his fellow creatures (CW 9:455; compare 446, 453, 465).

In saying that 'whoever cultivates a disposition to wrong, places his mind out of sympathy with the rest', Mill implies that the criminal is the agent who cultivates his own disposition, a view Owen had rejected. Mill's somewhat confusing and perhaps confused position is that insofar as a society announces punishments for an act, and one is motivated by the threat of punishment, then one is accountable and responsible if one commits the act – even if, as Owen held, one cannot truly control his own character: '[f]ree-will or no free-will, it is just to punish so far as

is necessary for this purpose, as it is just to put a wild beast to death (without unnecessary suffering) for the same object' (CW 9:460). Mill, who insists that criminals be justly accountable, argues that they are justly accountable if pain operates as a deterring motive on them (CW 9:463) and if 'the end which society is attempting to enforce by punishment should be a just one' (CW 9:459). If these conditions are met, then punishing a criminal 'is no more unjust than to administer medicine' (CW 9:458).

Mill's use of 'just' here is curious. Normally, we would say that treating a sick patient or incapacitating a dangerous beast is justified, but we would not say it is just, because neither the patient nor the beast are blameworthy. Mill himself, a few pages before writing that it is just to put a wild beast to death, notes that those who are inherently and unalterably evil should 'be regarded and treated as noxious beasts: not punished perhaps, since punishment would have no effect on them, and it might be thought wrong to indulge the mere instinct of vengeance: but kept carefully at a distance, and killed like other dangerous creatures when there was no other convenient way of being rid of them' (CW 9:456). In this earlier passage, Mill implicitly acknowledges that while it may be useful and, on that ground, justified to incapacitate a wild beast, the beast does not deserve punishment and is not morally responsible. That view seems right, although it fits uneasily with Mill's view that moral responsibility is consistent with a condition in which our character is shaped by education and the threat of punishment. Mill reconciles the doctrine of necessity with moral responsibility and the principle that the criminal must be justly accountable by conflating a justification of punishment – that it realizes a good for society and the criminal – with a showing that punishment is just. A Millian might agree with Mill's utilitarian theory of punishment and his view that punishment must be deserved, yet reject Mill's attempt to reconcile accountability and the doctrine of necessity. Following this path, one might conclude that a cultural defense may be warranted for unassimilated subjects if they are not blameworthy.

But it is also possible for a Millian to adopt Mill's argument in its entirety and reach a similar result. Mill argues that criminals are accountable insofar as they shape their own character by responding to threats of punishment. Punishment is an instrument that society uses to 'try to convince or persuade' the criminal 'that he had better act in a different manner' and to 'educate all, especially the young, in the habits and dispositions which lead to well-doing' (CW 9:453; compare 446, 465). Owen agreed that we should educate the young but found punishment unintelligible. Mill wonders how else but by punishment we can shape character: 'On the theory of Necessity (we are told) a man cannot help acting as he does; and it cannot be just that he should be punished for what he cannot help'. But, Mill responds quizzically, '[n]ot if the expectation of punishment enables him to help it, and is the only means by which he can be enabled to help it?' (CW 9:458). Through the oft-repeated imposition of pain for doing certain acts with bad consequences, punishment becomes expected. Mill clarifies that it is not merely 'an expectation and dread of external punishment' that makes one accountable, but the fact that through the 'principle of association', the feeling of wrong naturally grows up 'when pain has long been thought of as a consequence of a given fact' (CW 9:455). This expectation and feeling of wrong may not have been

successfully created in unassimilated subjects. Drawing on this argument, the Millian might conclude that until they have, one has not yet initiated the effort of character development that warrants blaming. This might be a basis for mitigating punishment in circumstances where unassimilated subjects are not exposed to the norms of their alien society, which is most likely the case with newly arrived immigrants.

Mill's argument is not simply that we deserve punishment if we expect it. Punishment must also serve a just end if the criminal is to be justly held accountable. Punishment serves a just end if it is effective as a deterrent and curative and is used 'to protect the just rights of others' (CW 9:459). Mill may assume that unassimilated subjects can be deterred given that he thinks all humans can eventually be civilized. But he qualifies this assumption. One exception he discusses is the madman, fanatic or, more generally, someone with so violent a motive that punishment would have no effect. Such a condition, he writes, is a 'just ground of exemption' (CW 9:464). A Millian might apply this subsidiary principle by arguing that Kimura or other unassimilated subjects who potentially would violate the law by committing a culturally sanctioned act, strongly motivated by their beliefs, are not likely to be deterred by the threat of punishment. This may be one of his reasons for recommending reduced sentences for Indians who engaged in a practice sanctioned by 'immemorial custom'.

In a passage that seems to undermine the view that Mill would take into account an offender's state of mind in deciding their punishment, Mill refers to the assassin Ravaillac, who regarded himself not as a criminal but a heroic martyr. Mill writes that if he was 'justly put to death, the justice of punishment has nothing to do with the state of mind of the offender further than this may affect the efficacy of punishment as a means to its end' (CW 9:461). Mill's qualification is crucial. Mill agrees that if we could have positive assurance that someone like Ravaillac killed another out of self-sacrifice 'to what they considered a higher and more sacred' obligation, 'we should be obliged to admit that their doom was not just in the particular instance' and that 'it is doubtful whether they deserve' to be hung (CW 9:462n). He notes that '[h]anging ... those who are not amenable to motive, adds nothing to the deterring effect, and is therefore a gratuitous brutality' (CW 9:460n). Mill concludes that expediency makes Ravaillac's punishment just, not because there is any doubt about Ravaillac's good intentions – he was not mad, his act 'simply originated in false teaching' – but because there is no doubt about its efficacy (CW 9:462n), Ravaillac being amenable to motives.¹⁰

Another qualification to Mill's assumption that all humans are subject to the threat of punishment is his recognition of differences in individual and national character that may make it more difficult to apply the same incentive structure to people of different cultures. In the *System of Logic*, Mill criticizes political economists for assuming a competitiveness of all human beings that may only be true of the English and Americans. Mill notes that Continental Europeans may care less about money, to illustrate how we must acknowledge 'the diversities of individual and national character' (SL 906). Given differences of this sort, punishment may have a limited deterrent effect on some unassimilated subjects.¹¹

Conclusion

As a moral imperialist, Mill hopes to extend the influence of the individualist moral values that he believes will improve humankind and welcomes the end of some traditional and 'barbaric' practices, although his principle of liberty restricts the zealous imperialist. Mill defends individual liberty at least up to the point where a person causes harm to others, at which point he thinks the state may restrain the individual. But when we arrive at this point, having to decide how to respond to people from other cultures that violate our law, we face some complicating issues.

One complication is whether the conception of harm is culturally relative. The harm principle might preclude punishment of an unassimilated subject if it could be established that the practice in which they were engaging, such as exorcism or *oya-ko shinju*, did not really cause harm, by appealing to a set of beliefs that provide a sufficiently rational ground for the practices, rational in the sense that Mill means of being based on reasons and not mere preferences. I have argued that this is a high hurdle to overcome, given Mill's rationalism and insistence that one be able to give a public justification for one's beliefs that appeals to good empirical evidence. I have, however, pointed to aspects of Mill's discussion of religion that at least gets the foot in the door for the defendant claiming they were not harming but benefiting their so-called victim. But the this-worldly conception of harm to which Mill appeals is more amenable to claims from unassimilated subjects whose practices aim at this-worldly goals rather than at benefits in an afterlife.

The door more readily opens for a Millian cultural excuse because the harm principle only permits but does not require punishment. Mill is sensitive to the role that cultural practices and traditions have in shaping character, even though as a moral imperialist, he welcomes the eventual abolition of some. He acknowledges that we may need to make concessions even to illiberal practices until education and other forms of character improvement take effect. This toleration of culture, coupled with his concern that punishment be deserved, could support gentler means of coercion. If a Millian sought to mitigate punishment of an unassimilated subject in cases of culture clash where harm was caused, it would not be for the sake of liberty, for the harm principle permits punishment to prevent harm. Rather, it would be because severe punishment is not deserved. Essentially utilitarian, Mill's theory of punishment recognizes a demand of just accountability but holds that this demand is met merely if one is deterrable, and the punishment is for a just end. If a person is incapable of being motivated by the threat of punishment, Mill says that punishment is not deserved. For Mill, the deterrent function of punishment would not be advanced by punishing the unassimilated subject in some cases, as when they are subject to 'such a violent motive that no fear of punishment could have any effect; which, if capable of being ascertained, is a just ground of exemption' (CW 9:464).

It is difficult to speculate how high Mill himself would set the bar for a cultural defense in particular cases. We might think that Mill would set the bar too high for Kimura but low enough for Kargar, insofar as Kimura appeals to other-worldly harms whereas Kargar appeals only to this-worldly, culturally specific harms,

although the issue is complicated by the fact that Kargar cannot be assured that his children will grow up to accept the same cultural norms by which he lives. It may be that Kimura or other unassimilated subjects who potentially would violate the law by committing a culturally sanctioned act, strongly motivated by their beliefs, are not likely to be deterred by punishment for the act. It may be that newly arrived immigrants had no opportunity to be given an expectation of punishment through oft-repeated associations of pain with the culturally sanctioned act. A Millian might argue that harsh enough punishment could deter anyone or, on the other hand, that someone who is not deterrable should not be punished at all – although Mill suggests that dangerous but undeterrable people can, at the very least, be incapacitated.

For the most part, Mill provides guiding principles only, leaving it up to the Millian to apply them, an exception being his recommendation of a reduction of sentence for Indians participating in *bahirwattia*. By laying out the subsidiary principles that Mill develops, I hope to have contributed to our understanding of some features of Mill's political theory – his harm principle, empiricism, theory of punishment and respect for traditions and custom – but there are difficulties in his theory that Mill himself did not work out. What seems clear is that Mill's empiricism would keep him from justifying actions such as those of Kimura or the Korean exorcist. But mitigating the sentence of unassimilated subjects is another matter. Doing so is not necessarily inconsistent with the logic of Mill's political philosophy, which is not so obsessively 'antitradition' and 'anticustom' as is supposed.

(Accepted: 10 February 2005)

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Notes

The author thanks the editors and anonymous reviewers of *Political Studies* for their comments and suggestions.

- 1 OL refers to Mill, 1859b and U refers to Mill, 1861a: references are to chapter: paragraph; CW refers to Mill, 1963; NW refers to Mill, 1986; Rel refers to Mill, 1874; RG refers to Mill, 1861b; SL refers to Mill, 1843.
- 2 Ann W. O'Neill, '2 Missionaries Guilty in Fatal Exorcism Case', *Los Angeles Times*, April 17, 1997, p. B3, and *United Press International* news release of April 24, 1997, indicating that the husband was sentenced to four years in prison and the other man to two years in prison, both for involuntary manslaughter rather than for second-degree murder, on the basis of evidence from a cultural anthropologist.
- 3 *Maine v. Kargar*, 679 A 2d 81 (1996).
- 4 A California court sentenced her to probation. See Janet Rae-Dupree and Jack Jones, 'Children in Arms, Mother's Trek into Sea Stuns Her Neighbors', *Los Angeles Times*, January 31, 1985, and Maura Dolan, 'Two Culture's Collide Over Act of Despair', *Los Angeles Times*, February 24, 1985.
- 5 In *On Liberty*, Mill seems to say otherwise: 'I am not aware that any community has a right to force another to be civilized' (OL 4:20) and explains that while he disapproves of the Mormon practice of polygamy, it would be tyrannical to prevent it. If Mill says this only because he regards the Mormons as civilized, he would not mean to imply that England cannot use 'civilizing coercion' on societies he regards as backward. On Mill's views on Mormon polygamy, see Baum, 1997.

- 6 Mill writes that 'no belief which is contrary to truth can be really useful' (OL 2:10). But this does not conflict with his position in 'Utility of Religion' and 'Theism' because Mill distinguishes beliefs proven false, which have no utility, from those not proven true.
- 7 For a characterization of liberal theory's requirement of impartiality as a demand for public justification and evidence, as opposed to reliance on faith or revelation, see Nagel, 1987, especially p. 232.
- 8 Gray, 1991, p. xix; but Hamburger disagrees, seeing Mill as illiberal (Hamburger, 1999, pp. 8, 170–1). Several of Hamburger's examples of what Mill would see as justified coercion for acts that do not harm others do seem to involve acts harming others: lying (p. 12), beating a horse (p. 13 and n. 31) and murder (p. 15). Moreover, Hamburger, arguing that Mill's willingness to use nonlegal forms of coercion to enforce a nonliberal morality qualifies him as illiberal, sees no great difference between shaming and legal punishment (p. 177), whereas there is a tremendous difference between being put behind bars and bearing the disapproval of one's peers – compare Rees, 1985, discussed and criticized in Hamburger, p. 183.
- 9 The criminal law distinguishes excusing conditions, to which defendants appeal if they were incapable of or had another excuse for not complying with the law, and justifying conditions, to which defendants appeal who deny that their act was wrong because they were justified – see Greenawalt, 1984.
- 10 Mill could regard Kimura as, like Ravaiillac, the victim of false teaching and amenable to motive if he would regard her Japanese upbringing as a false teaching from the 'fountain of goodness' – his characterization of the influence acting upon Ravaiillac (CW 9:462n). This seems doubtful to me, although the passage is admittedly cryptic.
- 11 Compare 10:401: Mill seems critical of those who judge people 'totally unlike themselves' without recognizing differences in opinion and taste.

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