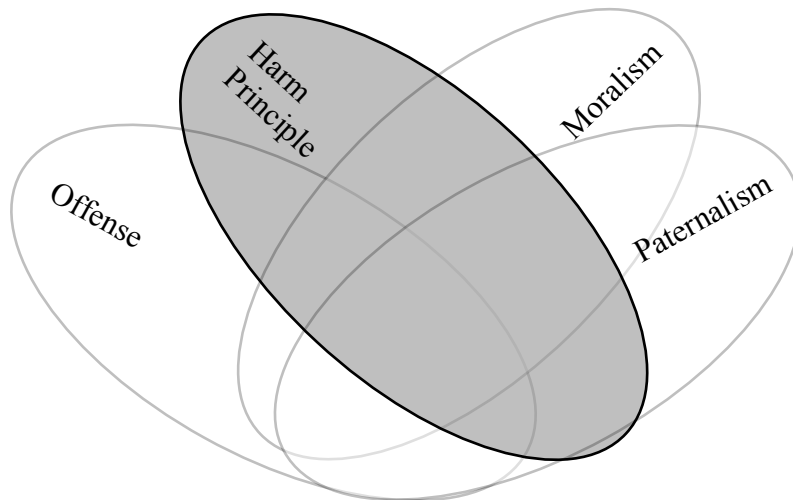


- How to interpret the harm principle affects which conception of liberalism, if any, is defensible.
- In an early and famous passage, Mill offers one formulation of his liberal commitments in terms of "one very simple principle."

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone 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 [OL I 9].

- Here, Mill distinguishes three rationales for restricting liberty -- paternalism, moralism, and the harm principle -- claiming that harm prevention is the sole legitimate basis for restricting liberty. Later, he distinguishes between harm and offense, claiming that harm alone is a legitimate basis for restricting liberty.
- This suggests a categorical approach to restrictions on liberty in which the sole legitimate restriction on liberty is harm prevention. The simple principle implies that paternalism, moralism, and offense regulation that cannot be brought under the harm principle are impermissible.



- The categorical approach derives liberal rights as those liberties that do not offend the harm principle.
- The categorical approach is libertarian insofar as Mill believes that the sphere of liberal rights is large. In particular, a libertarian conception of the harm principle says that one has a right to any and all liberties that do not cause harm to others.
- If we associate an important form of liberalism with the harm principle and accept a libertarian conception of the harm principle, we can see why Millian liberalism might be polarizing. He will be attractive to libertarians, but non-libertarians will feel compelled to reject Millian liberalism.
- I'd like to take a closer look at the harm principle and Mill's claim that it can serve as his one simple principle. Mill's liberal principles are more complex than this would suggest; we should not interpret the harm principle in libertarian terms; and even when charitably interpreted, the harm principle is neither necessary nor sufficient for restricting liberty.

## 1. HARM PRINCIPLE PRELIMINARIES

- First, Mill distinguishes *harm* and *mere offense*. Not every unwelcome consequence for others counts as a harm. Offenses tend to be comparatively minor and ephemeral. To constitute a harm, an action must be injurious or set back important interests of particular people, interests in which they have rights (I 12; III 1; IV 3, 10, 12; V 5). Whereas Mill appears to reject the regulation of mere offense, the harm principle appears to be the one justification he recognizes for restricting liberty.
- Second, Mill envisions that the harm principle is something that we can apply prospectively to prevent someone from *risking* harm (IV 10). Presumably, the risk threshold should vary inversely with the magnitude of the harm risked, so that the probability of harm required to justify regulation is lower the greater the harm risked.
- Third, the harm principle is not restricted to relations between government and individuals. Its application should include the family, in particular, relationships between husbands and wives and parents and children (V 12).
- Fourth, though Mill often focuses simply on harm, it appears that his real focus is on *non-consensual* harm (I 12). Here, Mill endorses the maxim *volenti non fit injuria*, which he glosses in *Utilitarianism* as the doctrine “that is not unjust which is done with the consent of the person who is supposed to be hurt by it” (U V 28). As this gloss makes clear, it is not that one cannot be hurt by something one has consented to or freely risked. Rather, when one has knowingly and willingly risked something harmful, one cannot legitimately complain when that harm comes home to roost (cf. Hobbes, *Leviathan* XV 13).
- Fifth, Mill recognizes a *scope limitation* on the harm principle when he says that it does not apply to those with insufficient normative competence.

It is, perhaps, hardly necessary to say that this 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. ... Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion [OL I 10; cf. *PPE* V.xi.9].

This scope limitation reflects the fact that liberties are important as a way of exercising those normative capacities that make us progressive beings.

## 2. IS HARM SUFFICIENT?

- If the harm principle is the one principle needed to determine when restrictions on individual liberty are justified, harm prevention must be both necessary and sufficient for restricting liberty. Does Mill embrace sufficiency?
- Mill says that society “has jurisdiction” over any harmful conduct, but the determination of whether it should regulate the conduct depends on a utilitarian calculation.
 

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 welfare will or will not be promoted by interfering with it, becomes open to discussion [IV 3].
- Later, Mill makes clear that harm prevention is necessary but not sufficient to justify restrictions on liberty.
 

[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference [V 3].
- Mill denies one obvious form of sufficiency. But he also claims
 

If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law or, where legal penalties are safely applicable, by general disapprobation [I 11].

Here, we might distinguish between weak and strong sufficiency theses.

*Weak Sufficiency:* Harm to others is a *pro tanto* justification of regulation.

*Strong Sufficiency:* Harm to others is a *conclusive* justification of regulation.

Whereas Mill denies strong sufficiency, he embraces weak sufficiency.
- But weak sufficiency implies that the harm principle must be supplemented with another principle to determine when harmful conduct is not just *pro tanto* but on balance regulable.
- Is there even a *pro tanto* case for regulating losses in fair competition (e.g. being forced into bankruptcy by one’s business competitors)? Mill invokes his free-trade exception (V 4). But it might be better to argue that these losses are not genuine harms either because they were freely risked or because individuals only have a right to compete on fair terms, not to succeed.
- Is there even a *pro tanto* case for regulating emotional loss (e.g. my partner’s decision to leave me standing at the altar)? Again, one might argue that losses of the heart are freely risked or that lovers don’t have a right to performance or notice, even if this would be the decent thing for my partner to do.
- Is there even a *pro tanto* case for regulating harms caused in self-defense and other justified harms?

### 3. IS HARM NECESSARY?

- Is harm prevention necessary to justify restrictions on liberty?
- Many things that Mill thinks the state may do involve restrictions on liberty designed to benefit others, rather than prevent harm to them. To simplify, let's focus on two kinds of cases: (a) Good Samaritan laws that require one to provide significant aid to others when one can do so a little cost or risk to oneself (I 11), and (b) the provision of various kinds of public goods (e.g. public defense, public education, community infrastructure, and state support for the arts and sciences) that Mill defends in *The Principles of Political Economy, On Liberty, and Considerations on Representative Government*.
- In the case of Good Samaritan laws, Mill claims that the failure to supply the benefit harms (I 11).
- This is not generally true. Your failure to benefit me by transferring your savings to my bank account does not harm me. This is presumably because we assess harms counterfactually: you harm me if you make me worse off than I would otherwise have been. But the baseline for assessing harm cannot be set by the restriction on liberty itself. It must have an independent rationale.
- In the classic Good Samaritan scenario (e.g. rescuing the drowning child from the shallow pond), it's not clear that my failure to rescue harms the child, because it's not clear that I have made the child worse off than she would have been without my intervention, since, by hypothesis, she would have died if I had not intervened or been there. It may well be obligatory to rescue and that may be an enforceable duty, but this is not obviously supported by the harm principle.
- But even if I don't harm the child by failing to rescue her, she will be harmed by my failure to rescue. This draws our attention to a significant ambiguity in the harm principle (cf. Lyons). Mill talks both about preventing one from harming others and about harm prevention. Indeed, his statement of the one very simple principle mentions both.

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 [I 9].

And

To justify that [compulsion and sanctions], the conduct from which it is desired to deter him, must be calculated to produce evil to someone else [I 9].

But these two claims are not equivalent. Every time I prevent one person from harming another, I also engage in harm prevention. But, as the rescue case illustrates, some cases of preventing harm may not be cases of preventing one person from harming another. So we should distinguish two versions of the harm principle.

- HP1 is an *anti-harming* principle: A can restrict B's liberty only in order to prevent *B from harming others*.
- HP2 is a *harm-prevention* principle: A can restrict B's liberty only in order to prevent *harm to others*.

Because every case of preventing one person from harming another is a case of harm prevention, but not vice versa, HP1 is narrower than HP2. Indeed, HP1 is a proper part of HP2. Whereas HP1 justifies intervention only when the target herself would be the cause of harm to others, HP2 would justify intervention to prevent harm to others, whether that harm would be caused by the target or in some other way. Clearly, HP2 will justify more intervention than HP1. As we have seen, it is hard to justify Good Samaritan laws if HP is the sole basis for restricting liberty as long as we understand HP as HP1. However, it looks like we could square Good Samaritan laws with HP if we interpret HP as HP2.

- But notice that if we interpret HP as HP2, then it is likely to allow a good many more restrictions on liberty than we might have thought when we focused on its anti-harming applications. The sphere of liberal rights that follow from the harm principle should be smaller according to HP2 than according to HP1.
- What about the restrictions on liberty involved in the provision of public goods? Public goods are genuine goods without which we would be worse-off. But it's not clear that the baseline from which to assess harms should be the provision of public goods, and even if it were, it's not clear that individual failures to contribute to the production of public goods would be harmful, inasmuch as individual contributions typically have negligible effects on the provision of the good. So individual failures cannot be seen as setting back important interests of others.
- Mill might concede that the provision of public goods restricts liberty but insist that it does not restrict the *basic liberties* that are protected by the harm principle. Mill says that his liberalism recognizes three basic kinds of liberties (I 12).
  1. Liberties of conscience and expression
  2. Liberties of tastes, pursuits, and life-plans
  3. Liberties of association

Though these basic liberties evidently include quite a bit, Mill does not claim that there is a right to liberty per se.

- If we recognize the way in which Mill's defense of liberties rests on a perfectionist conception of happiness appropriate for progressive beings (I 11), conceived as responsible agents with normative capacities, then we might identify some

liberties as more basic than others insofar as they play a more central role in forming ideals and carrying out experiments in living. On such a rationale, liberties of speech, association, political participation, and occupational choice would be among the basic liberties.

- But this distinction between liberty and liberties exposes another possible ambiguity in the harm principle.
  - HP1A: A can restrict B's *liberty* only in order to prevent *B from harming others*.
  - HP1B: A can restrict B's *basic liberties* only in order to prevent *B from harming others*.
  - HP2A: A can restrict B's *liberty* only in order to prevent *harm to others*.
  - HP2B: A can restrict B's *basic liberties* only in order to prevent *harm to others*.

Earlier, we suggested that the harm principle would be more robust and better fit with Mill's views about justified restrictions of liberty if we understood it is a harm prevention principle, essentially, as HP2A, rather than HP1A. Now we have seen how the harm principle would be more robust and better fit his views about justified restrictions of liberty if we understood it to regulate restrictions on basic liberties, rather than liberty per se. This requires us to interpret the harm principle as HP2B. We might call this the *basic liberties harm prevention principle*.

- But if we interpret the harm principle this way, then Mill is even further from a libertarian view, at least if libertarianism is understood as the idea that the only legitimate limit on individual liberty is to prevent that individual from acting in ways that harm others.

#### 4. PERMISSIBLE PATERNALISM

- The necessity claim is more robust if we interpret HP as HP2B. But even so, it is clear that Mill does not embrace the necessity claim consistently. One exception to the necessity claim is Mill's paternalistic prohibition on selling oneself into slavery.
  - The ground for thus limiting his power of voluntarily disposing of his own lot is apparent, and is very clearly seen in this extreme case. ... [B]y selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He, therefore, defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself [V 11].
- One might try to justify the prohibition as an application of the harm principle, restricting the (would-be) master's freedom to harm the (would-be) slave. But (a) these would appear to be consensual harms, making the harm principle inapplicable, and (b) Mill clearly justifies them as paternalistic restrictions on the (would-be) slave's freedom.
- Mill represents this as a principled exception to the usual prohibition on paternalism, because the very same values that normally speak against paternalism here speak in favor of it. If the usual reason we oppose paternalism is out of respect for the normative powers of the agent, then respect for those normative powers gives us special reason to prohibit the use of those normative powers to permanently undermine all future use of those same powers.
- Mill notes that the reasons for allowing paternalism in "this extreme case" are "evidently of far wider application" (V 11). Mill may have in mind other contracts in perpetuity (PPE V.xi.10). He also probably has in mind the marriage contract under Victorian marriage law, as he mentions the "almost despotic power of husbands over wives" (OL V 12), a theme that is picked up later in *The Subjection of Women*. These other exceptions need not be exhaustive, so that we don't know the size of the iceberg of which the prohibition on selling oneself into slavery is the tip.

#### 5. CONCLUDING REMARKS

- Mill's harm principle is not simple, and it cannot be his only principle.
  - At most, harm prevention is weakly sufficient for restricting liberty and would need to be supplemented by an analysis to see if the benefits of regulation exceed its costs.
  - It's not even clear that harm prevention is weakly sufficient (e.g. economic losses in fair competition, losses of the heart, and self-defense).
  - To defend the necessity claim while recognizing Samaritan regulations, we must treat HP as a harm prevention, rather than anti-harming, principle.
  - To defend the necessity claim while recognizing the legitimate state provision of public goods, we must interpret HP as protecting only basic liberties, not liberty per se.
  - Even when so interpreted, Mill does not embrace the necessity claim, because of the permissibility of paternalistic interventions to protect the very normative powers respect for which normally speaks against paternalistic interference.
- If so, we should not accept the libertarian reading of Mill's harm principle.
- Though the harm principle may be a useful political heuristic, it is a proxy for Mill's real concern with developing, protecting, and exercising the normative powers of individuals.