J.S. Mill Meets Ms. G., or, Exploring Implications of Mill's Harm Principle, and His Doctrine of Freedom of Action

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I. INTRODUCTION

In 1996, Winnipeg's Child and Family Services Agency tried to force a pregnant, glue-sniffing woman into a treatment program, setting off a heated national debate. A century-and-a-half earlier, John Stuart Mill, published his most famous essay, *On Liberty*, setting off his own heated debate. Today, elements of both of these seemingly disparate events can be compared and contrasted with each other to illuminate enduring and difficult issues regarding individual liberty.

The case of *Winnipeg Child and Family Services (Northwest Area) v. D.F.G* was ultimately resolved in the Supreme Court of Canada. It was decided that a pregnant woman should not be deprived of her liberty for the sake of her unborn fetus.[1] The case, however, has precedential value exceeding that single judgment regarding the rights of pregnant women. It also provides a useful framework within which to explore a complex array of modern dilemmas regarding coercive legal action, and how the courts ought to respond to such action.

Mill's famous treatise on personal liberty is a useful tool for examining that framework. His stated purpose in writing *On Liberty* is to describe when it is appropriate for society or the state to consider such coercive interference with a person's liberty. The central question Mill poses is: what are "the nature and limits of the power which can be legitimately exercised by society over the indi-

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1 *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925; [1997] S.C.J. No. 96.

vidual?"[2] His answer is encapsulated in what has come to be known as "The Harm Principle"—the idea that one is free to do what one wants, as long as one does no harm to another person.

This essay will investigate the ways in which key concepts and arguments Mill employs in *On Liberty* illuminate the problems of the Ms. G. case. At the same time, the essay will use the case of Ms. G. to highlight both the strengths and weaknesses of Mill's position.

A central focus will be "The Harm Principle", including the question "what constitutes harm?" Mill's key distinction between self-regarding and other-regarding acts will be considered, to determine what application it has to the facts of the Ms. G. case, and to illustrate needed development of this part of Mill's thesis. Mill's staunch anti-paternalism will be discussed, and will be shown to be useful for understanding the value of allowing the individual to choose her own fate. It will be noted that Mill's analysis is incomplete in some important respects, and ought to be expanded. In particular, it will be argued that the harm principle should be supplemented in a way that addresses the possibility that coercive legal action can have disproportionate effects on the poor and racial minorities.

In Chapter Five of *On Liberty*, Mill enables the reader to appreciate the scope and force of his theory, by testing the theory as it applies to specific ethical problems, or "specimens" as he puts it. In effect, my analysis of Mill in this essay might be viewed as an addition to Mill's Chapter Five—an application of his theory to a modern dilemma that perhaps could not have been anticipated by a writer in Mill's time. It is hoped that this analysis will lead to a better understanding of Mill's thesis—its strengths and weaknesses—and will show how its contemporary application can still be of enormous value in identifying and evaluating the important arguments that emerge from attempts to control individual liberty.

II: THE SALIENT FACTS AND KEY ISSUES OF LAW AND MORALITY RAISED BY THE CASE OF MS. G.

It was late July when Winnipeg social worker Marion Clement drove to the home of her client DFG. When she found Ms. G., her client stared at her dully, surrounded by the strong odour of glue (containing its toxic compound of toluene). The social worker proposed to take Ms. G. to a treatment centre for solvent abuse. Ms. G. indicated that she would get treatment, but "not right now." "I then advised [her] that if she would not come with me I would try to get a

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2 John Stuart Mill, *On Liberty*, 8th ed. (Indianapolis: The Liberal Arts Press, 1956).

Court order requiring her to attend for treatment. She indicated that she understood, but that she would not come with me."[3]

Ms. G. was five months pregnant. She had been sniffing solvents for six years. She already had three children, two of whom were born with obvious damage to their nervous systems as a result of their mother's 'sniff' addiction. Child welfare authorities, after apprehending all three children, had decided to take unprecedented action to prevent Ms. G from damaging *in utero* yet another future child with her 'sniff' habit.[4]

There were two legal issues in dispute: 1) does a pregnant woman owe a duty of care to her fetus? And, 2) if she does, should the court sanction a legal regime under which judges could order the incarceration of addicted and pregnant women whose fetuses are at risk (an extension of the *parens patriae* jurisdiction of the courts)?

The moral issues of this case are nearly identical to the legal issues. Mill's central argument in *On Liberty* points us to those factors that help to resolve: 1) whether there should be moral condemnation of Ms. G.'s damaging behaviour to her fetus, and 2) whether she should be actively pressured into seeking treatment to prevent further damage to her fetus.

III: The Harm Principle (and what counts as "harm")

Mill claims that his object is to assert "one very simple principle"[5] that will serve to guide those who consider restricting the liberty of another, either by coercive legal force, or by social pressure of moral condemnation. Mill states his principle as follows:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[6]

In other words, Mill claims that the only point at which it is acceptable even *to consider* coercive action against a citizen is when the citizen's actions threaten to harm another person.

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3 Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* Case on Appeal, "Affidavit of Marion Clement" at 34.

4 A comprehensive description of the facts of the case is found in: Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)*, "Factum of the Appellant" at 1–5.

5 *Supra* note 2 at 13.

6 *Ibid.* at 13.

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general will or will not be promoted by interfering with it becomes open to discussion.[7]

Political and social philosopher Joel Feinberg has refined Mill's concept of "harm to others" by assessing and comparing various kinds of harms.[8] Noting the relevance of such factors as "magnitude of harm" and "probability of harm", Feinberg provides further tools for distinguishing cases deserving of intervention from those undeserving.[9] This refinement of Mill's theory is helpful when assessing the proposed interference with Ms. G.'s liberty by Winnipeg Child and Family Services (CFS).

The magnitude of harm that Winnipeg CFS sought to address, as detailed in its factum to the Supreme Court, was a *reduction* in the likelihood of damage to the nervous system of Ms. G.'s fetus and, in consequence, a reduction in the likely medical and social costs to society of treating the effects of such damage. The Agency conceded that irreversible damage had quite possibly already occurred, since the first 16 weeks of gestation are the most critical for neurological development.[10] It also noted the more than one million dollars it costs to treat each person who suffers from such damage.[11]

Thus, the Agency was not claiming that its coercive intervention, coming so late in the gestational process (five months), could likely prevent all or even the most serious damage to the fetus of Ms. G. Rather, it claimed that by restricting Ms. G.'s liberty it might reduce the damage to the fetus that had (likely) already occurred, and quite possibly save the provincial treasury a considerable sum. As for probability of the harm to be prevented, the agency's expert witness admitted that limited data were available, but he claimed that "logically", it appeared that eliminating further exposure to solvent toxins during the second and third trimester could reduce the extent of the damage to the central nervous system of the fetus.

Feinberg would have us consider these two factors—magnitude and probability—together.

> The greater the *gravity* of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatened to produce it.

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7 *Ibid.* at 92.

8 Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. 1-4* (Oxford: Oxford University Press, 1988).

9 Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. 1, Harm to Others* (Oxford: Oxford University Press, 1984).

10 *Supra* note 4 at 34.

11 *Supra* note 8 at 34.

> [...Concomittantly], the greater the *probability* of harm, the less grave the harm need be to justify coercion[12] [emphasis in original].

In the case of Ms. G., we are dealing with degrees of gravity and probability that are relatively difficult to quantify, given the lack of conclusive scientific evidence. But Feinberg does not require certainty in such matters, and it would seem reasonable to conclude that the gravity of any further harm to a baby's nervous system might be sufficiently large that we should not require a high degree of probability of harm before we would take the next step of considering coercive legal action against a woman such as Ms. G. On the other hand, one could argue that if it is likely that Ms. G.'s fetus has already suffered damage to its central nervous system, then the marginal benefit of preventing a minimal increase in that benefit is not a sufficient reason to consider coercive legal action.

A. The harm principle and the case of Ms. G

What would Mill say about the self-destructive behaviour of addicts such as Ms. G.? Leaving aside for the moment the fact of Ms. G.'s pregnancy, he might argue that, for Ms. G., the liberty to abuse herself appears to have little redemptive value. Mill might argue that uncontrolled solvent abuse would not easily fit with his vision of "different experiments of living" or "different modes of life",[13] which he views as having the potentiality to lead to personal fulfillment and social development. When he writes that "the worth of different modes of life should be proved practically, when any one thinks fit to try them", it strains credulity to think that he intends this argument to encompass the practice of repeatedly inhaling solvents that have the predictable effect of causing brain damage. But, perhaps he would not have been so judgmental of this choice. If the psychological torment that results from a childhood of poverty and abuse can only be numbed by the inhaling of solvents, Mill (as a utilitarian) might have said that while we can legitimately try to persuade this person to adopt a healthier lifestyle, it is not for us to intervene coercively, for who are we to say that the alternative of living life fully conscious does not bring its own special torments to people whose lives are such a misery? At this point, it is difficult to predict with confidence which side of the argument Mill would align himself with.

Interestingly, the Manitoba Court of Appeal found that for purposes of legal rather than social interference, the arguments regarding the relative value of Ms. G.'s behaviour were unhelpful. The Court stated, "The mother's right to sniff solvents may not seem of much importance, but I do not see how a court can select which conduct harmful to an unborn child should be restrained and

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[12] *Supra* note 7 at 116.

[13] *Supra* note 1 at 68.

which not." In other words, when the Court weighed the distinction between worthwhile and worthless ways in which an individual may choose to live her life, the distinction lost its importance. When the issue involved harm only to the individual involved (the fetus's health not entering into the legal equation since, in law, the fetus does not count as a person at any time prior to birth), the Court was reluctant to condemn Ms. G.'s lifestyle with legal sanctions. The Court, despite its allusions to the lack of wisdom of Ms. G.'s behaviour,[14] did not consider forced medical treatment to be appropriate. The fundamental obstacle was the Court's inability to view, legally, the behaviour of Ms. G. as "other-regarding" (explored below).

Thus, a reader who attempts to apply Mill's reasoning to the case of Ms. G. might conclude that Mill would not defend her liberty to injure her own health by sniffing glue, *even if she were not pregnant*. Contrariwise, she might conclude that even such dubious "experiments in living" as glue sniffing should count as falling within the sphere of liberty. A legitimate application of Mill's harm principle could lead one to conclude that it is, after all, her life, to live as she sees fit (provided that she does not harm others). And insofar as she is a competent adult living in a "civilized society", it is not unreasonable to conclude that Mill would say we ought to respect her autonomy, and allow her the discretion to live her life as she chooses.

There are, however, many aspects to the story of Ms. G. which would no doubt intrigue Mill, and cause him to weigh carefully whether Ms. G.'s liberty was sufficiently valuable to defend, given her particular circumstances. There is, of course, the fact that Ms. G. was pregnant, and fully intending to carry her pregnancy to term. Add to this the fact that her solvent abuse was likely to harm the resulting child, and there is one potential ground for interference. There are also the further problems of her mental competence and her ability to make free, voluntary choices. These factors, too, might take her conduct out of what Mill calls "the realm of liberty". That is, Mill might find strong grounds for justifying interference with the liberty of Ms. G. based upon either the prevention of harm to others principle, or upon her dubious competence. These distinctions will be explored in further detail below.

1. A Cruel Irony

Joel Feinberg notes the distinction between two concepts of liberty: negative liberty (non-interference) and positive liberty (having the ability to achieve one's wishes).[15] Mill's *On Liberty* is primarily concerned with defending the con-

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[14] The Court drew attention to the *UN Declaration of the Rights of the Child*, adopted by Canada in 1959, which states, "The Child, by reason of his physical and mental immaturity, needs special safeguards and care, including legal protection *before as well as after* birth" [emphasis added].

[15] *Supra* note 9 at 8–9.

cept of negative liberty. The case of Ms. G., however, might lead one to question Mill's almost exclusive focus on negative liberty. Ironically, evidence presented in court on behalf of Ms. G. demonstrates clearly that if the State had shown more respect for her positive liberty, the need to interfere coercively with her (negative) liberty might not have arisen.

Twice during her pregnancy, Ms. G. sought medical attention.[16] In fact, it was only because she sought medical care that she came to the attention of the child welfare authorities. And, significantly, court records show that not only did she agree to residential treatment when it was recommended—at about the 14th week of her pregnancy—she even went so far as to phone a treatment program for solvent abusers to find out if she could get in.[17]

The cruel irony, then, is that provincial authorities were apparently willing to consider incarcerating Ms. G. for her continued solvent abuse, but were not willing (or able, because of lack of resources), at an earlier time (when intervention would have been more beneficial for fetal health), to honour her positive liberty by providing the treatment place which she actively sought. To re-phrase this point in Hohfeldian language: under Canadian law, Ms. G. had no right to treatment, no "claim right" in the Hohfeldian sense, as no one appeared to have a duty to provide treatment.[18] She had, technically, the freedom to help herself (her "liberty right"), but lacked the means to achieve her wish for treatment in a timely manner because the province perceived it had no duty to provide such treatment *when needed* (a result of apparent under-funding of residential treatment programs for solvent abusers).

It is interesting to note the sequence of events of Ms. G.'s attempts to access treatment, and the province's response. When Ms. G. wanted help, (*i.e.* a residential treatment program) the province resisted. When the Agency later decided residential treatment was necessary, Ms. G. resisted. Later still, when the Manitoba Court of Appeal ordered her release from treatment, her resistance faded and she was again willing to accept help. Ms. G.'s common-law husband revealed what in hindsight now seems predictable: "She feels that she isn't locked up. And she has made a decision, her own decision, to stay inside the hospital."[19] Once the pressure was off, Ms. G.'s former desire for treatment 'magically' returned.

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[16] Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* Case on Appeal, "Transcript of Proceedings" at 59.

[17] Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* Case on Appeal, "Medical records" at 75, 80.

[18] W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 30–33.

[19] Transcript of CBC Television News story that aired on "24 Hours", 6 p.m. August 8, 1996.

What would Mill have thought of this turn of events? Perhaps he would have observed that it corroborated his thesis: that people are the best judge of what is best for them, and that they function best when they have the liberty to make choices for themselves without coercive interference. In fact, he was well aware of the potential for coercive actions to backfire when directed at people with some backbone:

> [T]hey will infallibly rebel against the yoke. No such person will ever feel that others have a right to control him in his concerns, such as they have to prevent him from injuring them in theirs; and it easily comes to be considered a mark of spirit and courage to fly in the face of such usurped authority, and do with ostentation the exact opposite of what it enjoins.[20]

IV. THE DISTINCTION BETWEEN SELF-REGARDING AND OTHER-REGARDING ACTS

Self-regarding acts are those which (primarily) affect no one but the actor himself. When a person's actions are purely or primarily self-regarding, Mill argues forcefully that no one ought to interfere coercively with that person. By contrast, other-regarding acts, *i.e.* those that affect a person other than the actor, give rise to the possibility that interference may be justified (unless the other person has consented to be harmed, as in a contact sport or a fair competition).

> 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 merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[21]

One could note, however, that Mill's use of such terms as "absolute" right and "sovereign" individual, has a distinctly non-utilitarian ring to it. That is, notwithstanding Mill's insistence in Chapter One that he will appeal in all his arguments to the principle of utility,[22] one finds, at various places in *On Liberty*, that Mill is offering arguments which appear to value individual liberty/autonomy for its own sake or as a fundamental right, rather than simply as a means to happiness.

A. Other-Regarding Acts

Mill repeatedly endorses a strongly libertarian position: "The only freedom which deserves the name is that of pursuing our own good in our own way"; "Each is the proper guardian of his own health, whether bodily *or* mental and

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20 *Supra* note 2 at 101.

21 *Ibid.* at 13.

22 *Ibid.* at 14.

spiritual."[23] But almost without exception he qualifies that strongly held sentiment with the *proviso* that it applies only insofar as another person is not harmed by our conduct. That qualification might mean that Mill's "sphere of individual liberty" shrinks quite dramatically—perhaps more dramatically than even he realizes. A critic might ask: How can I harm myself, without at the same time harming my family and friends? Mill would answer with his conception of a 'distinct and assignable obligation":

> 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.[24]

He then concludes: "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."[25]

Writing about the obligations of parents to their children,[26] Mill makes it abundantly clear that he regards the decision to bring children into the world as an other-regarding action rather than a self-regarding action. From this it follows that once Ms. G. decided to carry her fetus to term, she voluntarily assumed an obligation not to prejudice the health of her future child. Indisputably, given what Mill says about procreative liberty in Chapter Five, he would regard her as under a "distinct and assignable obligation"[27] to protect her fetus from serious harm. Thus, Ms. G.'s decision to engage in solvent sniffing while pregnant would be transferred from the realm of the self-regarding sphere (of individual liberty) into the other-regarding sphere (of potential legal or social interference).

Mill does not tell us who, precisely, decides which obligations are distinct and assignable (and thus enforceable through legal or social coercion). Nor does he tell us anything about the scope of our obligations. For example, is Ms. G. also under an obligation (moral, if not legal) to eat a well-balanced diet? To seek pre-natal care from a physician? To exercise? To avoid second-hand smoke? If so, ought the sanctions to be social, legal, or both?

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23 *Ibid.* at 16–17.

24 *Ibid.* at 99.

25 *Ibid.* at 100.

26 *Ibid.* at 99.

27 *Ibid.*

Mill presumably introduces the "distinct and assignable" qualification to his doctrine of self-regarding action because he recognizes that without this qualification his doctrine would be indefensible. But he does not address, and perhaps does not appreciate, just how powerful this restriction could become if its scope is interpreted widely. Without clearly defined parameters, it could lead to vast numbers of intrusions into personal choice, and a nearly complete loss of the right to liberty of many individuals whose actions have a potentially harmful impact on those to whom they have voluntarily accepted personal responsibilities (*e.g.* spouses, friends, business partners, neighbours).

Nonetheless, Mill describes one practical application of this principle, the common sense of which seems obvious: "No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty."[28] It would not be much of a stretch to say that Ms. G. was, in effect, "drunk on duty". But if we accept that comparison at face value, we are assuming that the being to whom she owed a duty—the fetus—constitutes "[an]other person" and therefore Ms. G.'s solvent abuse would count as an other-regarding act. Only if we make such an assumption would her fetus be counted as a member of the class towards whom it is possible to have "distinct and assignable obligations" sufficient to generate not only a moral but perhaps also a legal obligation.

To decide whether Ms. G.'s substance abuse is properly thought of as "other regarding" behaviour, Mill's concept of distinct and assignable obligations will have to be clarified and refined. We need to answer a question which Mill himself does not explicitly pose: who/what counts as "other" when deciding whether causing harm to her fetus is grounds for restricting the personal liberty of a pregnant woman?

1. Who Counts as "Other"?

Mill is prepared to consider coercive interferences with the liberty of an individual when that individual's conduct is "other regarding". Although his position might be labelled "libertarian", he concedes that it may be legitimate to restrict a person's liberty if what he is doing is likely to "affect prejudicially" the interests of another and if the interference satisfies various utilitarian tests.

In the case of Ms. G., part of what must be determined is whether the fetus counts as "other'—a person/being with interests which must be taken into account morally and legally. Feminists strongly defend the view that the fetus is not a person, and that in cases where the interests of a pregnant woman conflict with those of her fetus, the interests of the woman should prevail. Canadian

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[28] *Ibid.* at 99–100

courts have adopted roughly the same position: prior to birth, the fetus does not enjoy the status of a legal person and therefore has no legal rights.[29]

As a libertarian and a feminist, Mill might have been expected to exclude fetal interests from the category of "others" when assessing whether a woman's actions are causing "harm to others". However, when Mill comes to discuss procreative liberty in his final chapter, "Applications", he adopts an expansive view of whose interests must be counted, legally as well as morally: "to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society."[30]

Later in this same chapter, Mill declares that to bring a child into the world "is one of the most responsible actions in the range of human life", and he insists that "[t]o undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being."[31]

Mill decries the irony he perceives in the prevailing views of his time: that it was legitimate for the state to infringe on the liberty of persons engaged in purely self-regarding actions, but illegitimate for the state to infringe on a person's liberty in order to protect the lives of the very young "when the consequence of their [the parents'] indulgence is a life or lives of wretchedness and depravity to the offspring."[32] This is where Mill's utilitarian analysis comes strongly into play: "Hardly anyone, indeed, will deny that it is one of the most sacred duties of the parents ... after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life toward others and toward himself."[33]

If we take his words literally, Mill seems to recognize only the interests of those already born, in which case we cannot assume that he would also favour coercive action to protect the not-yet-born. In fact, it is likely that he simply overlooked the interests of the fetus, given his generation's lack of access to scientific evidence about pre-natal influences on fetal development. From such passages as those quoted above, it is reasonable to infer that Mill would condemn any actions of a pregnant woman that were likely to harm her future child. There is a strong analogy to be found between a parental obligation to

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29 See *e.g. Daigle* v. *Tremblay*, [1989] 2 S.C.R. 530; *R.* v. *Sullivan*, [1991] 1 S.C.R. 489; *Mathison* v. *Hofer*, [1984] 3 W.W.R. 343 (Man. Q.B.)

30 *Supra* note 2 at 128.

31 *Ibid.* at 132.

32 *Ibid.*

33 *Ibid.* at 128.

nurture and educate, which Mill defends, and a maternal obligation to protect the fetus, which he does not consider. Whether his condemnation would be moral, or legal, or both is more difficult to judge, but given his strong language ("a crime against that being"), it is possible that he would favour both moral and legal sanctions against an offending mother.

This focus on the potential damage to the future child was obviously the dominant factor motivating Winnipeg Child and Family Services, and the provincial government that funded and supported CFS. As the Agency says in its factum, "Judicial intervention is not the method of choice to resolve substance abuse problems in pregnant women. ...[I]n some cases, it may be the only way to prevent a lifetime of suffering for a child and his/her caregivers."[34] While the government understood the problematic nature of attributing legal rights to the unborn, its focus was, like Mill's, utilitarian. It believed, on the basis of scientific evidence, that Ms. G. (by her solvent-abusing behaviour) was risking permanent and serious damage to her child, including a ninety-per-cent chance of mental disability. The research placed before the court showed that life, for this future person, promised to be a grim brew of social maladjustment and economic dependency.[35] As a preventive measure, the Agency advocated an extension of the law.

The view of the Agency and the province was, however, that the status of the fetus as a legal person ["other"] would only come into being if three criteria were met: it is known that the fetus will be carried to term; the conduct of the mother is causing, or if continued will cause, serious and irreparable harm to the future child; and a judicial intervention order will effectively prevent harm to the child and not cause harm to the mother.[36]

This novel idea, that the legal status of the fetus as "other" would be contingent on the fact that it is likely to be born, makes intuitive sense. Pregnant women who had the option of abortion (because of the early stage of pregnancy, and their personal inclinations) would not be affected by this extension of law. It could also be seen as a logical extension of tort law, which allows infants who

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34 Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* "Factum of the Intervener, the Attorney-General of Manitoba" at 3.

35 Ann Streissguth *et al*, *"Understanding the Occurrence of Secondary Disabilities in Clients with Foetal Alcohol Syndrome (FAS) and Foetal Alcohol Effects (FAE)"*, Final Report (University of Washington School of Medicine, August, 1996), as cited in the "Factum of the Intervener, the Attorney-General of Manitoba" at 5.

36 *Supra* note 34 at 11–12.

are born alive to sue for damages caused by injuries or impairments inflicted on them *in utero*.[37]

The Agency's argument in favour of extending legal protections to the fetus was vigorously contested by Ms. G.'s lawyers and other interveners. Making a fetus's rights contingent on the stated intentions of another (the pregnant woman) was a legal concept without precedent, and this faction argued that the legal status of the fetus should stand alone, regardless of the mother's plans.[38] They argued that if the fetus were to be viewed, legally, as entitled to protection from harm, then it is difficult to see why such protection should not include protection against the harm of pregnancy termination. Various religious or "Right to Life" groups were happy to embrace this extension, but neither government, nor the courts, nor wider public opinion, were willing to vitiate a woman's right to decide whether or not to terminate her pregnancy.[39]

As an aside, it is interesting to note Mill's other references in his final chapter to child-bearing responsibilities. Mill is, by modern standards, shockingly willing to set aside his own precepts of non-interference with individual liberty, in order to deprive people of what would now be viewed as a fundamental human right—the right to procreate. He suggests it would be a crime to have too many children if overpopulation would deprive others of economic opportunity, and that it would be legitimate for the state to prevent people from having children (by forbidding marriage), unless they had sufficient economic means to raise those children. Mill, surprisingly, describes these limitations, as "not objectionable as violations of liberty."[40] This willingness to place restrictions on the right of the poor to bear children will strike many as abhorrent.

Mill, of course, would not view his position on child-bearing as being inconsistent with the respect he advocates for an inviolable sphere of liberty. There is no inconsistency, he would argue, since the action of bringing children into the world is an other-regarding action and one which can potentially cause serious harm to both the child and society. In practice, however, what he was advocating, given that contraception was only of the crudest form in his day, was sexual abstinence for the very poor—hardly a humane or liberty-valuing attitude. This was, perhaps, the product of a lack of imagination about the ways in which a

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[37] *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.J.), aff'd (1973) 1 O.R. (2d) 482 (C.A.). See also Ontario *Family Law Act*, R.S.O. 1990, c. F.3, s. 66.

[38] Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* "Factum of the Respondent" at 5–6.

[39] Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* "Factum of the Intervener, Alliance for Life", "Factum of the Intervener, The Evangelical Fellowship of Canada and the Christian Medical and Dental Society".

[40] *Supra* note 2 at 132.

democratic state could, and indeed ought, to provide sufficient supports to enable all individuals to choose for themselves whether to have children (a neglect of the importance of "positive liberty").[41] While he did entertain the possibility of state-funded education, he was unable to see a role for such social programs as family allowances and universal health care, making it possible for anyone to have a family, if they chose, and still provide their children with a reasonable opportunity to live a decent life.

2. A *Utilitarian Test for Restrictions of Liberty*

The central objective of Mill's *On Liberty* is to describe a protected sphere of individual liberty, a sphere of action within which the individual is free to do or be whatever he or she chooses. For this reason, Mill's philosophy is widely regarded as libertarian. Nevertheless, for all of his dedication to the value of individual liberty, Mill believes its value must be assessed in a utilitarian context: "I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions"[42] [emphasis added]. Despite his occasional references to the individual's absolute sovereignty over his own mind and body, Mill officially declares that all claims to liberty are to be decided, ultimately, in the court of utility: the maximization of happiness and the minimization of suffering.

There might, as Mill himself concedes, be many instances in which a person's duty to society (*e.g.* the duty to contribute to the defence of the country or to serve as a juror in the justice system) is important enough to warrant state or community enforcement by legal coercion. Mill, however, would only permit legal coercion where it would have the effect of making the person more likely to do her duty or where it would not, on balance, produce other (worse) consequences:

> In all things which regard the external relations of the individual he is *de jure* amenable to those whose interests are concerned, and if need be, to society as their protector. There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: 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 than when controlled in any way in which society have it in their power to control him; or because

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41 Towards the end of his essay (at 134–137), Mill reveals an almost virulent anti-bureaucracy attitude that sees an inextricable causal link between the broad use of social programs, on the one hand, and an oppressive communist state that undermines the self-sufficiency of its citizens, on the other.

42 *Supra* note 2 at 14.

> the attempt to exercise control would produce other evils, greater than those which it would prevent.[43]

Mill's reasoning here has come to be known as "the rational connection test".[44] No matter how valuable may be the end or goal one is seeking, if the liberty-restricting (or otherwise harmful) means one adopts to achieve that goal are not likely to have their intended result, it is irrational or wrong to adopt those means. This utilitarian principle has particular application to the case of Ms. G., where the likelihood of a successful outcome in the event of legal coercion, both for her and for others like her, was hotly debated.

Would coercive interference work effectively in cases of pregnant, substance-abusing women? The contending parties in the case of Ms. G. agreed that the goal of social policy should be to enhance the health of Ms. G. and her future child, and others in a similar situation. There were, however, widely diverging answers regarding the question of whether forced medical treatment for substance abuse in a residential facility would be likely to achieve that goal. Expert testimony was somewhat divided on this point, and the empirical evidence was less than conclusive, but the preponderance of expert evidence suggested that a punitive response by health care professionals to the needs of a pregnant, substance-abusing patient would be counterproductive. By discouraging open and confidential communication between patients and health care professionals, we impose on the patient the need to edit what they say to us. The relationship becomes adversarial and at arm's length. Patients become less willing to ask questions or discuss intimate concerns because of this adversarial relationship.[45]

After the case of Ms. G. became public, the Native Women's Transition Centre in Winnipeg held a sharing circle with women who at some point had suffered from substance addictions. A report of that meeting stated the consensus view of this group that court orders forcing women into residential treatment would discourage women from even going to see a doctor, out of fear of being reported to authorities. They asked, "Why would you go and see your doctor when you know they will end up taking your baby away?" The women also expressed the view that any forced treatment of addiction was doomed to failure: "For treatment to be effective the women have to be ready to quit."[46]

If the view expressed above is correct, and if the coercive treatment of Ms. G. was to become a precedent, the harm caused to pregnant, substance-abusing

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[43] *Ibid.* at 15.

[44] As expressed in, *e.g.*, *R.* v. *Oakes*, [1986] 1 S.C.R. 103, paras. 37, 59

[45] H. Westley Clark, "Society, Drugs and Pregnant Women", in C.J. Morton *et al.*, eds., *Promoting Family Health in the 1990s: Strategies for Public Health Social Work, Proceedings of the 1990 Public Health Social Work Institute* (Rockville, MD: DHHS, 1993) at 50.

[46] Native Women's Transition Centre, *Circle Meeting Report* (Winnipeg, 1997) at 1–2.

women and their fetuses would far outweigh any benefits. After all, if women-at-risk avoid the health care system because the system is viewed as an extension of the penal system, then the women lose the opportunity to receive advice, counselling, and pre-natal care, and the system loses the opportunity to minimize fetal damage through educational and other voluntary treatment programs. Thus, on utilitarian grounds, the argument for a public health approach appears stronger than the argument for a legally coercive approach.

The Agency acknowledged the argument that there was a potential downside to court-ordered treatment, in that some women could be discouraged from accessing pre-natal care. Its response was to note that Ms. G. had received no prenatal care during her first trimester, and that many pregnant addicts were already avoiding doctors out of guilt and shame over their addiction. "The facts of the present case would also suggest that women who suffer from gross addictions will not receive medical care because their lifestyle is so dysfunctional that regular medical care is of low or no priority."[47] Therefore, according to the agency, there was no great loss if the court order frightened women away from treatment, because the ones who would be frightened away were already avoiding the health care system.

The Agency's logic was not entirely coherent, in that it was not only seriously addicted women who might have been scared away from treatment, but moderately addicted women as well. If we were to assume, however, that both sides of this issue had equally persuasive arguments about the likely public health consequences of forcing Ms. G. into treatment, how would Mill's reasoning help us to assess the strength of the competing positions?

Mill, being a utilitarian, would have us ask the following question: is the coercive interference truly necessary? That is, are there effective alternatives which are non-coercive or less coercive? The Native Women's Transition Centre report pointed to several alternatives that might have resulted in a woman like Ms G. getting the treatment she needed without coercion: reduced waiting lists for solvent abuse treatment, improved outreach programs, counselling that would be culturally appropriate for Aboriginal people, and a 'crack-down' on stores that sell products likely to be used for 'sniff'. A coalition led by the Women's Health Clinic put the alternative succinctly: "The Coalition urges reliance on the old midwifery saying, 'Mother the mother, and she will mother the child.'"[48]

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47 *Supra* note 4 at 23.

48 Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)* "Factum of the Interveners: Women's Health Clinic Inc., Metis Women of Manitoba Inc., Native Women's Transition Centre Inc., Manitoba Association of Rights and Liberties Inc" at 4.

But what about Ms. G. personally? It is useful to examine the dubious record of the Agency, in the execution of its plan to get her into treatment. The facts on the record show that no one from the Agency considered the possibility that, given a little more time to consider the matter, Ms. G. might well have freely consented. She had, after all, repeatedly sought out substance abuse treatment in the past, and even phoned a residential program herself. And when approached on that fateful day when she was scheduled to enter treatment, she did not flat-out refuse to go; she said "not right now." It seems not to have occurred to anyone that perhaps Ms. G.'s guilt and shame over her addiction might have made her feel too embarrassed to show up at the treatment centre while she was still high on solvents. No one considered that she might be more amenable to treatment if she had the more dignified option of making her first appearance at the centre when she was sober.

In other words, as Mill rightly insists, legal coercion ought to be an option of last resort, and it is far from clear that the Agency sensitively pursued the option of voluntary compliance. Coercion might have been unnecessary, not just for Ms. G., but also for many other pregnant, substance-abusing women.

Another question that a utilitarian such as Mill would suggest is: does the coercive measure contemplated interfere with individual liberty to the least degree possible? This is what came to be called the "minimal impairment test". On the whole, despite its mishandling of the broader issue of whether Ms. G. might have been helped into a voluntary treatment program, the Agency does not appear to have employed excessive coercion or threats of coercion against her. They never locked her up, for example, and the extent they were prepared to go along this route was never made clear.

Finally, a utilitarian analysis invites us to weigh the magnitude of the harm caused by coercion against the magnitude of the benefit pursued—the "proportionality test". On the benefits side, the Agency could reasonably promise only a marginally lower risk of damage to Ms. G.'s baby. She had, after all, been abusing solvents for the first five months of her pregnancy, and scientific evidence presented at the trial indicated that the first four months of gestation is the period when fetuses are most susceptible to damage to their central nervous systems. Moreover, long term benefits to Ms. G. herself (from compulsory treatment for substance abuse) were speculative at best. This is because the track record of compulsory treatment for substance addiction and abuse is much poorer than is the track record for voluntary treatment. And, as discussed above, on the harm side, we have the possibility of many addicted women avoiding prenatal treatment altogether, thereby jeopardizing the health of both themselves and their future children. There is also the harm caused to Ms. G. by the loss of her liberty, something she would presumably have experienced as a personal deprivation and indignity.

At the very least, those seeking to deprive Ms. G. of her liberty failed to meet the burden of proof that lay on them. Their most serious failure was that

they failed to demonstrate the rational connection between their means and their goal, given that most of the damage to the fetus had likely already occurred prior to the time they sought to impose compulsory treatment. In addition, they failed to prove that the benefit to be gained was greater than the potential harm that could result. As a public health strategy, seeking court orders to force medical treatment creates considerable risks for other pregnant and addicted women in the community.

3. *Race, Class, and Utility: An Issue of Fairness*

As the above discussion is intended to show, Mill's utilitarian approach to liberty restrictions provides useful guidance to anyone considering the case of Ms. G. There is, however, a rather different principle of morality, raised by the case of Ms. G., that Mill neglects to develop—the possibility of a disproportionate (and hence unjust) effect of coercive legal policies on racial minorities and the very poor. Using a utilitarian analysis, weighing benefits against detriments, an important part of the equation is overlooked: whether one part of society is forced to bear the detriments in a manner disproportionate to the rest of society.

Mill does note the dangers to liberty posed by the "tyranny of the majority", and shows a remarkable appreciation for the effects of internalized oppression that result when society "practices a social tyranny more formidable than many kinds of political oppression, ... penetrating much more deeply into the details of life, and enslaving the soul itself."[49] While Mill condemns the social intimidation that arises from one class of people feeling inferior to another, and even the legal sanctions that target unpopular minorities,[50] he does not reflect on the possibility that laws without an overt class or racial bias may be applied inequitably, in ways that have class-biased or racist results.

The effort by Winnipeg CFS to extend the *parens patriae* jurisdiction of the courts and to create a new legal status for the fetus, seems to be racially and socially neutral. And yet it is surely relevant to notice that the person against whom the action was sought was an Aboriginal woman, belonging to a class of people who suffer from deep and pervasive discrimination in Canada, as described, for example, by Emma LaRocque, a Métis woman and professor Native Studies at the University of Manitoba: "The portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The 'squaw' ... has no human face; she is lustful, immoral, unfeeling and

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[49] *Supra* note 2 at 7.

[50] *Ibid.* at 9.

dirty."[51] Manitoba's Aboriginal Justice Inquiry detailed a myriad of ways in which the negative stereotype of Aboriginal women has made the legal system treat Aboriginal women as less than equal with other members of the community, despite the racial neutrality of our laws:

> ... indifference/arrogance of lawyers; long police response time; insensitive response of police to spousal abuse; humiliating questioning; failure of police to protect victims; failure of police to take spousal abuse as a serious crime; difficulties obtaining peace bonds; lack of supports to witnesses and treatment of witnesses as criminals; difficulties obtaining protection or getting away from abusive partners in small communities.[52]

The Women's Legal Education and Action Fund (LEAF) found it no coincidence that the state was attempting to extend the law into an area of experience (solvent abuse coinciding with pregnancy) dominated by Aboriginal women. In its factum, LEAF expressed the fear that forced confinement of pregnant Aboriginal women, in numbers disproportionate to the general population, was about to be added to the list of the ways in which the legal system fails Canada's Aboriginal women. It also noted the historical patterns of the compromised health and dignity of this particularly marginalized minority group, and submitted that "an equality rights analysis means that her social context, group affiliation and various sources of disadvantage must be considered."[53]

A critic of this position might point out that while Aboriginal women might be deprived of their liberty in disproportionate numbers, these mothers and children would also reap the benefits of treatment in disproportionate numbers (assuming that treatment actually would result in benefits). It is unlikely, however, that pregnant Aboriginal women would experience forced incarceration for medical treatment as a net gain. Nor would they be likely to see the disproportionate exercise of the power to enforce such measures on their own particular group as being fair. This potential experience ought to necessitate a reconsideration of the relative benefits and burdens of forced residential treatment, and cause authorities to look again at other forms of support for pregnant, solvent-abusing women, such as the above suggestions of the Native Women's Transition Centre.

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[51] Associate Chief Justice Alvin C. Hamilton and Judge C.Murray Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991), online: <http://www.ajic.mb.ca/volumel/chapter13.html#5> (date accessed: February 2003).

[52] *Ibid.*

[53] Supreme Court of Canada Court File No. 25508, 1996, *Winnipeg Child and Family Services (Northwest Area) and G. (D.F.)*, "Factum of the Intervener, Women's Legal Education and Action Fund" at 18.

Mill's failure to develop fully his class analysis, or to evince sensitivity to inequitable application of the law on grounds of race, is likely the result of the fact that he is, at least to some extent, a product of his time. Nonetheless, this can be seen as one area in which the case of Ms. G. illuminates a deficiency in his utilitarian approach. Fairness counts as well as utility.

B. Self-Regarding Acts

Purely self-regarding acts are, in general terms, those which, if they harm anyone at all, harm no one other than the agent herself (or those competent adults who choose voluntarily to join with her). According to Mill, they are those acts that the individual should be free to pursue without coercive interference.

It is beyond dispute that Ms. G.'s behaviour was harmful to herself, and not just because, to put it bluntly, she was putting holes in her own brain. Equally important, Ms. G. evidently wanted to have and to raise the baby she was gestating. If she continued to abuse solvents, however, this new baby would most certainly have been apprehended at birth, and even if not apprehended the baby would likely have been born with serious neurological damage that would have made raising him/her especially difficult. Thus, it was in Ms. G.'s self-interest to stop abusing solvents in order to increase the chances that she would have a healthy child and be permitted to raise it herself.

It is important to note that with respect to such exclusively self-regarding factors, Mill would *not* advise us simply to mind our own business, for, as he readily acknowledges, "Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter."[54] Persuasion and encouragements to live a healthier lifestyle are permissible, even morally required. Mill argues strongly, however, that any form of coercion would be out of the question when the behaviour at issue is self regarding:

> Considerations to aid his judgment and exhortations to strengthen his will may be offered to him, even obtruded on him, by others; but he, himself, is the final judge. All errors which he is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his own good.[55]

It seems, then, that were Mill consulted about the case of Ms. G., he would say (assuming, for the sake of argument, that he would not regard the interests of the fetus as having any moral weight): we can legitimately warn and advise Ms. G. to refrain from her self-destructive behaviour; but if she insists on carrying on with glue sniffing, then we could not legitimately interfere with her. Or, at least if we do interfere, it ought not to be on the grounds that it would be

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[54] *Supra* note 2 at 92.

[55] *Ibid.* at 93.

better for her. To hold otherwise would constitute paternalism, towards which Mill holds a deep antipathy.

1. Mill's Anti-paternalism

The term "paternalism" generally carries negative overtones. After all, when is calling someone "paternalistic" ever a compliment? Some would claim, however, that paternalism can be justified by the need to prevent people from harming themselves, or to provide them with a benefit they would otherwise not have.

Mill himself recognizes the value of some forms of paternalism, particularly with regard to children.

> [T]his doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.[56]

But with respect to competent adults, Mill holds a deep conviction that paternalism is counterproductive to human happiness.

> [N]either one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it. *He is the person most interested in his own well-being: the interest which any other person [...] can have in it is trifling compared with that which he himself has*[57] [emphasis added].

This belief in the overriding value of personal autonomy is rooted in a utilitarian analysis, which leads him to believe that the individual whose life is most closely affected is more likely to "get it right" than anyone else, however benevolent their paternalistic motivation.

> The interference of society to overrule his judgment and purposes in what only regards himself must be grounded on general presumptions which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.[58]

In other words, because each person loves himself best, and because he knows himself best, he is the best judge and guardian of what is good for him. These two factors taken together—self-knowledge and self-love—form the basis of Mill's argument that the state and other individuals ought to defer to the judgment of the individual when the conduct in question is primarily self-regarding.

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[56] *Ibid.* at 13.

[57] *Ibid.* at 93.

[58] *Ibid.*

We might, at this point, consider whether it is plausible to claim that Ms. G. loved herself best, and/or knew herself best. The claim is plausible only if we have decided that she was a legally and morally competent adult. And that proposition, both in court and among her family and friends, was very much a live issue.[59] If her actions were to be judged not fully voluntary—*e.g.* because of her addiction to solvents—then Mill's prohibition against paternalistic restrictions of individual liberty might not apply to her case. The voluntary status of her actions must be assessed.

2. Self-regarding Acts as Voluntary Acts

Mill placed one important *caveat* on the requirement of non-interference with self-regarding behaviour: in order to fall within the sphere of individual liberty, the behaviour in question must be fully voluntary. Thus, a person harming no one but himself, and "of full age and the ordinary amount of understanding", ought to be allowed the freedom to do as he wishes and face the consequences.[60]

The clear implication of this statement is that those with less than the "ordinary amount of understanding" could be candidates for paternalistic interference. As a threshold at which coercive interference may be contemplated, this formula appears to offer a much higher standard than that of legal competence, with the consequence that Mill's sphere of inviolable liberty may be rather narrowly constricted.

The application to Ms. G. is obvious. Can a person in the grip of an addiction to solvent abuse be said to have "the ordinary amount of understanding"? Was Ms. G. sufficiently brain-damaged by her long history of solvent abuse that her actions could no longer be considered voluntary? The psychiatrist who examined Ms. G. testified that she was able to answer questions in a relevant and rational manner, that she was fully oriented to place and time, that she was quite aware of her situation, and that she presented no signs of impaired contact with reality.[61] These conclusions seem to indicate at least a minimal amount of understanding, and the Manitoba Court of Appeal found it sufficient to establish Ms. G.'s legal competence.[62] While not disagreeing with that finding, the Supreme Court noted that the factors establishing the voluntary nature of a person's actions can be complicated. The Court cited with approval the following observation:

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59 *Supra* note 4.

60 *Supra* note 2 at 92.

61 Case on Appeal, Report of Dr. Michael Eleff, August 3, 1996, Exhibit 2 at 88–92.

62 *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G*, [1996] M.J. No. 398 at para. 8 (Man Q.B.).

> [W]omen do not abuse drugs out of a lack of care for their fetuses. Drug abusing pregnant women, like other drug abusers, are addicts. People do not want to be drug addicts. In addition, a product of addiction is the inability to control intake of the substance being abused.[63]

In other words, the Court was telling us that the intoxication itself may not be voluntary, in which case actions that result from it are also not seen as voluntary.[64]

Mill does attach a qualification to the state of involuntariness required for coercive interference: the absence of an ability to forewarn a person of the consequences of his or her involuntary behaviour. In Chapter V ("Applications"), Mill refers to a scenario in which a person is about to cross an unsafe bridge. Where there is a certainty of accident, (or "mischief" as Mill puts it), and there is no opportunity to forewarn the person of the imminent danger, it is permitted to restrain him forcibly, "for liberty consists in doing what one desires, and he does not desire to fall into the river."[65] Based on this line of reasoning, we might argue that it is defensible to incarcerate Ms. G. during the balance of her pregnancy, because she does not wish to harm herself or her baby. But then Mill attaches the following condition:

> Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk; ... he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.[66]

This point would appear to support the case against forced intervention of Ms. G. (assuming, still, that we do not give legal or moral status to the fetus), for, as Mill goes on to state, only the person in question can judge whether a risk is worth taking, given the "sufficiency" of his motive.

The argument against intervention, however, starts to break down when we focus on the bracketed *caveat* that Mill interposes in the above quote: "unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty."[67] This is a significant qualification, and it is remarkable that Mill consigns it with his brackets to the status of

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63 Julia Hanigsberg, "Power and Procreation: State Interference in Pregnancy" (1991) 23 Ottawa L. Rev. 35 at 53, as quoted in *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, [1997] 3 S.C.R., 925, para. 41.

64 The Supreme Court of Canada used this line of reasoning not to support the argument for coercive interference, but to underscore its view that allowing forced treatment would not be a deterrent for other pregnant women who were substance abusers.

65 *Supra* note 2 at 117.

66 *Ibid.*

67 *Ibid.*

an aside. Anyone with the normal range of human emotion, and distractibility, might find himself from time to time in a "state of excitement or absorption". Mill seems to hold that only the "full use of the reflecting faculty" qualifies one's actions as "fully voluntary". Should this high standard not be met, it seems he would permit coercive interference. This would lead to the dangerous result that whenever someone is highly excited and influenced by such things as an increased flow of adrenalin, she is not to be considered in full control of her actions and may be subjected to coercive interventions in her own best interests.

Such a conclusion defies common sense, and seems discordant with the overall thrust of Mill's argument; so, perhaps it is an inappropriate conclusion to draw from his words. (It would also enable some people to avoid taking responsibility for actions that were clearly deliberate—a result that Mill would certainly abhor.) A more plausible interpretation would be that whenever someone is significantly out of touch with reality, *i.e.* whenever *crucial* information is unavailable either because of ignorance or an inability to understand that information, the voluntary nature of the act may be questioned and coercive intervention may be contemplated. This would place the threshold for interference a safer distance from the one that falls just below the level of "full use of the reflecting faculty".

What we see here is that Mill's analysis regarding voluntary action lacks a sufficient degree of precision regarding mental competence to be adequate for us to draw definitive conclusions about Ms. G. This is not surprising, given that his analysis predated modern psychology by many decades, hence he was deprived of current insights regarding the addictions, neuroses, hidden fears and subconscious motivations that often drive people. Owing to this imprecision in a key part of Mill's anti-paternalistic doctrine, advocates on both sides of the Ms. G. argument can appeal to Mill in support of their position.

3. *The Limits of Self-regarding Behaviour*

It does not take much imagination to conceive of circumstances in which seemingly self-regarding (and voluntary) behaviour becomes other-regarding. When, for example, large numbers of people engage in devastatingly self-destructive behaviour, there is a meaningful loss to society of potentially productive human beings with a capacity to maintain and develop the social bonds of community. The concern is not just that such people become a burden on others—a clearly other-regarding effect—but also that the ability of a community to procreate and thrive is weakened. In other words, Mill's critic can argue that personally harmful self-regarding behaviour, when replicated in sufficient numbers, can take on the dimension of being other-regarding. This is an important aspect of Lord Devlin's critique of Mill's liberalism.[68]

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[68] Patrick Devlin, "Morals and the Criminal Law", *The Enforcement of Morals* (London: Oxford University Press, 1965).

As an isolated solvent abuser, Ms. G.'s behaviour might harm no one but herself. But if her desire to abuse solvents is part of a larger pattern of self-destructive behaviour within the wider community, at what point does the *cumulative* effect of such behaviour become sufficiently other-regarding that coercive intervention becomes an option worthy of our consideration? Lord Devlin believes that the harm caused by the cumulative impact of individually self-regarding acts can be as serious as "treason", and can thereby warrant coercive state interference.[69] Joel Feinberg contemplates this same question, and offers an answer which appears similar to that of Lord Devlin: namely, that intervention is warranted when the situation approaches the threshold at which further survival of the community is threatened.[70] But why not at the point of serious harm, or at the point at which the behaviour threatens to escalate dangerously? The place at which one chooses to "draw the line" will necessarily have some element of arbitrariness about it.

Mill cleverly anticipates this objection in Chapter IV of *On Liberty*, and gives it a fairly curt dismissal. He imagines a critic objecting that if large numbers of people were to become alcoholics, then the harmful effect on society would require coercive interference with the liberty of drinkers. Mill's answer: "If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences."[71]

It appears to be Mill's belief that because every society is in control of the training and the "entire circumstances" of the generation to come, it must collectively bear the burden of negative outcomes when its preparations for future generations fail. Rather than interfere coercively with individuals, the remedy is for that society to reform itself. Thus, a society which is so dysfunctional that large numbers of its citizenry drink themselves into a stupor every night needs to re-examine and reform its educational system, its early childhood education, and its fundamental values. If the rot goes so deep that legal coercion of self-regarding behaviour is necessary for social survival, then it is Mill's view that survival of such a society may not be desirable and is probably impossible.

It is not entirely clear how this argument of Mill's would apply to the situation of pregnant, substance-abusing Aboriginal women living either on reserves or in urban centres on the Canadian prairies. The birth of a generation of brain-damaged Aboriginal children would be burdensome to the larger Canadian community, but it would scarcely constitute a major threat to the continued existence of Canada. On the other hand, widespread FAS (fetal alcohol syn-

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69 *Ibid.*

70 Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. 3, Harm to Self* (Oxford: Oxford University Press, 1986) at 23.

71 *Supra* note 2 at 100.

drome) and FAE (fetal alcohol effect) might well pose a threat to the future of Aboriginal communities themselves. An assessment of whether this self-regarding behaviour can threaten the wider community depends upon whether we view the community as being the larger Canadian community or the Aboriginal community. Applied to the larger community, Mill's view that we should look to reform rather than coercive legal interference seems appropriate given that the plight of Aboriginal people is largely a result of centuries of maltreatment at the hands of the dominant non-Aboriginal population. Alternatively, if we apply the theory to Ms. G.'s own personal community—the Aboriginal community—the theory falters. To suggest that the community ought to be left to disintegrate if it cannot save itself would be to impose the grossest unfairness. The Aboriginal community's education, health care, and economic systems have been largely controlled by outsiders, unlike the society envisioned by Mill.

Although Mr. Justice Shulman was widely praised when he ruled that Ms. G. should be incarcerated to prevent her further solvent abuse, it might have been wiser, and more socially productive, to ask the question: why are there so many Ms. G.s in the Aboriginal community, and what kinds of radical changes are necessary to prevent young men and women from following such a self-destructive course of behaviour? We still have something to learn from Mill.

C. An exception to anti-paternalism and self-regarding behaviour

Mill makes a further important qualification to his view that a competent adult should not be interfered with if her behaviour is both self-regarding and voluntary. The exception arises when a person chooses to forego irreversibly her own liberty—Mill takes the extreme example of a person selling himself into slavery to illustrate his point. He says that such a slave contract would be null and void, because the person, rather than acting in the pursuit of liberty, has abdicated her liberty. Giving up liberty irreversibly is not a defensible act, because a person is forever deprived of the ability to exercise her liberty (an apparent tautology: you are not entitled to give up liberty, because liberty is something you are not entitled to give up). This is one of those places in *On Liberty* where Mill appears to assign more priority to the value of liberty than he does to the principle of utility: "The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom."[72]

It is illuminating to apply this reasoning to the situation of an addicted person such as Ms. G., whose dependence upon solvents is also an abdication of free choice, and if not quite irreversible is reversible only with great struggle and sacrifice. A typical addict is unlikely to have chosen the addiction; rather, he will have chosen the intoxicant, which leads to an addiction. Should we respect

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[72] *Ibid.* at 125.

his freedom to exist in a state of lack of self-control? Lack of choice? In truth, lack of liberty?

If we viewed Ms. G. as enslaved by her addiction, we might use Mill's argument to say that it is permissible for society to force her to break her chains.

V. CONCLUSION

This paper has attempted to demonstrate that Mill's Harm Principle is alive and well. Its force should be ignored neither by those who wish to defend individual liberty nor by those who seek to limit it in various ways. Both opponents and proponents of coercive legal intervention in the case of Ms. G. can find support in the approach to individual liberty advocated by Mill. His development of the utilitarian approach is remarkably useful, despite the passage of time. While Mill was dedicated to his "one very simple principle", he was much too sophisticated to ignore the innumerable difficulties and subtleties that arise when one attempts to apply theory to practice. His own attempts to apply his theory to such problems as alcohol abuse and over-population demonstrate that careful balancing is a necessary and vital part of a wise decision-making process. Attempts to apply Mill's reasoning to the case of a pregnant, glue-sniffing Manitoba woman similarly demonstrate the need for subtlety and judgment.

Nevertheless, despite the fact that proponents and opponents of coercive legal intervention can strengthen and refine their arguments by appealing to Mill's "Harm Principle", on balance the weight of the arguments—both utilitarian and libertarian—favour the side opposed to coercive legal intervention. Respect for the liberty of Ms. G. and other similarly situated Aboriginal women, and a desire to adopt an approach which would truly minimize harm to these women and their children, both seem to favour a voluntary public health approach rather than a coercive legal approach. The law is a blunt instrument and should only be used to limit individual freedom when those who would use coercion have proven that the intervention is necessary, and will produce more overall benefit than harm. In the case of Ms. G., the Supreme Court was fully justified in finding that the burden of proof was not met by Winnipeg CFS.