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# Toward a Legal Harm Principle: Constructing and Applying a Legal Principle from John Stuart Mill's General Harm Principle

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Toward a Legal Harm Principle: Constructing and Applying a Legal Principle from John Stuart  
Mill's General Harm Principle

A dissertation submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy in Philosophy

by

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## Abstract

My goal in this work is to outline a specifically legal harm principle that is derived from John Stuart Mill's harm principle in *On Liberty*. I will do this by providing a close reading of *On Liberty* and comparing it to what he says in chapter V of *Utilitarianism*. I believe that these two works provide a foundation for a harm principle that defines the domain and limits of the law. While this goal is not new, I focus on Mill's general harm principle and the two maxims that he believes make it up in order to construct a relatively clear legal harm principle which becomes a part of his general principle. I believe that this may also make clearer what Mill's view of the limitations of speech are and that he would allow that certain sorts of hate speech are not only within the domain of the law but that they could legitimately be prevented through the law.

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## A Note on Citations

Much of this work will rely on John Stuart Mill's *On Liberty* and *Utilitarianism*. I will, therefore, use abbreviated in text citations for his works. I will use the following abbreviations for these texts:

Works by John Stuart Mill will be referenced by abbreviated title, chapter, and paragraph number. Ex. (OL II: 14)

- (OL) Mill, *On Liberty*.
- (U) Mill, *Utilitarianism*.
- (A) Mill, *Autobiography*.

## Preface

My goal in this work is to outline a specifically legal harm principle that is derived from John Stuart Mill's harm principle in *On Liberty*. I will do this by providing a close reading of *On Liberty* and comparing it to what he says in chapter V of *Utilitarianism*. I believe that these two works provide a foundation for a harm principle that defines the domain and limits of the law. While this goal is not new, I focus on Mill's general harm principle and the two maxims that he believes make it up in order to construct a relatively clear legal harm principle which becomes a part of his general principle. I believe that this may also make clearer what Mill's view of the limitations of speech are and that he would allow that certain sorts of hate speech are not only within the domain of the law but that they could legitimately be prevented through the law.

In the introduction I will focus on preliminary definitions and concepts that help to frame the overall project. I will look at liberty and why liberty is seen as such an important value. I will also describe what the criminal law is and why—because of its coercive and invasive nature—it is important to focus on understanding its limits. I will then propose why I believe the harm principle is a likely starting point for understanding the limits to liberty interference.

After framing the issue in the introduction, the first section of this work will focus on what I call Mill's general harm principle. I will attempt to parse out Mill's goals with his principle and discuss the ways in which his principle is a very general principle that describes all manners of liberty infringement from the most basic to the serious. Doing this requires examination of the limits of the general harm principle regarding individual liberty as well as separating what Mill believes is the inviolable self-regarding sphere of liberty from the harm principle. This section serves as an exegesis of Mill's general principle in *On Liberty*.

The second section will focus on defining a specifically *legal* harm principle that I

believe can be found in *On Liberty* though Mill is not focused on this task. I believe that Mill leaves several clues as to where he believes the domain of the law and the extra-legal domain come apart. By looking at what he says in *On Liberty* regarding harm and rights I will argue that chapter V of *Utilitarianism* can give us the rest of what we need to get a legal harm principle from Mill that is not only consistent with the general harm principle but is extracted from it and serves as an important principle within it.

The final section will serve as an application of the legal harm principle. I will focus on the issue of speech because while Mill spends a large portion of *On Liberty* defending the right to free speech, he also recognizes its limitations. Mill's corn dealer example (OL III: 1) shows that, in principle, Mill allows for limitations to the free expression of speech. I will use this to then argue that Mill could claim that certain types of controversial hate speech fall within the domain of the law. I believe that the legal harm principle allows for such a discussion and furthermore, that a Millian justification can be had for actually limiting hate speech through the law.



## **Introduction**

### **The Importance of Liberty and Autonomy**

#### **I.1 The Importance of Liberty**

Robert Paul Wolff in *A Defense of Anarchism* and John Stuart Mill in *On Liberty* note that one of the most important issues within political philosophy is determining whether the moral autonomy of individuals is compatible with the legitimate authority of the state.<sup>1</sup> While there are many definitions of individual liberty or autonomy, it can most easily be described as the ability to choose how one shall live one's life or the ability to self-govern. Legitimate state or governmental authority, on the other hand, is the right to govern or to have others obey orders, laws, or rules. There is an undeniable tension that exists between these two essential philosophical notions. The prevailing argument which illustrates the strain between these two concepts is as follows: if it is the case that individuals are and should be considered autonomous agents, then this means they are self-governing agents. If they are self-governing, autonomous agents, then these agents have sole authority over their own actions. This legitimate authority implies the *right* to govern. If they are the sole legitimate authority over their own actions, then it seems inconsistent that there are others (i.e. the state) that have legitimate authority (i.e. the right) to dictate how individual agents behave. If an outside agent (i.e. the state) has legitimate authority over another individual, then this means that the outside agent (the state) has the right to govern and the right to be obeyed when governing. If this is the case, then individual agents are not autonomous after all.<sup>2</sup> This tension with autonomy and government is inherent in (most, if not all) societies which 1. have a body of laws and a system of government that forbid its

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<sup>1</sup> Robert Paul Wolff, *In Defense of Anarchism*, (New York: Harper Torch books, 1970) 3–4; John Stuart Mill, *On Liberty*, (Indianapolis: Bobbs-Merrill Educational Publishing, 1956) I: 2.

<sup>2</sup> Wolff, *In Defense of Anarchism*, 3–4.

citizens, who are presumed to be autonomous, from performing certain acts and 2. such government is thought to have a genuine right to be obeyed. While I am not concerned with arguing over how states gain authority or if the authority they have is rightful or not, I am concerned with how liberty serves as a moral limit on the sorts of actions that the state can prohibit and how a penal law can be morally justified when it leads to the coercion and liberty invasion of its citizens.

At this point, it is important to note that there are different conceptions of liberty. The anarchist, such as Wolff, claims that liberty is *absolute* and consists of the ability to do what one wants, when one wants. Furthermore, since the only way in which the state is able to obtain authority over its citizens is by encroaching on this ability of its citizens to do what they want when they want, then such authority to rule is never legitimate.<sup>3</sup> However, while the liberal, such as Mill, agrees that there is tension between liberty and authority, one of the primary reasons to support governmental authority is to obtain security and protection against the threat of others—which actually helps to maintain and even expand liberty. The liberal argues that the anarchist concept of absolute liberty comes with too many problems. If everyone were absolutely free to do whatever it was that he/she wished to do, as the anarchist demands, then agents are free to assault and murder others.<sup>4</sup> This absolute liberty does not seem likely to produce any kind of working society and actually restricts much more than it expands liberty. Each agent would lack security of person and property and would have no recourse to prevent threat other than to produce threat in kind. This unbridled liberty, therefore, seems undesirable and not very valuable—at least not very valuable to all agents, only the strongest among them would tend to benefit.

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<sup>3</sup> Wolff, *In Defense of Anarchism*, 3–4, 51.

<sup>4</sup> Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, NJ: Prentice Hall, 1973) 22–3.

To remedy this problem with unrestrained liberty, liberals and most other theorists often propose a more limited version of liberty which allows for the greatest amount of liberty for each individual that is consistent with the same amount of liberty for others.<sup>5</sup> These autonomous agents choose to sacrifice certain freedoms for security and protection. This understanding of liberty, while giving up the ability to do *whatever* one wants, when one wants, is a much more secure and even robust version which, in actuality, would allow for a more extensive liberty base. This wider liberty is gained by employing a state to which agents give certain authority to restrain certain liberty-invading behaviors. This authority allows for agents to go about unmolested in exchange for refraining from molesting others.<sup>6</sup> Hence, there is a reason or motivation to give up absolute liberty for the sake of security and a more limited, albeit expansive, liberty. This tradeoff of absolute liberty for protection is not unqualified and there are still moral limits that the government must maintain to claim moral legitimacy. Mill's method of determining acceptable infringement of liberty, which is the primary focus in what follows, comes in the form of what has been labeled "the harm principle" which states 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 rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others" (OL I: 9). This dissertation serves as a commentary on how this principle can be used as a method of protecting, preserving, and maintaining liberty generally and I will further argue that the harm principle can be used to derive a legal principle to determine limits for the law as well. Yet before this principle is even defended and/or analyzed, a natural question that

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<sup>5</sup> This concept is often associated with John Rawls, *A Theory of Justice* (1971), 60.

<sup>6</sup> This interpretation borrows heavily from the social contract tradition as represented by Thomas Hobbes, *Leviathan*, (1651); John Locke, *Second Treatise of Government* (1689); and Jean Jacques Rousseau, *On the Social Contract*, (1762).

arises is: why is there such a presumption of liberty and autonomy?

## I.2 The Presumption of Liberty

As legal philosopher Joel Feinberg<sup>7</sup> notes, “whatever else we believe about freedom [liberty], most of us believe that it is something to be praised, or so luminously a Thing of Value that it is beyond praise.”<sup>8</sup> Indeed many other values that we have, it seems, presume that we also have a certain degree of liberty. H.L.A. Hart claims that

The unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere; or it may be thought valuable because it enables individuals to experiment—even with living—and to discover things valuable both to themselves and to others.<sup>9</sup>

Mill also argues that liberty is one of the highest social and individual values. He believes that certain liberties, namely the liberties of speech, thought, and certain sorts of non-harmful actions, make up individuality and this is “one of the principle ingredients of human happiness, and quite the chief ingredient of individual and social progress” (OL III: 1). The ability to choose what we are going to do and how we are going to act is a way to decide what sort of person we are going to be. It is what makes us good or bad people, moral or immoral, or good or bad citizens. Liberty and a presumption of liberty, all things being equal, allows for and contributes to social and individual progress, many people see the liberty of choice to act/think/speak (or not) as one of the key elements of social and individual progress. It seems, then, that there is a presumption of liberty and autonomy built into our everyday concepts, values, and the idea of the “good life.”

It is noteworthy that even critics of liberalism, and not merely the above quoted liberals,

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<sup>7</sup> Feinberg believes the presumption of liberty is so important that he developed a four-volume series, *The Moral Limits of the Criminal Law*, which delves into the moral restrictions on the criminal law. Feinberg’s work was invaluable and much of what follows was influenced by these texts.

<sup>8</sup> Feinberg, *Social Philosophy*, 20. ‘Freedom’ and ‘liberty’ will be used relatively interchangeably.

<sup>9</sup> H. L. A. Hart, *Law, Liberty, and Morality*, (Stanford: Stanford University Press, 1963) 21–2.

place a high degree of importance on liberty and the presumption of liberty seems to be a common ground for most theorists—indeed, even the anarchist agrees here. Similarly, those who hold that Mill’s harm principle, which will be examined in this work, is insufficient and that the state can legitimately interfere with liberty for reasons over and above harm do not claim that liberty is insignificant. Such critics of liberalism—and the harm principle specifically—such as Patrick Devlin, Sarah Conly, and Michael Moore, still hold liberty as one of the most significant values.<sup>10</sup> They also believe that coercive interference and obstruction of liberty and autonomy must be justified; however, where they differ is in deciding what actually justifies interference in liberty. Many critics of the liberal harm principle believe that while liberty and individual autonomy are important values, this does not mean that there are not other important values that may trump the presumption in favor of liberty.

Feinberg claims that

while it is easy to overemphasize the value of liberty, there is no denying its necessity, and for that reason most writers on our subject have endorsed a kind of ‘presumption in favor of liberty’ requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.<sup>11</sup>

And most theorists, liberal or not, believe this to be the case. So, when the state interferes with our liberty, it interferes with our ability to lead our lives as we see fit. But remember, to a certain extent this interference is justified in order to provide security and a greater amount of liberty

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<sup>10</sup> For Legal Moralists see: Patrick Devlin, *The Enforcement of Morals*, (London: Oxford University Press, 1965); James Fitzjames Stephen, *Liberty, Equality, and Fraternity*, (Cambridge: Cambridge University Press, 1967); Michael Moore, *Placing Blame: A Theory of Criminal Law*, (Oxford: Oxford University Press, 1997); Robert P. George; For Legal Paternalists see: Danny Scoccia, “In Defense of Hard Paternalism,” *Law and Philosophy* 27 (2008); Plato, *Republic*. Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism*, (Cambridge: Cambridge University Press, 2013).

<sup>11</sup> Joel Feinberg, *Harm to Others*, (*The Moral Limits of the Criminal Law*, 4 vols. New York: Oxford University Press, 1984) 9.

overall. Yet, once this system of government is put into place, it is important to ensure that the laws that are enacted do not restrict liberty further than ensures security of person because when liberty is restricted by an outside force it interferes with the autonomy of agents and while such agents give up some liberty to such an authority they do not give up all or even most liberty. Hence, it is especially important to justify liberty invading practices by the government. Mill and subsequent liberals focus on the importance of maintaining individual liberty from illegitimate outside (state and/or social) interference. But it is not clear when such interference is illegitimate. So, the question arises: when is such interference unjustified or illegitimate? One way to help address this question is by determining the proper domain of the law. Part of my goal in developing a legal harm principle is to address this domain question.

Because we find ourselves living in a society with others and we value liberty highly, we are generally willing to give up certain sorts of liberty so that we are protected against serious infractions and limitations on our liberty that tend to occur when agents live together. I am not working from within any sort of theory, such as social contract, and am not concerned with *how* governments gain legitimate authority (this is an important question). I am going to presume that governments have some sort of authority and what I am concerned with is the idea that governments—when they already exist (as they do)—have moral limitations because of the importance of liberty and finding those limitations helps us to preserve a robust and valuable sort of liberty. In other words, because there is such a presumption of liberty and because agents are autonomous, there must be some principled reasons, like Mill's harm principle, that either justify governmental interference with liberty or else that excuses it.

### **I.3 What is the Criminal Law?**

While there are many ways in which others may interfere in the liberty of individuals, generally the most imposing way in which the government can infringe on liberty is through the penal law. States offer protection to its citizens by enacting laws, specifically criminal laws, which coercively interfere by punishing those who do not follow its dictums. In this work, I will focus specifically on the criminal law as a particularly insidious form of coercion and liberty invasion. Following Feinberg and other legal theorists, I will *not* focus on all legal forms of liberty invasion like the many relatively “subtle uses of state power, like taxation, indoctrination, licensure, and selective funding,”<sup>12</sup> and other types of law such as tort and regulatory law. My focus on the criminal law stems from the desire to derive a specifically legal harm principle in order to provide 1. a relatively clear and principled method for legislators to use to determine if acts fit within the legal domain which can then be considered for criminal regulations, 2. a defense for applying Mill’s harm principle as a basis for a legal harm principle, and 3. an interpretation of the harm principle as a legal principle that is robust and useful in delineating wrongful interferences of liberty from acceptable interferences. By focusing specifically on the criminal or penal law, we can better understand the domain in which some of the most costly and serious invasions of liberty belong and why they commonly involve steep consequences for the behaviors in question. The focus on criminal law also enables us to focus on an aspect of liberty invasion that has a tendency or at least has the potential to be particularly difficult to escape.

#### *I.3.1 The Criminal Law’s Reach*

The criminal law’s steep consequences do not end when the violator “serves his time”

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<sup>12</sup> Feinberg, *Harm to Others*, 2.

and indeed tend to persist into his/her life after punishment. The official punishment for crimes, as invasive as they are, are not necessarily the most problematic invasions of liberty. Many of the consequences and liberty invasions that follow the proscribed punishment are problematic and often not justified. As Feinberg notes,

Penal statutes can reenforce social pressures, and also create effective restrictions of their own. The threat of legal punishment enforces public opinion by putting the nonconformist in a terror of apprehension, rendering his privacy precarious, and his prospects in life uncertain. The punishments themselves brand him with society's most powerful stigma and undermine his life projects, in career or family, disastrously. These legal interferences have a prior claim on our attention then, not merely because of their greater visibility and theoretical accessibility, but also because of their immense destructive impact on human interests. Given the inherent costs of criminalization, when a particular legal prohibition oversteps the limit of moral legitimacy, it is itself a serious moral crime.<sup>13</sup>

As this quote suggests, because of the sort of coercion, punishment, and consequences involved in the criminal law, special justification is often called for. John Stuart Mill claims that there are always questions as to “the proper limits of what may be called the functions of police; how far liberty may legitimately be invaded for the prevention of crime, or of accident. It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards” (OL V: 5). My discussion focuses on what Feinberg calls “the moral limits of the criminal law”<sup>14</sup> and attempts to address how we can utilize the harm principle to determine which acts may legitimately be included in the criminal law while maintaining a proper respect for liberty. More specifically, Mill's harm principle in *On Liberty* will be analyzed, discussed, and clarified to show how it may serve as a principled way to determine which acts fall within the domain of the criminal law. While many theorists, especially Feinberg, rely on Mill to concoct a morally acceptable legal principle that restricts

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<sup>13</sup> Feinberg, *Harm to Others*, 2.

<sup>14</sup> See Joel Feinberg's four volume work, *The Moral Limits of the Criminal Law*.



liberty, Mill does not have such a narrow focus and analyzes the interference of individual liberty on a broad scale which includes all manner of liberty infringement from pleading to education, from shunning to imprisonment. I will begin my search for a principle with Mill as well, however, I will follow Feinberg's lead and attempt to derive a specifically legal principle, unlike Mill, to focus more specifically on those liberty infringements that are on the more severe side of the spectrum (i.e. imprisonment, fines, forced community service, and other sorts of punishments).

When discussing and developing a normative theory of the criminal law, there is frequently a division made between “real” crimes that are a part of the criminal law and crimes that are not a “proper” part of the criminal law. However, it is not necessarily clear what it means to be a proper part of the criminal law. There are two potential interpretations of proper: one is descriptive/categorical and the other is normative. In this section, I will focus on the descriptive understanding of the criminal law, or what is—or what it means for something to be—an actual part of the criminal law. In the rest of this work I, in turn, focus on understanding and developing a normative moral system which identifies the limits of the criminal law by outlining the “principles, values, and aims that should guide legislatures in making such decisions.”<sup>15</sup> In other words, I will discuss what *may* be a part of the criminal law, not what *is* a part of the criminal law or what criminal law means.

### *1.3.2 Distinguishing the Criminal Law and the Moral Law*

It is important to note that there is a real distinction between the criminal law and the

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<sup>15</sup> R. A. Duff, Lindsay Farmer, SE Marshall, Massimo Renzo, and Victor Tadros (editors), “Introduction: Towards a Theory of Criminalization?” in *Criminalization: The Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2014), 2. The distinctions made in the remainder of this section follow Duff, et al.

moral law.<sup>16</sup> These are not and should not be equated. R. A. Duff, et al., make the point that the moral law is not what binds us as citizens to a country, state, or political institution. And while morality does not bind us to such an institution, the institution can be understood to abide by certain moral principles in order to claim legitimacy.<sup>17</sup> We must keep in mind that any work on legal theory is also a work in political philosophy which ought not be separated from the political world in which we live. We must realize and consider that a morally corrupt and bankrupt individual may well be an excellent citizen because not only are the moral law and criminal law distinct, but the collective civic values that the state ought to concern itself with do not and ought not cover all of morality.<sup>18</sup> However, this does not mean that we can ignore the moral elements that aid political entities in living and cooperating under a coherent system of laws that serve collective interests.<sup>19</sup> Indeed as Arthur Kuflik states, “Liberalism requires that citizens who disagree with one another on a number of morally significant matters nevertheless coexist and cooperate within a political framework of basic rights protections.”<sup>20</sup> This Rawlsian or Scanlonian understanding of society is common in that many of us recognize that we live among a variety of individuals with different conceptions of the good, morality, or the good life and that we must all live together under a minimal set of rules that most individuals would be reasonably expected to endorse or, as Scanlon would say could not reasonably reject.<sup>21</sup>

Still, since I am primarily concerned with the criminal law, much will be left unsaid on other parts of the law, such as regulatory infractions and tort law. Because I am singling out the

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<sup>16</sup> I will talk more about this distinction in section 2, chapters 3–4 when discussing rights.

<sup>17</sup> Duff, et al., “Introduction,” in *Criminalization*, 19–20.

<sup>18</sup> I will discuss this distinction more in Chapter 4.2.

<sup>19</sup> Duff, et al., “Introduction,” in *Criminalization*, 19–20.

<sup>20</sup> Arthur Kuflik, “Liberalism, Legal Moralism and Moral Disagreement” (*Journal of Applied Philosophy* 22, no. 2 (2005)) 185.

<sup>21</sup> Duff, et al., “Introduction,” in *Criminalization*, 20; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); T. M. Scanlon, *What We Owe to Each Other*, (Cambridge, MA: Harvard University Press, 1998).

criminal law as distinct from other types of law, there is some clarification needed that indicates which types of acts are properly called criminal and which fall (or ought to fall) under some other category of law. The law, as it is written in many countries today, is difficult to clearly classify; however, there is something that can and needs to be said about analyzing the morality of the criminal law proper as distinct from other types of laws (some of which may, as a matter of fact, be part of an already existing body of criminal law) because there is a very real distinction between the types of behaviors that are properly characterized as criminal and those which do not have the same qualities necessary to make a behavior criminal. A crime is most colloquially understood as an act that the law prohibits us from performing. So, we understand that murder, rape, theft, and arson are crimes. It is a behavior that the law prohibits us from performing. However, this prohibition alone is not enough to describe the criminal law. There are many things that we see ourselves as being prevented by the law from doing, such as parking on a street facing the opposite direction from traffic, practicing medicine without a license, and tax evasion and yet these are not crimes in the primary sense alluded to above. There is an important distinction between those prohibitions that are a “proper” part of the criminal law and those that are not.

### *I.3.3 Mala in Se and Mala Prohibita*

There are two common interpretations of how the criminal law is divided.<sup>22</sup> The first is between *mala in se* and *mala prohibita*. *Mala in se* describes “conduct that is wrong independently of its being regulated.”<sup>23</sup> This aligns with Feinberg’s claim that the crimes

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<sup>22</sup> When laying out the general understanding of the criminal law in the next several paragraphs, I follow much of what R. A. Duff, et al. outline in their introduction “Toward a Theory of Criminalization?” in *Criminalization: The Political Morality of the Criminal Law*.

<sup>23</sup> Duff, et al., “Introduction,” in *Criminalization*, 3.

covered within the criminal law are those in which

‘punishment is used in the first instance’ and not merely ‘as a last resort,’ where punishment is clearly *for* something other than (or in addition to) mere disobedience to authority as such, and it can be specified what punishment is for independently of the rules of legal institutions set up for some purpose.<sup>24</sup>

These are acts which do not need the law to exist in order to define the behavior and can be thought of as acts which are “pre-legally wrongful.”<sup>25</sup> However, using the concept of pre-legal wrongness may not be as helpful as it seems because there are some things that seem pre-legally wrong that ought not to be covered, such as lying.<sup>26</sup> The pre-legal wrongness is a part of what makes an action prohibitable but cannot serve as the whole picture for what it takes for an act to be legislated through the criminal law proper.

*Mala prohibita*, on the other hand, is “conduct that is wrong only in virtue of its being regulated.”<sup>27</sup> This distinction is an important one when dividing crimes into those that fit into the criminal law “proper” and those that are, for instance, mere regulatory infractions, as it is not always clear in the vernacular what we mean when we say something is a crime (part of the criminal law proper) and many things that are not a part of the criminal law are often understood or labeled as penal crimes when they fit more accurately into another category.

#### *1.3.4 Punishment and Penalties*

The second common contrast of crimes that fit into the criminal law and those that do not is “between offenses that are deemed punishable and those to which mere penalties are

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<sup>24</sup> Feinberg, *Harm to Others*, 21. Feinberg’s discussion here seems to follow the division of *mala in se* and *mala prohibita* offenses but he is talking of “primary” and “derivative” crimes.

<sup>25</sup> Duff, et al., “Introduction,” in *Criminalization*, 8.

<sup>26</sup> *Ibid.*, 8.

<sup>27</sup> *Ibid.*, 3.

attached.”<sup>28</sup> This contrast and the contrast between *mala in se* and *mala prohibita* are often conflated and they are, in a way, related. For instance, contempt of court (*mala prohibita*) is not something that is punished as a crime in the same way that murder (*mala in se*) is punished. If one unjustly kills, they are punished harshly, generally with imprisonment. Something like contempt of court or tax evasion is a behavior that may result in a warning, a citation, or a fine but is not usually punished as a crime in the first (or subsequent) instance. So, when someone violates the rules of the court, the individual may be warned and then fined and may eventually be jailed, but this punishment is only meted out as a last resort or backup sanction. The “crime” in this case amounts to disobeying authority or attempting to undermine a regulatory system. In this way, it is not the behavior that is being punished but the disobeying of authority, which must be built into the system in some way to allow for efficient and practical regulation and government. As Feinberg correctly points out, “if we are going to confer authority on designated officials in order to make some governmental program or institutions work, we are committed thereby to granting them enforceable powers, since unenforceable authority is, in effect, no authority at all.”<sup>29</sup> Without such authority to be obeyed in these cases, the institutions, programs, and appointed officials lose authority which in turn could lead to a collapse of these important institutions which would then lead to greater amounts of harm. For instance, if a court system does not have authority, then one can argue that a miscarriage and failure of justice ensues because the perpetrators of crime are unable to be punished. Further, one may also believe that the purpose of the court system is to compensate victims, so if the court system does not have authority then the victims are not compensated for harms done against them.<sup>30</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> Feinberg, *Harm to Others*, 21.

<sup>30</sup> *Ibid.*

There are many different non-penal sanctions that the law does and should appeal to for certain acts that we (incorrectly) call crimes; however, those acts that are considered crimes in the pre-legal sense that initiate penal sanctions as the primary mode of punishment generally interfere with liberty to a greater extent than non-penal sanctions and have punishments rather than penalties. These types of crimes are the main focus of this work. It is important to note that I will not provide a guide to what sorts of punishment can or should be used, i.e. I am not advocating or endorsing imprisonment, fines, capital punishment, etc. My goal is not to say *how* the penal law should respond to violations or what is the appropriate punishment (though in some instances I will highlight a balancing test that should be applied to make the punishment fit the crime, so to speak),<sup>31</sup> only what it *may* say or at least consider as acceptable behaviors to consider as crimes. I will attempt to provide a guide for determining when it is acceptable to limit someone's liberty through the criminal law, not how the criminal law should actually punish.

### *1.3.5 Regulatory Infractions and Crimes*

According to R. A. Duff (et al.), there are generally three primary differences between regulatory infractions and those crimes that are a proper part of the criminal law; they are that

- [1.] they do not attract the formal censure that attaches to criminal convictions;
- [2.] while they may be sanctioned by fines, or disqualifications from the activities in which the infraction occurred, imprisonment is not a possible penalty; and
- [3.] the procedures through which they are dealt with are simpler than those of a criminal trial.<sup>32</sup>

While these three differences often indicate the division between regulatory infractions or tort

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<sup>31</sup> See chapter 6.6.

<sup>32</sup>R. A. Duff, et al., "Introduction" in *Criminalization*, 33.

law and the criminal law proper, there may be a backup threat of criminal proceedings which make the regulatory infractions, and those actions like them, seem more serious or on par with those acts covered by the criminal law. However, for the most part such crimes are handled through the many different non-criminal penalties at the government's disposal. Clarifying this issue, Feinberg explains that "it is not the central purpose, the *raison d'être*, of the law of torts to punish contempt of court, any more than it is the purpose of legal marriage to prevent adultery; but it is the whole point of the law of criminal homicide to prevent and punish wrongful killings."<sup>33</sup> Tax evasion and contempt of court, draft dodging, escape from prison, driving without a license, etc. are crimes that are secondary or that are only comprehensible under a preexisting system of rules and regulations. Murder and rape can be understood as crimes independently of such systems. As Feinberg notes, "one can wrongfully kill whether or not there is a criminal law of homicide, but one cannot commit contempt of court unless there is already in existence a complex legal structure (the court system) whose rules already confer powers and immunities, and define authority."<sup>34</sup>

While there are notable differences among these divisions of law, it is not always clear which action falls under which type of law and indeed, oftentimes a single policy can discuss and combine several different types of law, notably criminal law and a regulation such as immigration.<sup>35</sup> This further muddies the water when one is attempting to understand the distinctions. However, discovering principles on which legislators ought to base the criminal law is entirely possible and indeed may help to clarify how laws should be drafted. Again, the purpose of this work is to look to those crimes that can be categorized as falling under the proper

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<sup>33</sup> Feinberg, *Harm to Others*, 20.

<sup>34</sup> *Ibid.*

<sup>35</sup> Duff, et al., "Introduction" in *Criminalization*, 37.

domain of the criminal law and to explain how the harm principle can serve as a principle for determining legitimate governmental coercion. This is to limit the discussion to a manageable range of topics as well as to distinguish between parts of the law that have multiple purposes and very well may have alternate principles that serve as a guideline for performance.

Critics may claim that by limiting the discussion to only those acts which would require penal legislation, we are ignoring acts and behavior that are counterproductive to liberty and a cohesive and harmonious society. However, while this may be the case, and while there are many ways in which the law can attempt to “change, alter, and limit the behavior of its citizens,”<sup>36</sup> such as through incentives, taxes, or appealing to civil or tort law, the penalties that result from such practices are generally far less invasive of liberty and also fall outside of the realm of criminal law. But again, this does not mean that there is nothing the law can do to curb such undesirable behaviors and that preventing such acts is not an interesting study; it is just a separate issue from the focus of this project. I wish to focus on the harshest of the legal penalties (legal/penal coercion) because if we can justify the most invasive restriction on liberty, it not only makes those less invasive restrictions clearer, but may also provide us with a greater basis for justification of coercive legal measures because, as Mill says, “unless the reasons are good for an extreme case, they are not good for any case” (OL II: 9).<sup>37</sup>

#### **I.4 The Case for Principles**

All practical reasoning involves the application of principles to the facts. The principles, in turn, must be clarified and tested tentatively against hypothetical possibilities. ... But the principles at hand, at least as simply stated, are rarely clear. They must be fleshed out; otherwise they are mere rhetorical slogans, empty

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<sup>36</sup> Gerald Dworkin, “Harm and the Volenti Principle,” (*Social Philosophy & Policy Foundation* 29, no 1(2012)) 309.

<sup>37</sup> While in this passage Mill is specifically discussing freedom of speech, the sentiment is applicable to the topic at hand as well.



of meaning.<sup>38</sup>

Not all criminal laws that restrict the liberty of people are morally legitimate. Defining and defending principles which are supposed to justify such coercion is thus critical to determining their moral legitimacy. There are several attempts to justify state coercion of individuals that appeal to a variety of principles, notably legal paternalism, legal moralism, the offense principle, and the liberal harm principle (the latter is the primary topic of the current work). However, why is it the case that the state must rely on principles at all? For instance, it seems that one way to ease the tension between liberty and authority is to look at each individual case, determine the main concern that arises, and then create a solution to resolve the tension.

#### *1.4.1 Consistency of Application*

One of the main issues with a case-by-case method of dealing with the law is that it lacks a consistency of application that one generally demands of the law and social justice in general. For instance, if one were to decide in each circumstance which acts were crimes and which were not, there would be instances of the same act being both a crime and not a crime in different cases.<sup>39</sup> If there are not principles that are appealed to in the law, it is easier to have lapses of justice and fairness which are key components of the law. The law is created to dictate rules for everyone equally. Because the law is created as a system of rules that apply universally, for the law to unpredictably apply to some cases and individuals and not to others causes serious issues.

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<sup>38</sup> Feinberg, *Harm to Others*, 16.

<sup>39</sup> One could argue that even with clear principles this may occur. For instance, despite having a law against a particular act, it is often more common that one group is prosecuted disproportionately for the crime than others. For instance, in today's US legal system black people are disproportionately punished for drug crimes as compared to white people. However, this is an issue of application and does not mean that we should not use principles or rely on principles, only that we should enforce the principles fairly. And, really, it is not that the same act is a crime in one case and not the other, in both cases it is a crime, it is just not punished in one case and it is in the other.

As Gerald Dworkin notes

It is by now widely accepted that those who act and claim moral justification for their conduct must be prepared to accept as legitimate certain universalizations of their action. There must be consistency in conduct, a refusal to make special pleas in one's own behalf or to consider oneself an exception to general principles.<sup>40</sup>

If we allow for rulings on a case by case basis there is a greater possibility that exceptions will be made unjustly.<sup>41</sup> For instance, if two agents are convicted of the same crime, and the situation is roughly the same, most believe that the same consequences ought to follow.<sup>42</sup> This is not to say that the law cannot provide exceptions to certain rules, for instance there is a law against speeding, but ambulances are allowed to speed if there is an emergency.<sup>43</sup> An important thing to keep in mind with such exceptions is that they are not arbitrary and they are reasoned and universal exceptions that most people would accept as legitimate. While the law can make such exceptions, when the law is applied to those that are not legitimately excepted, a similar result ought to obtain.<sup>44</sup>

However, based on a case-by-case examination, oftentimes it may be that grave irregularities result. This may occur if one gives certain groups or individuals preference over others without just cause. When we consider the law, however, there is a necessity for impartiality. The reason for this is that in order to be effective, the law must provide clear guidelines and rules so that agents know and understand ahead of time what behaviors and acts are or are not acceptable. In addition to this, the concept of justice or fairness is an important

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<sup>40</sup> Gerald Dworkin, "Non-Neutral Principles," (*The Journal of Philosophy* 71, No. 14 (1974): 491–506) 491.

<sup>41</sup> This is not to say that unjust exceptions could not be made with principles, only that it would not be as pervasive as it would be without them.

<sup>42</sup> While most of us believe this to be so, it also happens that in actual cases such principles and situations are in fact judged and ruled differently. This is not a problem with the theory but rather the application and those involved in the decision-making process.

<sup>43</sup> Feinberg, *Social Philosophy*, 104.

<sup>44</sup> *Ibid.*

component of the law. If an agent does not know which acts will result in a penalty or which acts will fall under a certain law, then that agent is constantly at risk of performing acts that are, unbeknownst to the agent, criminal. And even if the law is written in a clear and concise manner, a case-by-case basis will still result in an unfair and erratic application.

#### *1.4.2 Fair and Unbiased*

In addition to the necessity for clear and consistent application of principles, such principles must be applied to fair and unbiased laws. For instance, if a legislator enacted an arbitrary law that all and only those people of Celtic descent are forbidden from riding bicycles, then the law would no longer be impartial or consistent. It would depend upon facts that agents do not have any control over and that are not relevant to the behavior in question. This observation is not based on a sophisticated philosophical understanding of legitimacy or relevance but is fairly straightforward and normal understanding of relevance and fairness.<sup>45</sup>

Not only are there problems of this sort, but also knowing that a particular act is wrong does not provide any guide to figuring out what it is that makes such acts wrong. As Socrates pointed out in *Euthyphro*, it is not a question of whether a particular act is impious, but rather what impious acts have in common such that they are thought to be impious. In other words, a particular act of murder is wrong, but understanding what features it shares with other instances of murder such that actions of this type can be made wrong according to the law is what is necessary.<sup>46</sup>

In order to have a well-functioning system of laws, laws need to be reasonably clear and

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<sup>45</sup> Feinberg, *Harm to Others*, 6–7.

<sup>46</sup> Plato, *Euthyphro*, in *Plato in Twelve Volumes, Vol. 1* translated by Harold North Fowler. (Cambridge: Harvard University Press, 1966) 10a–11a.

appeal to principles which provide reasons that promote consistency and impartiality. Mill states that contrary to what he believes should be the case, “there is, in fact, no recognized principle by which the propriety or impropriety of government interference is customarily tested” (OL I: 8). Relying on principles to decide when government interference is acceptable is important and something that is needed; yet, the protection of the rights of individuals,<sup>47</sup> such as liberty, is rarely decided on matters of principle but rather is decided on the whims of those in power or those who are in great numbers. Mill believes that utilizing and relying on the harm principle is the best, and really only, way to determine when interference in the rights of individuals by others (government or otherwise) is acceptable (OL I: 9). He argues that it is really a matter of intuition and feeling that tends to decide when rights are protected and when they are not. If people do not like something that is happening in a particular instance, only then do they tend to decide that that particular behavior ought to be stopped, almost regardless of whether it infringes on the rights of others (OL I: 7). Generally, people want their own rights protected but when someone else is doing something they do not like, they tend not to care or they tend to ignore that it would violate the others’ rights.<sup>48</sup> By utilizing principles, there is a clear and accessible way to

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<sup>47</sup> By this I do not mean there is harm or threat to actual “rights” but rather that there is harm to individuals that implicate rights. The harm is always to the individual and while I will utilize language that suggests the harm is to the rights, such as protection of rights, violating rights, infringing rights, harm to rights, etc., this is never the case. In this instance I mean something like ‘protect individuals in their rights.’

<sup>48</sup> A rare principle “maintained with consistency”: Mill does note that there is one rare instance in which principle, as opposed to sentiment, personal preference, or majority morality ruled/rules, and that is in the matter of religious belief and tolerance for religious diversity. He claims that here, with freedom of religious belief and nowhere else, one has “the only case in which the higher ground has been taken on principle and maintained with consistency” (OL I: 7). However, even here, where freedom of religious belief is given more consideration, Mill admits that in instances when one has a geographical area with a majority or dominant religion, tolerance of other religions only goes so far and “it is found to have abated little of its claim to be obeyed.” This tendency to vacillate is pervasive even today and Mill sees this as problematic as this domain seems to be the best instance of principle trumping sentiment. However, it is also a particularly interesting example as it shows the distinction between how individuals (and Mill) view the law in relation to custom or public opinion. While most people believe that religious belief (and liberty?) ought to be protected *in principle*, custom and public opinion seem to lean toward intolerance *in practice*. So, while individuals *want* religious freedom to be a protected right, they also want others to do as they do which frequently leads to legal moralism, a principle Mill believes to be illegitimate. This disparity between thought and action is what leads Mill to state that the harm principle ought to be employed to avoid inconsistencies and violations or infringements of rights. Interestingly and importantly, he states this as a universal principle which

determine what is expected of citizens and what rights are protected. Appealing to principles provides a consistent and clear guideline for agents and law-makers alike. This is not to say that such principles are absolute and never conflict, but rather that there needs to be principles or reasons that always count as good reasons for or against a particular law. As Feinberg claims, liberty limiting principles are those that always provide a “morally relevant reason in support of penal legislation even if other reasons may in circumstances outweigh it.”<sup>49</sup> This allows for consistent reasons to be considered in enacting legislation. This way everyone has a clear idea of what laws are legitimate and which actions are allowed. Principles such as these allow for consistency of application and a concept of fairness that is necessary in a legal system where liberty is a significant value and that has a presumption of liberty.

#### *1.4.3 A Formal Theory of Justice*

In other words, what we are attempting to produce is a formal theory of justice. In the above discussion, the formal theory that is appealed to is derived from Aristotle when he states that like cases ought to be treated in a like manner and dissimilar cases ought to be treated in a dissimilar manner<sup>50</sup> “(and in direct proportion to the differences between them).”<sup>51</sup> While this principle is helpful, it does not exactly outline what it means for cases to be similar or what

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covers not only the way in which the law may act toward citizens but also the way in which society *qua* public coercion can act toward its individual members. Mill claims that his principle covers *all* coercive dealings between people, “whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion.” (OL I: 7).

<sup>49</sup> Feinberg, *Harm to Others*, 9–10.

<sup>50</sup> Aristotle, *Nicomachean Ethics*, Book V; Feinberg, *Social Philosophy*, 99; However, Aristotle also called for the law to give preference to certain conceptions of freedom and that “freedom sometimes requires that government and law not be neutral with respect to questions of the good life, with respect to moral and religious questions. Freedom is not a matter of autonomy or choosing whatever we happen to want. Rather, to be free is to live a certain mode of life: the good life.” Charles Fried, “The Nature and Importance of Liberty,” *Harvard Journal of Law & Public Policy* 29 no 1 (2005): 7. Nevertheless, the Aristotelian principle of fairness is a key component to a theory that appeals to principles as a necessary feature of the law.

<sup>51</sup> Louis I. Katzner, “Presumptivist and Nonpresumptivist Principles of Formal Justice,” (*Ethics* 81, No. 3 (1971): 253–258) 254.

makes things dissimilar. Since every case or situation differs in some respects it is important to determine the *relevant* differences in order to justify treating cases similarly or differently. When (relevantly) like cases are treated alike it is just, when (relevantly) like cases are treated differently it is unjust. Injustice then, Feinberg claims, amounts to “unfair discrimination, arbitrary exclusion, favoritism, inappropriate partisanship or partiality, inconsistent rule-enforcement, ‘freeloading’ in a cooperative undertaking, or putting one party at a relative disadvantage in a competition.”<sup>52</sup> Feinberg points out that writers such as Isaiah Berlin believe that this principle is not merely “one among many ethical principles vying for our allegiance, but is rather an instance of a more general principle that is constitutive of *rationality* itself.”<sup>53</sup> However, whether or not the principle—that like cases ought to be treated the same—is a part of rationality does not really need to be decided in this work and I will remain neutral on this point. But it is interesting and useful to point out that this principle plays an important and, in some cases, necessary part of justice, impartiality, and the law.

However, again, the formal principle alone is not enough and a variety of material principles are necessary to understand and interpret the formal principle of justice which does not provide which reasons are relevant in a given situation. There are a variety of material principles of justice and there does not seem to be one overarching or supreme principle of material justice that applies to all cases. Indeed, Feinberg claims that “there is no one kind of characteristic that is relevant in all contexts, no single material principle that applies universally.”<sup>54</sup> Instead he calls for utilizing H. L. A. Hart’s understanding of material principles which rely on “a shifting or

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<sup>52</sup> Feinberg, *Social Philosophy*, 99.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 102.

varying criterion.”<sup>55</sup> Such criterion would be interpreted through the context in which the principle is applied. In other words, as Hart claims, “There is therefore a certain complexity in the structure of the idea Justice. We may say that it consists of two parts: a uniform or constant feature [formal principle] ... and a shifting or varying criterion used in determining when ... cases are alike or different [material principle].”<sup>56</sup> Relevant differences are going to depend on the contexts of the case in question.<sup>57</sup> This does not mean we should reject formal principles of justice altogether, only that interpreting the cases to which the principles apply is difficult.<sup>58</sup>

### **I.5 A General Harm Principle and a Legal Harm Principle**

As Feinberg claims, the liberal, at bottom, must endorse the presumption in favor of liberty. However, there are a variety of ways in which agents can adopt this presumption and even the paternalist and moralist endorse this presumption which “could be thought of, at one extreme, as powerful enough to be always decisive, and at the other, as weak enough to be overridden by any of a large variety of liberty-limiting principles, even when minimally applicable.”<sup>59</sup> However, because of this, the presumption in favor of liberty alone cannot be what determines a liberal. To have any relevance, then, the liberal is “one who has so powerful a commitment to liberty that he [or she] is motivated to limit the number of acknowledged liberty-limiting principles as narrowly as possible.”<sup>60</sup> Indeed, John Stuart Mill claims “the only purpose for which power can be rightfully exercised over any member of a civilized community, against

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<sup>55</sup> Hart, *The Concept of Law*, (Oxford: Oxford University Press, 2012) 160 quoted in Feinberg, *Social Philosophy*, 102.

<sup>56</sup> Hart, *The Concept of Law*, 160.

<sup>57</sup> Feinberg, *Social Philosophy*, 102.

<sup>58</sup> Again, this is not a problem unique to this project. This applies to all attempts to define and determine a criminal law.

<sup>59</sup> Feinberg, *Harm to Others*, 14.

<sup>60</sup> *Ibid.*

his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant” (OL I: 9). This principle serves as the cornerstone of what follows. I will attempt to lay out the various parts of the harm principle and this dissertation will serve as a commentary on and defense of Mill’s harm principle.

### *1.5.1 Deriving a Legal Harm Principle*

In addition to explicating Mill’s harm principle, my goal is to define a “legal harm principle” that is derived from Mill’s general harm principle in *On Liberty* in order to defend the liberal position as a particularly useful and robust method for interpreting legitimate uses of the penal law. This legal harm principle will resemble what Feinberg calls the “Extreme Liberal Position” in referring to the idea that the *only* morally legitimate criminal prohibitions by the state are those based on the harm principle.<sup>61</sup> I will defend this by outlining Mill’s harm principle as clearly as possible and highlighting its nuances in order to defend its use in constructing a specifically legal principle. This approach, while not uncommon, is still criticized as a mistaken endeavor because some critics, such as Bernard Harcourt and Piers Norris Turner, claim Mill is not trying to define so narrow a principle that it applies only to the law.<sup>62</sup> According to this view, attempting to articulate a legal harm principle is missing the point of what Mill is really doing—attempting to outline *all* instances of interference in liberty, not solely legal interferences. While this criticism does highlight the ultimate goal of Mill’s view in *On Liberty*, I do not believe it is problematic to attempt to parse out where Mill would fall on such a principle. I will argue that one is able to reasonably derive a harm (sub) principle that applies solely to the law relying on

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<sup>61</sup> Feinberg, *Harm to Others*, 26.

<sup>62</sup> Bernard Harcourt, “The Collapse of the Harm Principle” (*Journal of Criminal Law and Criminology* (1999): 109–94); Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle,” (*Ethics* 124 (2014): 299–326).



what Mill has to say about harm and his harm principle.

Mill believes that invasions of liberty based on legal moralism and legal (hard) paternalism,<sup>63</sup> the two most commonly proposed alternatives to the harm principle, are never legitimate means of state coercion because the level of interference with individual liberty and personal autonomy is too great a sacrifice and is not morally justified. While rejecting the above conservative liberty-limiting principles is always a concern of the liberal, it is not the primary aim or focus of this work and while these principles are mentioned occasionally, the primary motivation is to delineate a liberal legal harm principle that is derived from Mill's more general one. I will then focus on the issue of speech, specifically hate speech, in the third section to analyze how I might apply my legal harm principle.

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<sup>63</sup> Feinberg makes a distinction between hard and soft paternalism, with soft paternalism actually comprising a subset of the liberal harm principle and thus, serving as a legitimate interference in the liberty of others. This seems consistent with some of what Mill claims. See Feinberg, *Harm to Self*, 12–6.

## Chapter 1 Limiting Liberty: Situating John Stuart Mill's Harm Principle

### 1.1 Mill and the Harm Principle

When considering which acts ought to be covered by the criminal law, it is likely that many people will list similar acts as being appropriately covered. For instance, most people hold that if I stab you, steal from you, deliberately destroy your property,<sup>64</sup> threaten you, or beat you—in other words, if I harm you—I should be held criminally liable and punished. Famously, John Stuart Mill in *On Liberty* claims that the *only* legitimate interference in the liberty of an individual is to prevent harm to others (OL I: 9). In essence, this is an endorsement of the liberty limiting principle<sup>65</sup> that has become known as the “harm principle” and though it may not have originated with him, it is most frequently associated with Mill and liberalism.<sup>66</sup>

However, while associated with liberalism, it seems that whatever a person's moral or political background, he/she generally believes that causing harm to others, whether in their person or their property, is wrong and should be punished, often through the law.<sup>67</sup> As Gerald Dworkin notes, “there has been a remarkable consensus that whatever other principles might be

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<sup>64</sup> This particular act and those that involve restrictions on individual liberty based on the idea of property rights are a bit more controversial than others because there are a variety of theories regarding the legitimacy of private property, specifically land. The most problematic being trespassing and breaking and entering. If I destroy nothing, is it still an invasion of liberty? And if it is, on what grounds? If it is harm, there needs to be a clear interference in liberty that results in a wrongful harm.

<sup>65</sup> Here I am referring to Joel Feinberg's definition of liberty limiting principles which “put fort[h] a kind of reason it claims always to be relevant—always to have some weight—in support of proposed legal coercion, even though in a given instance it might not weigh enough to be decisive, and even though it may not be the only kind of consideration that can be relevant” (*Harm to Others*, 10). See my Introduction for discussion.

<sup>66</sup> For instance, versions of the harm principle are echoed in the French *Declaration of the Rights of Man and of the Citizen*, The Hippocratic Oath and other “do no harm” principles, as well as Socrates' view expressed in Plato's *Crito* where he claims that it is never justified to harm another (though here he seems to be talking more about harm to the soul than harm to interests as Mill and other contemporary liberals understand it).

<sup>67</sup> Even relatively conservative legal theorists or those decidedly against liberalism, especially the liberalism of Mill, notably Patrick Devlin, Michael Moore (though Moore is more moderate), and Sarah Conly hold some sort of harm to others thesis/principle. An obvious exception to this idea is the anarchist who believes that no government coercion is legitimate.

required for an adequate theory of criminalization, some form of a harm to others principle is required.”<sup>68</sup> But, because of the shared and almost universal presumption of liberty<sup>69</sup> and the idea that individual autonomy warrants *prima facie* respect, it falls on those who support *any* liberty limiting principles—even one that is relatively universal and interferes with liberty to a lesser extent than other such principles—to defend why such coercive measures are legitimate interferences in individual autonomy.

### *1.1.1 Distinguishing the Harm Principle from Other Liberty Limiting Principles*

Because there are many ways in which individuals and governments may interfere with the liberty of others, proper legislation needs to distinguish and highlight acceptable levels from unacceptable levels of interference. The harm principle, then, as defined by Mill is “that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any of their number is self-protection” (OL I: 9). Mill continues this definition by expanding what he means by self-protection. If I want to protect myself or the community wants to protect itself, then “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” (OL I: 9). This means that the only appropriate interference of the liberty of citizens by the government or individual citizens is to protect oneself or others from harm or the likelihood of harm.<sup>70</sup>

While it seems that Mill does not go into as much detail when defining his principle as to

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<sup>68</sup> Dworkin, “Harm and the *Volenti* Principle,” 310.

<sup>69</sup> Because liberty seems to be a necessary feature of a good life or happiness (discussed below) and is seen as an important value, there is a general presumption that, all things being equal, liberty should be the norm and coercion or interference with liberty should be the exception, or should be justified. See my introduction for a discussion on the presumption in favor of liberty.

<sup>70</sup> I will refer to “harm” throughout and in most cases I mean harm and/or the likelihood of harm. Including the likelihood of harm occurring and not relying on actual harm occurring is important for harm prevention. This sentiment is found in Mill, *On Liberty*, IV: 10. However, the likelihood of an act causing harm must be high and a common consequence of the act in question.

what he means by harm as we might like, he does give a rough idea of *how* harm can be prevented and *who* may prevent it.<sup>71</sup> He suggests two overlapping categories. The first category involves *how* individuals or society may interfere in instances of harm to others: “physical force in the forms of legal penalties or the moral coercion of public opinion” (OL I: 9). The second category discusses *who* may interfere in the liberty of others for the sake of self-protection: the individual or society collectively.<sup>72</sup> Society collectively can include either governmental interference or social interference more generally (the latter being extra-legal<sup>73</sup> or non-governmental).<sup>74</sup> Furthermore, the individual or society may interfere in the liberty of others to protect “any of their number” or “any member of a civilized community” (OL I: 9) from harm. These latter terms would—and I believe ought to—include a wide range of individuals, such as immigrants, refugees, visitors, and even non-terrestrial beings (if such were to exist), and would apply to all instances of liberty invasion.

While this discussion of harm indicates that agents may interfere in the liberty of others

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<sup>71</sup> One of the most frequent criticisms of Mill’s conception of liberty and the harm principle is that he fails to adequately define “harm.” Jonathan Riley claims that Mill is “rather cavalier” about his notion of harm early on (*Mill on Liberty*, New York: Routledge, 1998) 75. An analysis of his understanding of harm will be discussed in the remainder of this work.

<sup>72</sup> “The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.” Mill, *On Liberty*, I: 9.

<sup>73</sup> By extra-legal here I mean those forms of coercion that are not the domain of the law. I do not mean illegal or above the law. I do mean something like outside the law but again, by this I do not intend anything like illegal but rather those coercive means that entities outside of the law, such as individual citizens or society, enact. Most frequently this means something like social pressures or what Mill calls “moral coercion” though this can also be physical coercion by those who are not representatives of the law.

<sup>74</sup> Now when we combine these categories, we come up with several potential options: a. I may prevent harm to me or, more generally, one may protect oneself through either moral coercion or physical force; b. individuals can prevent harm to other individuals through either moral coercion or physical force; c. society collectively (non-government) may prevent harm to others through either moral coercion or physical force; d. society (*via* the government) may prevent harm to others through either moral coercion or physical force. However, in the first general category in the text above, namely the legal versus extra-legal social interference, it seems that physical coercion is reserved for the state *via* legal penalties. Mill seems to suggest that the community or society (non-government) can only prevent harm to others through “moral coercion of public opinion” though not physical coercion. It is not really clear at this point and it may be that Mill is talking generally here but he does say elsewhere that individuals may stop others from doing or risking harm to others and this prevention may be physical and not merely moral pressure (OL V: 5).

when someone is inflicting harm directly on another and acting in a manner that is likely to cause harm to others, Mill is explicit that this does not cover an agent harming himself, consenting agents engaging in behavior that may cause harm to themselves, or even agents performing immoral (but harmless) acts.<sup>75</sup> Mill claims that an individual's

own good, either physical or moral, is not a sufficient warrant [for interference in an agent's liberty]. He cannot rightfully be compelled to do or to 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 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 (OL I: 9).

In other words, Mill does not allow for others to limit which acts an agent may or may not perform unless such acts cause or risk harm to another. And while he does allow for the legitimacy of certain types of intervention in non-harmful situations, it is only in the form of verbal persuasion or education and not tyranny, physical, or even moral coercion.<sup>76</sup> However, it is important that Mill stresses that this principle only applies when the agent in question harms or risks harm to *others* and does not apply in instances of harm or risk of harm to the *self* or any other act which only concerns himself.

### *1.1.2 Alternate Liberty Limiting Principles*

The qualifications that Mill presents in the above quote ultimately serve as a rejection of many of the principles that are suggested as alternative (or perhaps additional) liberty limiting

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<sup>75</sup> Mill, *On Liberty*, I: 9, I: 12, I: 13, and Chapter IV.

<sup>76</sup> A general discussion on types of intervention will be discussed below in Chapter 2.4.

principles. As noted, theorists generally agree that harm or likely harm to others ought to be a legitimate reason for interference; however, some theorists do not believe that the harm principle goes far enough.<sup>77</sup> The most common theories that are suggested as supplements to the harm principle are legal moralism, legal paternalism, and as Gerald Dworkin argues, moral paternalism which can be thought of as a form of moral perfectionism which seeks to understand and develop an objective concept of the good life and aid agents in striving toward that life (which often utilizes paternalistic principles to achieve its goal if agents are not performing those acts necessary for reaching “the good life”).<sup>78</sup>

### *1.1.3 Legal Moralism and Legal Paternalism*

Again, while the harm principle allows for interference only in cases where there is harm or likely harm to others, legal moralism allows for interference in the liberty of others in order to prevent acts that may be considered immoral, but not necessarily harmful, such as homosexual sex and other “deviant” but consensual sexual acts. These acts are usually considered to be offensive to others but not really harmful to others.<sup>79</sup> They may argue that the harm that occurs is to the participants but this is not harm to *others*. Legal paternalism increases those actions and behaviors covered over and above those included in the harm principle by allowing for interference in the liberty of another for that agent’s own good, which is usually interpreted as preventing self-inflicted harm to the agent, such as mandating seat belts or laws against suicide, or benefit to the agent, such as being required to pay into social security (though the latter sort of

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<sup>77</sup> See, Michael Moore, *Placing Blame: A Theory of the Criminal Law*, (Oxford: Oxford University Press, 2010); Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1968); Sara Conly, *Against Autonomy: Justifying Coercive Paternalism*, (Cambridge: Cambridge University Press, 2013) among many others.

<sup>78</sup> Gerald Dworkin, “Moral Paternalism,” (*Law and Philosophy* 24, no. 3 (2005): 305–31.

<sup>79</sup> See chapters 1.2.6 and 5.4.1 for discussions of offense.

interference generally does not apply to criminal law).

#### *1.1.4 Moral Paternalism*

Moral paternalism is often a version of perfectionism and, according to Dworkin, allows for the interference in the liberty of another to improve that agent's moral good or well-being (as opposed to preventing self-inflicted or consensual physical harm) or to prevent harm to the agent's moral character or soul.<sup>80</sup> This can be understood to mean either improvement to or salvaging of one's moral character or prevention of harm to one's moral character, an example would be something like making people volunteer at a charitable venue to promote generosity, or not allowing them to consume certain products such as drugs or alcohol.

It is interesting to note that most, if not all, of the theorists who advocate these additional liberty limiting principles include some type of harm to others principle in their arsenal but wish to *also* restrict *more* behaviors through the criminal law. For this reason the harm principle seems to be the most common ground for discussion and best place to begin.

## **1.2 Defining the Private Sphere of Liberty**

As noted, Mill's principle relies on a notion of harm to "others" serving as the only legitimate means of interference in the liberty of individuals and Mill distinguishes his principle from other liberty limiting principles such as moralism and paternalism which consider harm to self in addition to harm to others as legitimate grounds for interference. However, while it may seem intuitive or obvious what "harm to others" means, Mill purposely outlines what he intends the sphere of other-regarding actions to encapsulate so as to ward off potential criticisms that

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<sup>80</sup> Dworkin, "Moral Paternalism," 305–31.

stem from the idea that “no man is an island” and all acts are other-regarding in some manner, even seemingly self-regarding behaviors. Mill’s distinction here also serves as a way to address the legal moralist and paternalist who attempt to increase controllable or prohibitable behaviors beyond that of the harm principle. For instance, many people claim that they are affected when someone else does something immoral or when they are offended by something another does. Is it the case that this is harm to others and properly covered? Mill addresses these concerns by drawing a distinction between self-regarding and other-regarding acts as they relate to the harm principle, preventing harm, and the limits of the law and society at large (OL I: 9, I:12, I:14, IV, V: 6).<sup>81</sup>

### *1.2.1 Self-Regarding Versus Other-Regarding Acts*

Mill divides actions into two (very rough) categories, those that are primarily self-regarding and those that are primarily other-regarding because in understanding the scope of authority over individuals, Mill claims that “to individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society” (OL IV: 2). Mill asserts that in any case in which an individual does not significantly, primarily, or chiefly affect the lives of others by his/her action, then “there should be perfect freedom, legal and social, to do the action and stand the consequences” (OL IV: 3). Even in the case where the individual is in error as to what is morally right or even what is harmful to the agent, it is better for society, according to Mill, that he/she be left alone to act in whatever manner he/she sees fit (so long as there is not harm to others) contrary to what both the moralist

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<sup>81</sup> Some portions of the discussion on self-regarding and other-regarding acts have appeared in Kathryn Zawisza, *The Ins and Outs of Prostitution: A Moral Analysis* (Master’s Thesis, Fayetteville, AR: University of Arkansas, 2012) 7–9.



and the paternalist would likely claim. Those in society who are concerned for the moral well-being of the individual may offer advice or plead for a change, others who condemn the acts of the individual may choose to separate themselves from the individual; however, it is not the case that others are permitted to “make his life uncomfortable” or actively seek to control the actions of the individual (OL IV: 7). For Mill, even moral coercion is not an acceptable form of interference in those actions that are primarily self-regarding. If, on the other hand, harm is likely to be caused to others, then it is acceptable for the individual to be prevented from performing the act.

### *1.2.2 Is the Self- and Other-Regarding Distinction Helpful?*

Despite his attempt to delineate what exactly he means by self- and other-regarding acts, Mill’s distinction here has resulted in a great deal of criticism, much of which Mill himself addresses (OL IV). Indeed, David O. Brink believes that the self/other-regarding distinction is unhelpful despite Mill’s effort at exposition.<sup>82</sup> However, I believe this discussion is incredibly helpful in making a distinction between those acts that can be regulated and those that cannot. For instance, we know there are two (admittedly rough) categories and that one, the self-regarding, is never permissible for legislation. The second category, the other-regarding, *may* be eligible for regulation but that does not mean that it *must* be regulated.

For instance, as Brink points out, there are seemingly other-regarding acts that are merely offensive, Mill does not believe that they should be regulated, but this does not mean that they are not other-regarding only that they are perhaps not harmful. In discussing offensive behaviors, Mill indicates that this sort of behavior is primarily self-regarding even though people take

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<sup>82</sup> David O. Brink, *Mill’s Progressive Principles*, (Oxford: Oxford University Press, 2013) 141.

offense to it (so there is some aspect of other-regardingness) because the actions of the individual do not impact/harm the interests of others. For Mill we do not seem to have a significant interest in not being offended. To cite some of Mill's examples, after discussing the Muslim aversion to eating pork he claims

the majority of Spaniards consider it a gross impiety, offensive in the highest degree to the Supreme Being, to worship him in any other manner than the Roman Catholic; and no other public worship is lawful on Spanish soil. The people of all Southern Europe look upon a married clergy as not only irreligious, but unchaste, indecent, gross, disgusting. What do Protestants think of these perfectly sincere feelings, and of the attempt to enforce them against non-Catholics? Yet, if mankind are justified in interfering with each other's liberty in things which do not concern the interests of others, on what principle is it possible consistently to exclude these cases? or who can blame people for desiring to suppress what they regard as a scandal in the sight of God and man? No stronger case can be shown for prohibiting anything which is regarded as a personal immorality, than is made out for suppressing these practices in the eyes of those who regard them as impieties; and unless we are willing to adopt the logic of persecutors, and to say that we may persecute others because we are right, and that they must not persecute us because they are wrong, we must beware of admitting a principle of which we should resent as a gross injustice the application to ourselves (OL IV: 15).

This highlights the idea that every group has actions or ideas that offend them and that they think are immoral. However, when we look to examples of things that *we* do that others think are impious, it provides a striking and clear case in which we believe it should *not* be prohibited. As Mill says, "no stronger case can be shown" for why prohibiting immoralities is a "gross injustice" (OL IV: 15). What Mill seems to be doing is using this distinction between offensive and harmful conduct to refine the categories. So, conduct that is other-regarding becomes a candidate for prohibition only insofar as it is also harmful. If conduct is only self-regarding it is not eligible, even if there is harm to the agent performing the act. Mill states that "but with regard to the merely contingent ... injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable

individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom” (OL IV: 11).<sup>83</sup> So, there are divisions that may not be decisive because even some other-regarding harmful behavior may not be legislatable, i.e. offensive conduct or “immoral” conduct.

While these distinctions may not be decisive, I do not think they are “false” or “unhelpful” as Brink believes.<sup>84</sup> Part of the reason why Brink believes the distinction is false or unhelpful is because he is reading Mill as claiming either that “the harm principle is equivalent to letting society restrict all and only other-regarding conduct” or that “on this view it is ... perhaps always permissible to regulate other-regarding conduct.”<sup>85</sup> This is much too strong of a claim and Mill does not make it. Brink’s claim here would include too much because all and only other-regarding conduct would also include other-regarding beneficial acts, such as charity. This clearly affects the interests of others but it is a beneficial act and not harmful. Thus, the harm principle would not cover nearly as much as Brink suggests in this quote. If Brink meant all and only those *harmful* other-regarding conducts, even this would be too broad of a claim as Mill would say that there are certain instances of harmful other-regarding conduct that should not be prohibited because the harm of prohibition would be more invasive than the initial harmful behavior. However, Mill would say that all harmful other-regarding behavior *is eligible for discussion* as to whether it should be prevented or not.<sup>86</sup>

Where things get messy is when one admits that the distinctions are not sharp, always clear, or mutually exclusive. Mill admits that acts that are *primarily* self-regarding or *primarily*

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<sup>83</sup> This passage could be interpreted as suggesting that *even if* offensive conduct *is* harmful in some way, the prohibition of it is *more* harmful than allowing it.

<sup>84</sup> Brink, *Mill’s Progressive Principles*, 141.

<sup>85</sup> *Ibid.*, 139.

<sup>86</sup> This is a question of domain and will be discussed in chapters 3–5.

other-regarding are to be considered. But when we look at the distinctions, we find that it may be the case that an act is *primarily* self-regarding but does affect others in some ways, i.e. a single man gambling away his money is *primarily* self-regarding, but it does affect his family through their disapproval, his bad influence on children, etc. However, the significant interests of the others are not affected. They have no claim on his money, he has not promised it to them, etc. So, this falls in the category of *primarily* self-regarding conduct. Analogously, while some conduct may be merely offensive and not harmful, some behavior is harmful *and* offensive, so even these categories are not mutually exclusive. So, there are really two sets of overlapping categories, those related to harmful/non-harmful conduct and those related to other-/self-regarding conduct. Indeed, Brink notes that for Mill “only other-regarding conduct that is harmful can be regulated.”<sup>87</sup> This highlights the two important components of the harm principle but fails to recognize that the self-/other-regarding distinction is not meant to be a sharp or hard distinction just as the offensive/harmful distinction is not always sharp. And while these categories individually may not provide a final conclusion as to which conduct may be interfered with or not, they are useful in the categorization process. This failure to draw a conclusive division may be what Brink meant by Mill’s self/other-regarding categories being “unhelpful,” but I think that many distinctions involve such sloppy language and diving in and dividing the conduct provides helpful clues as to what conduct is appropriate and which is not for legislation. Therefore, examining what Mill says on the matter is a useful endeavor.

### 1.2.3 Social Obligations and Other-Regarding Acts

The main criticism of the distinction between self- and other-regarding behavior has been

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<sup>87</sup> Brink, *Mill’s Progressive Principles*, 141.

the focus of a debate over what it can mean for an act or “part of life” to involve *only* the individual to the exclusion of others (OL IV: 8). This characterization of the division is problematic for the reasons stated above, namely it does not have to involve *only* the individual but must *primarily* involve only the individual. However, Mill further clarifies what he means by other-regarding conduct when he claims that while there is not a social contract that binds individuals together, the fact that all citizens receive protection—and I would add many benefits—from living in a society or state creates an obligation “to observe a certain line of conduct towards the rest” (OL IV: 3). This obligation serves to outline the realm of “other-regarding” conduct which amounts to those actions which directly and significantly affect the interests of others. Such conduct, according to Mill,

consists, first, in not injuring the interests of one another; or rather certain interests, which either by express legal provision or by tacit understanding ought to be considered as rights; and secondly, in each person’s bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation (OL IV: 3).

The second obligation that he states describes the responsibilities that citizens have to the protection of the state. For Mill, this is part of the obligation that agents incur upon utilizing the protections that society grants in times of peace. The first condition, though, is generally considered to define those acts which agents may or may not perform precisely because they interfere with the rights and liberty of others against their will. The limits that the government may impose on the liberty of citizens is based upon preventing them from harming others.

However, he notes that there are certain acts and behaviors that do not violate or infringe on rights<sup>88</sup> or significant interests of others but “may be hurtful to others, or wanting in due

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<sup>88</sup> Again, by this I do not mean there is harm or threat to actual “rights” but rather that there is harm to individuals that implicate rights. The harm is always to the individual and while I will utilize language that suggests the harm is to the rights, this is never the case. Such as protection of rights, violating rights, infringing rights, harm to rights, etc.

consideration for their welfare” (OL IV: 3). These acts, he claims, may be “justly punished by opinion, though not by law” (OL IV: 3).<sup>89</sup> These acts may very well contain some of the aforementioned “offensive conduct” that Mill discussed as being primarily self-regarding. It is not the case that it does not interfere in the interests of others, surely none of us *want* to be offended, but the interference is not of a significant interest that one has. To prevent such conduct it seems, for Mill, would fail a balancing test and would be overly invasive of individual liberty because such conduct falls into the primarily self-regarding sphere that still affects others to some degree.<sup>90</sup> We do not have a “right” not to be offended and some offensive acts may be considered “wanting in due consideration” for others but are not intrusive of significant interests of others.<sup>91</sup>

#### *1.2.4 Division of Acts*

So, there are at least three types of acts and these types of acts may be regulated in different ways. The type of acts are: 1. those that interfere with the liberty/rights/significant interests of others. These are other-regarding acts that interfere with the significant interests and rights of others.<sup>92</sup> 2. Those that do not interfere with the rights/interests of individuals but do not properly respect the welfare of others. Mill claims that these may be “hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights” (OL IV: 3). These are other-regarding but, for Mill, fall on the line between primarily other-regarding and primarily self-regarding. These are minor infractions which are

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<sup>89</sup> These acts will be discussed in later chapters and belong in what I call the “extra-legal domain.” See for instance, chapter 3.1.

<sup>90</sup> The balancing principle that Mill utilizes will be discussed in Chapter 6.6 and will be referenced throughout this work.

<sup>91</sup> See chapter 1.2.2.

<sup>92</sup> These other-regarding acts may be covered by other branches of the law, such as tort or civil law but some may not be covered by the criminal law.

still other-regarding but do not cause the sort of harm that is relevant for the criminal law.<sup>93</sup> As indicated above, some offensive behavior may fall into this category though it seems that Mill would classify most offensive behavior as primarily self-regarding. And most important for Mill's discussion here, 3. those acts that primarily affect the individual (or others with their consent) and are self-regarding. These are clearly self-regarding but may also include some of the offensive behavior that does not harm others.

The latter domain is frequently criticized as a chimera because all important actions affect the feelings and lives of others to some degree. However, this seems to be missing Mill's point. He is not saying, and does not pretend, that the actions of individuals do not affect others, what he is doing here is providing a delineation (an admittedly sloppy one) as to which sorts of acts are acceptable to restrict in order to preserve the liberty of others while also granting the most robust liberty to those who would be restricted. But it is this third category of self-regarding acts which are of central importance for a liberal iteration of the harm principle because Mill believes that they may not be prohibited under *any* circumstances because they do not harm others. The second category, Mill seems to suggest, may be covered by extra-legal social pressures. They may be hurtful or harmful but do not violate or infringe any rights. And while they fail to consider the welfare of others, they may not be prevented by legal means.<sup>94</sup> Here extra-legal just means those things that are not covered by the law. It does not refer to illegal coercive interferences but rather things such as social pressures or "moral coercion." The first category contains those acts that are generally accepted legitimate restrictions on the liberty of certain people because those individuals are harming others.

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<sup>93</sup> The harm relevant is that that implicates rights. I will discuss rights in chapters 3-4.

<sup>94</sup> This will be covered in more detail in chapter 2.4.2.

### 1.2.5 Direct and Indirect Effects

There is another distinction that Mill attempts to make to clarify his harm principle. This division can be seen when he claims that “there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest” (OL I: 12). This sphere contains acts which affect the individual alone “or if it also affects others, only with their free, voluntary, and undeceived consent and participation” (OL I: 12). Mill, nevertheless, admits that many may still disagree that the aspect of an individual’s life that both affect and do not affect others are indeed distinct. Critics may claim that there can be no actions that harm, affect, or involve only a single individual. The critic may claim that “it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections, and often far beyond them” (OL IV: 8). When Mill claims that it affects only the agent in question and not others he means directly and not indirectly.

Many actions, if not all, affect others to some degree indirectly. This means that others are affected but only obliquely through the agent him/herself. In other words, anything that an agent does will affect others; however, the *manner* in which others are affected matters when performing an act. If someone merely dislikes or disapproves of an act that the agent is performing, this affects that person but not appreciably and it definitely does not interfere with the other’s significant interests. What a co-worker, friend, lover, child does, believes, and thinks affects those around him/her<sup>95</sup> but if a person chooses, for instance to partake in a juice fast, this does not really affect those around him/her directly (but rather indirectly) even if others think

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<sup>95</sup> While we may think that what someone thinks or believes does not affect others, it does because what one believes and thinks is often expressed through actions, etc. Even if the agent who believes and thinks things does not realize that he/she is expressing these things. Think of racism. People who have racist beliefs or thoughts often reflect these thoughts both unconsciously and unintentional through behavior.



that juice fasts are foolish or harmful to the body.<sup>96</sup> The same goes for drinking an alcoholic beverage, which is the example that Mill favors, because while it may be the case that people dislike or disapprove of drinking alcohol, it does not harm or significantly affect those others in the usual case. These are examples of primarily self-regarding acts. They may be immoral, they may be offensive, but they are not significantly harmful to others or do not harm their significant interests.

### *1.2.6 The Self-Regarding Sphere*

Mill lists several categories which he believes to be part of the self-regarding sphere. The first is the inner “domain of consciousness” including the “liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological” (OL I: 12). This domain also includes the separate but related area of public expression and freedom of press. (Mill spends considerable time defending the thesis that freedom of thought and speech are of fundamental importance and I will come back to this topic.)<sup>97</sup> The second area of the self-regarding sphere is the “Liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like ... so long as what we do does not harm them” (OL I: 12). The second aspect contains those actions like drinking alcohol or going on a juice fast. It may also contain other, more controversial, things like euthanasia, suicide, and doing drugs. These acts are often perceived as harmful to the agent who

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<sup>96</sup> The direct and indirect distinction is an important one to make and Mill makes this distinction in order to highlight the self-regarding/other-regarding distinction. However, we must also consider harm and if an act is other-regarding and harmful, the degree of harmfulness then becomes the most significant factor in determining legitimate or illegitimate legislation.

<sup>97</sup> The discussion of free speech will occur in chapter 5–6 comparing and contrasting harmful language and speech in order to showcase the role of the legal harm principle in determining legislation. I ultimately believe that Mill overstates the case for the liberty of expression and this seemingly absolutist position is not consistent with his principle.

performs them (and those who voluntarily participate in the acts with them); however, they are primarily self-regarding acts and are undertaken voluntarily. The third aspect of the self-regarding sphere covers the “Freedom to unite, for any purpose not involving harm to others” (OL I: 12). The third self-regarding aspect of liberty covers consensual acts and is also significant when considering issues such as Ku Klux Klan or white supremacist rallies or other such gatherings that stray dangerously close to legislatable other-regarding behavior.<sup>98</sup> Acts like engaging in prostitution or promiscuity, engaging in homosexuality, and attending book clubs or other meetings are part of this arena.

There is also additional criticism related to such acts because of behavior that may follow from participating in these acts. For instance, it could be the case that agent A decides to visit a prostitute. His visit to the prostitute affects not only himself and the prostitute (a willing, consenting, adult participant), but also perhaps his brother, child, friend, sister, mother, neighbor, etc. (OL IV: 9). In many cases, it is not direct harm of others but indirect harm that critics describe. Indirect harm caused to “near connections,” such as embarrassment, failure of a role model to behave accordingly, disgrace of a family, or even most instances of offense (that are not also harmful), are not enough to transform an act from a self-regarding to an other-regarding act because it is not the case that the “harm” caused in these cases is sufficient enough to infringe on an individual’s liberty.<sup>99</sup> To do so would have negative repercussions for liberty and individual freedom.

If, on the other hand, through this self-regarding action, agent A inflicts direct harm on others, such as passing on AIDS or other sexually transmitted diseases to offspring or other

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<sup>98</sup> This topic will be further discussed in chapter 5–6 when discussing the limits of freedom of expression.

<sup>99</sup> Part of the reason for this is that they do not have a claim on us or we do not have a duty toward them. This issue with claims will be discussed in chapters 4 and 5.

sexual partners, use of funds that would prevent the care of dependents, physical harm to others, or the breaking of a vow, then his behavior may be subject either to the law or social pressures. For example, if agent A spends her child support money on gambling or some frivolity, and is thus unable to take care of her child, it may be the case that her behavior should be censured and she should be held liable. However, in this case, Mill stresses that it is not the act of gambling that is reprehensible, but the failure to fulfill the parental duties that is the actual problem with the act. So, again, it is not exactly clear that even in cases of direct harm to others due to an individual's acts that the act that people may attempt to prohibit—gambling—is morally unacceptable because it is often corollary behavior that makes the act wrong—the failure to pay child support. In other words, gambling as an act should not be prohibited because it does not harm others but failure to pay child support is really what causes the harm and *that* behavior, not the gambling *per se*, should be prohibited (OL IV: 10). When a society condemns certain acts, such as prostitution, gambling, and drug use, as harmful, it is often not based on the self-regarding action, but some other act that may be prohibited by law or morality. Thus, Mill argues that many acts that are typically reviled as impermissible for others to perform are really self-regarding actions that in themselves are not wrong, and the law or the state has no justification for prohibiting them simply because they flout custom or have the potential in some cases to lead to harmful acts.<sup>100</sup>

### 1.2.7 *The Individual Case*

While the above-mentioned actions themselves are generally harmless to others, if in individual cases negative consequences to others follow on a regular basis, for instance a certain

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<sup>100</sup> The topic of “overcriminalization” is related to this idea. For an excellent discussion that seems to be in line with Mill, See Douglas Husak, *Overcriminalisation* (Oxford: Oxford University Press, 2007).

individual consistently abuses a spouse or fights others when under the influence of alcohol, such a case may justly warrant interference *in this case* because the predictable likelihood of harm that would follow. Mill claims that

The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment. Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, *personal to himself*; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity. The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others (OL V: 6 Emphasis added).

However, if there is no harm to others then such things “cannot without tyranny be made a subject of legal punishment; but if ... a man fails to perform his legal duties to others ... it is no tyranny to force him to fulfil that obligation” (OL V: 6). Yet, it is important to emphasize that the legitimate restriction would be *for that particular individual* or to use Mill’s words “personal to himself” and not for everyone who participates in the action in question. So, if the individual is known to be violent when consuming alcohol, *that individual* can legitimately be prevented from drinking alcohol. Additionally, on this account, gun laws which restrict certain violent felons from using firearms or those with psychiatric illnesses would be acceptable on a Millian account because they cease to be primarily self-regarding and begin to fall into the realm of other-regarding conduct.

## 1.3 The Harm Principle, Self-Regarding Acts, and Consent

### 1.3.1 *The Magic of Consent*

In dividing acts into those with which it is permissible to interfere and those it is not, acts that are both harmful and other-regarding seem to clearly fall into the permissible realm of interference in the liberty of others. For instance, you punch me in the face. This is harmful and other-regarding. This act would be covered by the harm principle and could be prohibited. But what about boxing? On the surface, boxing is you punching me in the face but it is not generally thought to be an acceptable realm of interference. Why not?—because of the magic of consent.

Consent takes acts that on their face seem to be unacceptable and transforms them into acceptable and legitimate acts which are protected by Mill's self-regarding sphere of liberty. Here is another useful illustration: someone removes a perfectly healthy kidney from my body. The kidney is healthy and non-diseased, kidneys are useful to me, and thus I have an interest in keeping my kidney. To take my kidney would be harmful and other-regarding and would rightly be prevented by the harm principle. However, if I freely consent to you taking my kidney, it seems that it is no longer an unacceptable act with which others may interfere.

When discussing such self-regarding acts, Mill claims “there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, *or if it also affects others, only with their free, voluntary, and undeceived consent and participation*” (OL I: 12 Emphasis added). The harm principle states that acts that cause harm to others are a legitimate reason for interference in the liberty of individuals. Acts that harm only the self or other non-harmful self-regarding acts are not legitimately interfered with and we see that when Mill considers and outlines self-regarding acts, his third category of self-regarding acts includes

agents uniting of their own free will. While this third category of self-regarding acts seems to be other-regarding (after all, it seems that if my actions involve another that means it is other-regarding), Mill focuses on the idea that they are consensual. Indeed, one of the concepts Mill builds into the harm principle is consent and when someone offers his/her valid consent to what would ordinarily be considered a harmful act, the consent transforms the act so that it is no longer legitimately prohibited as a harmful other-regarding act.

In a way, consensual acts between several individuals transform the act so that, for Mill and most liberals, these consensual acts are not really other-regarding and now fall into the primarily self-regarding sphere. It is perhaps better thought of as several individuals performing self-regarding acts together, this still has an other-regarding component but it is not an impermissible sort of other-regarding act. This category of actions is specifically delineated by Mill's third category of self-regarding conduct, namely the "Freedom to unite, for any purpose not involving harm to others" (OL I: 12). This category concerns all consensual acts. Consent effectively legitimizes certain acts that, without consent, could be legislated as coercive other-regarding acts. This consent takes these acts out of the sphere of legitimate interference and places them firmly into the inviolate self-regarding sphere.

For an act to be consensual, all parties must voluntarily grant permission. If they are not consented to by each party they may be harmful other-regarding acts. But, when an agent consents to an act, the act becomes a part of the self-regarding sphere. When something is self-regarding and not harmful, others are not permitted to interfere in the liberty of those acting agents. The harm principle is concerned with determining legitimate coercive interference in the liberty of others. Because of the consent, these acts are no longer a concern of the harm principle since the acts are now transformed into self-regarding acts, which are not properly regulated by

the harm principle (the exception of course, is unless such consensual group actions would harm innocent nonconsenting third parties). And while consensual acts do involve others, since there is consent, they seem to revert back into primarily self-regarding acts that are done with others (who are also doing something that is primarily self-regarding). Consensual acts are not regulatable because they are not interfering with the person's interests; in fact, it seems that we are respecting the interests of the agent in question when we do not interfere with consensual acts and to prohibit such behavior would be to go against the agent's interests.

### *1.3.2 Consent and Personal Autonomy*

In part, consent plays such a significant role in legitimizing certain sorts of conduct because of the value that Mill and other liberals place on the concept of liberty and personal autonomy. While Mill does not speak in terms of "autonomy" he seems to provide an account of personal freedom and autonomy that speaks to subsequent liberals. Indeed, even the Kantian philosopher Onora O'Neill claims that "contemporary conceptions of rational autonomy ... owe more to John Stuart Mill than to Kant" and "they rely on background theories that see rational action as guided by individuals' desires, preferences, beliefs, and 'identities.'"<sup>101</sup> My autonomous realm is an inviolable realm in which others may not impede without my direct consent, i.e. it is a primarily self-regarding realm. If another interferes with me, they are doing something wrongful, i.e. something that unjustifiably sets back my interests, harms me, violates or infringes my rights, and that person's actions may be subject to the law.<sup>102</sup> On the other hand, if I consent to an act, I cannot legitimately complain to the government or law when the act

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<sup>101</sup> Onora O'Neill, *Constructing Authorities: Reason, Politics, and Interpretation In Kant's Philosophy*, (Cambridge: Cambridge University Press, 2015) 127.

<sup>102</sup> Feinberg, *Harm to Self*, 22–25.

occurs.<sup>103</sup>

Consent seems to be a common and necessary determining moral factor in permissible and impermissible human interactions. It determines the difference between battery and sport, in fist fighting vs. boxing, for instance, of theft and gift, rape and sex, and more generally, perhaps most importantly for this analysis, between wrongful harm and legitimate voluntary acts.<sup>104</sup>

Consent represents a norm for determining permissibility. When an agent consents to an act, the act is no longer legislatable because it is taken from the harmful other-regarding sphere and placed in the self-regarding sphere. Yet once again, it is the act of consent that serves as a legitimizing factor. But not all instances where there appears to be consent legitimizes the shift from the other-regarding sphere to the self-regarding sphere. When consent does have this legitimizing ability it is considered to be *valid* consent. For this shift to be legitimate the consent must be valid. If the consent is invalid, then there is not a legitimate shift into the self-regarding sphere. But what exactly makes consent valid?<sup>105</sup>

### 1.3.3 Valid and Invalid Consent

Generally, there are three conditions that distinguish valid from invalid consent: 1. mental competence, 2. voluntariness, and 3. not being deceived (sometimes understood as being

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<sup>103</sup> Unless the consent was gained through illegitimate means, such as force or fraud, in which case it is not valid. See discussion below for valid consent.

<sup>104</sup> These examples are common in the literature on consent and are used frequently without citation by authors, see Igor Primoratz, "Sexual Morality: Is Consent Enough?," (*Ethical Theory and Moral Practice* 4, no. 3 (2001)) 201; Leo Katz, "Choice, Consent, and Cycling: The Hidden Limitations of Consent," *Michigan Law Review* 104, no.4 (2006): 628; Kimberly Kessler Ferzan, "Clarifying Consent: Peter Westen's The Logic of Consent" *Law and Philosophy* 25, no.2 (2006): 194, in reference to a statement by Peter Westen in his text p. 15 and subsequent articles, etc.

<sup>105</sup> Some of what follow on consent draws from sections in chapter 3 of Kathryn Zawisza, *The Ins and Outs of Prostitution: A Moral Analysis*.



informed).<sup>106</sup> If any of the three components are missing, the consent is invalid. Mill himself sets forth criteria along these lines when he argues that the “freedom to unite” only extends to those “of full age, and not forced or deceived” (OL I: 12). And later he claims that “there is no room for entertaining any such question [relating to interfering with an individual] when a person’s conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding)” (OL IV: 3). These components determine when acts are consensual or coercive (not valid consent). In other words, if an individual does not have the relevant understanding of the situation, the act is coercive. If the person is physically or verbally forced, the act is coercive. If the person is too young/immature mentally, the act is coercive. In all of these cases, we could justifiably interfere.

#### *1.3.4 Mental Competence*

The first criterion, mental competence refers to agents being able to adequately understand what is occurring. There are different reasons why a person would lack the necessary capacity to make a decision, some of these capacities are a permanent condition and others are temporary. A person who is mentally ill or mentally disabled is considered incompetent to validly consent in many circumstances. Determining the degree of the impairment is important, as in some cases those with mental impairments are not impaired to such a degree that *all* acts of consent are automatically invalidated. However, while severe mental diseases or disabilities are often permanent or develop into a semi-permanent condition (consider senility), this is not

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<sup>106</sup> These criteria are generally agreed upon by most theorists who discuss consent. See Peter Westen, *The Logic of Consent*; David Archard, *Sexual Consent*; Joel Feinberg, *Harmless Wrongdoing* and *Harm to Others*. Even Mill refers to these criteria.

always the case and indeed some mental diseases or disabilities can be reversed using medicine or are merely temporary conditions (consider intoxication or a concussion).

The most clear-cut and common instance of someone with a “temporary” case of mental incompetence is in children who are under the “age of consent.” At one point in all our lives we were unable to give valid consent to an act because we were unable to fully comprehend the nature of the situation or to make an informed decision about it. As we grow and mature, we gain the ability to comprehend situations and provide valid consent. This ability varies in all individuals and each individual may gain the ability at different times. The law attempts to reflect this when it determines ages of consent. There are different ages set by law for different situations depending on the impact the decision could have on a minor’s life (such as sexual intercourse or the legal drinking age) or even society at large (as is the case with setting a voting age or the legal drinking age).

Unfortunately, the age of consent that is set by law can oftentimes be problematic as it is generally used to determine mental maturity and some individuals mature at differing rates.<sup>107</sup> It is important to recognize that while age of consent laws attempt to capture the reality that those without mental maturity ought to be protected, the law itself does not *determine* actual mental maturity. Nevertheless, setting an age under which one lacks the ability to consent is both essential and beneficial because it protects the interests, well-being, and liberty of children who oftentimes cannot adequately protect themselves. However, once a person “comes of age” they are generally deemed competent to consent, thus making the incapacity merely temporary.<sup>108</sup>

This position regarding the age of consent is reflected in *On Liberty*. For instance, Mill

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<sup>107</sup> Having an age set by law does not mean that individuals cannot appeal to the law to have this age of consent waived, as is the case where minors petition to live on their own or get married when underage or have charges of statutory rape removed.

<sup>108</sup> Archard, *Sexual Consent*, 44.

claims that

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 (OL I: 10).

This would also apply to the above cases of those with severely diminished mental faculties that are permanent disabilities since those individuals “are still in a state to require being taken care of by others” (OL I: 10). Paternalistic policies for such individuals are acceptable for the law in general and the criminal law may only consider paternalistic policies if they apply to such individuals. Other cases that affect the ability of individuals to validly consent to otherwise harmful acts include the use of drugs and alcohol as well as temporary mental disturbances. These cases are some of the more difficult cases in which to determine valid consent because the nature of the incapacitation as well as the degree is not always clear.

### *1.3.5 Being Informed or Not Being Deceived*

Receiving all the relevant information is the second necessary condition for valid consent. This allows us to make an informed decision so that we do not unintentionally give our consent to something which we would not have otherwise.<sup>109</sup> Protecting citizens from the harm of such fraud is legitimate. What it means to receive all the “relevant facts” before validly consenting is difficult to outline. David Archard argues that “the person does not need to know everything, only everything that would make a real difference to whether or not she

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<sup>109</sup> This focus on consent and being adequately informed is related to the idea that Mill believes that utilizing our deliberative faculties is essential to well-being. Things that undermine such capacities or faculties are problematic. See chapters 5 and 6 for a discussion of deliberative faculties. The term is borrowed from David O. Brink’s *Mill’s Progressive Principles*.

consented.”<sup>110</sup> Some facts are easily understood to be relevant and others not. The relevant facts can include a number of things but tend to include “what is being consented to, prior or background information bearing on that which is consented to, or what may transpire in consequence of the giving of consent.”<sup>111</sup>

### *1.3.6 Voluntariness*

The last necessary component of valid consent is voluntariness which in some cases is closely related to the second knowledge criterion but in other ways surpasses simply being properly informed. When an agent is properly informed, that agent is able to assess whether or not to give valid consent. The less we know, the less free we are in choosing to consent. However, there are cases at the top of the scale in which there is no choice given to consent, such as when force, threat, or coercion is used. In all three of these cases valid consent is never legitimately given because of the lack of voluntariness.

Interferences that prevent this sort of interference are legitimate. All the same, there are cases in which an agent appears to “freely” consent to something which on the surface seems valid (i.e. there is no outward coercion or threat perceived) but upon further inspection is actually a case of other-regarding harm and can be condemned using the harm principle.<sup>112</sup> There are certain cases in which an action or choice falls somewhere on a line between completely unfree (compulsion by physical force) and free (completely voluntary). Compulsion and force are ways of acting toward a person without permission, there is no consent involved, it is something done

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<sup>110</sup> Archard, *Sexual Consent*, 46.

<sup>111</sup> *Ibid.*

<sup>112</sup> Cases like these are many and varied. There is the issue with offers versus threats, or acts that are semi-coercive (i.e. offers you cannot refuse).

to a person, not something to which there is any choice.<sup>113</sup> However, there are many other ways in which consent can be invalidated which have to do with illegitimate forms of coercion.

Consent is important because it helps to delineate when a person's rights have been violated or infringed.<sup>114</sup> For any act of consent to be valid, it must be free and informed, as well as given by an agent that is mentally competent. If these criteria are not met, the act is coercive and the consent is not valid. If the consent is not valid and there is harm to others, then the government may be permitted to enact laws to prohibit such a violation of another's rights. If the consent is valid then it falls within Mill's sphere of self-regarding liberty and outside of the domain of the harm principle.

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<sup>113</sup> Feinberg, *Harm to Self*, 190.

<sup>114</sup> I will discuss rights in chapters 3–4.

## Chapter 2 A “Simple” Principle?

### 2.1 Mill’s *Very General Harm Principle*

While Mill believes that all coercive actions, whether by the individual or the government, can be governed by “one very simple principle”—the harm principle—it seems he does not always distinguish which behaviors are acceptable for the *law* to cover and which are not (OL I: 9). In other words, it is not always clear which acts he considers to warrant interference *by the government* and which acts are merely within the domain of *public extra-legal*<sup>115</sup> coercion or even completely independent of coercive intervention by anyone, even when harmful.<sup>116</sup> He makes claims such as

Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost (OL III: 1).

This passage suggests that there is a distinction and a line to be drawn between acts that are of a certain type which warrant *some* kind of interference by others (harmful other-regarding) and those that are not (self-regarding), but he seems to make a further distinction between those other-regarding acts that warrant *legal* interference and those that warrant merely *extra-legal* social interference. In other passages, Mill suggests that there is indeed a division between legal and extra-legal social coercion. For instance, he claims in some instances “the offender may then

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<sup>115</sup> Those acts that fall outside of the legal domain and into the public domain, such as social pressures and “moral coercion” though this can also be physical coercion by those who are not representatives of the law.

<sup>116</sup> A rough taxonomy of harmful behaviors will be discussed below.

be justly punished by opinion, though not by the law” (OL IV: 3). And that “if anyone does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation” (OL I: 11). However, he does not actually clearly set that line because he was not directly concerned with doing so in *On Liberty*.

In other words, Mill is concerned with the harm principle as a principle which is “entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control” (OL I: 9). His goal is general in that it does not matter “*whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion*” (OL I: 9 *Emphasis added*). But even here he recognizes that there are different criteria governing extra-legal social coercion and legal coercion. I believe that to understand the differences we really need to describe two separate principles, Mill’s “general harm principle” which dictates all behaviors which become the business of others when considering coercive intervention and a “legal harm principle” which determines which behaviors become the business of the state.

While I am not alone in recognizing this distinction—indeed Feinberg’s harm principle and four-part *Moral Limits of the Criminal Law* depend upon such a distinction<sup>117</sup> and later theorists such as Simester and von Hirsch depend upon it as well<sup>118</sup>—I wish to draw attention to

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<sup>117</sup> Feinberg recognizes his break from Mill at the start of his work on *The Moral Limits of the Criminal Law* when he states in *Harm to Others* that Feinberg’s principle “though broad, is still narrower than John Stuart Mill’s famous concern in *On Liberty* with ‘the nature and limits of the power which can be legitimately exercised by society over the individual,’ since our concern is only with power exercised by the state by means of the criminal law. Unlike Mill, we shall be concerned here only with the exercise of political power, thus neglecting those interferences with individual liberty that come from private associations, public opinion, or the ‘despotism of custom.’ Moreover, we shall ignore the subtler uses of state power, like taxation, indoctrination, licensure, and selective funding, so that we may focus more narrowly on statutory prohibitions enforced by penal sanctions. What our question has in common with Mill’s broader one is its emphasis on determining the legitimacy of exercises of power” (3). I follow Feinberg’s lead here.

<sup>118</sup> In their introduction to *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011), A.P. Simester and Andreas von Hirsch highlight their dependence on Feinberg who uses this distinction. Indeed, when laying out their theory they recognize that Mill utilizes the harm principle much more broadly than they do: “Mill’s endorsement of the harm principle as the sole basis for state intervention is not specific to the criminal law: it applies to any exercise by the state of coercive power over its citizens. As Mill conceived it,

the fact that it is a distinct or perhaps a sub-principle that Mill does not make explicit in *On Liberty*. Part of the reason it is important to make this distinction explicit and to look to what Mill says regarding both his general principle and a specifically legal one is that confusions tend to be introduced when we fail to acknowledge or emphasize this difference. It seems that many argue over whether he is *primarily* concerned with the law or extra-legal social pressure when defining his principle.<sup>119</sup> However, he is *primarily* concerned with neither and distinguishing between acceptable legal interference and extra-legal social interference is a separate but intimately connected issue with which he was not particularly concerned.

It seems that if we want to understand what Mill means by harm being the justifying criterion for interference and, further, what Mill intends to serve as a division between those acts that warrant interference *by law* and those that do not, we need to do a bit more interpretive work since he does not lay out a plan for dividing interference in this manner. As the above statements by Mill suggest, he acknowledges that there *is some sort of division* between what the law can and cannot cover but he does not lay out exactly what that division is. As I will outline in chapters 3 and 4, it seems that if we want to understand where the lines are drawn to separate the

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the Harm Principle applies both to civil and criminal law, to contract or tort as much as crime” (143). They do not here even acknowledge the even broader appeal by Mill to the extra-legal.

<sup>119</sup>In *Mill's Progressive Principles*, Brink states that in *On Liberty* “Mill is concerned with articulating principles to apply to restrictions on liberty in various contexts, involving different potential actors and different forms of coercion. He is perhaps most interested in cases where the state uses civil or criminal law to forbid conduct and applies sanctions for noncompliance” (136). He later says, “But the central case that concerns him, it is still fair to say, is that of legal prohibition by the state” (136).

Against the idea that Mill was primarily concerned with the law is Currin V. Shields in his introduction to Mill's *On Liberty* when he claims while this text is often “praised as a classic statement of the case for individual liberty from governmental control [,] ... such praise misses the mark” because Mill is primarily concerned with liberty that “does not directly concern the government” (xix). Similarly, Bernard Harcourt laments the contemporary tendency to incorporate Mill's Harm Principle as a legal principle in his 1999 article “The Collapse of the Harm Principle” in the *Journal of Criminal Law and Criminology* and his “Mill's On Liberty and the Modern ‘Harm to Others’ Principle” in *Foundational Texts in Modern Criminal Law*, ed. Markus D. Dubber. Oxford Scholarship Online, 2014. DOI: 10.1093/acprof:oso/9780199673612.001.0001.

C.L. Ten, *Mill On Liberty*, (Oxford: Clarendon Press, 1980) and Piers Norris Turner “‘Harm’ and Mill's Harm Principle,” (*Ethics* 124 (2014): 299–326) also argue that Mill is not primarily concerned with the law.



legal harm principle from the general harm principle and legal interference from extra-legal interference, we should focus on his discussions of interests, liberties, and rights.<sup>120</sup> These concepts, I will argue, aid in developing a full understanding of what is to count as the sort of harm or risk of harm that ought to be regulated by the state through the penal law.

When determining which acts fall under the legal domain for restriction and which do not, I will argue that it seems that the legal harm principle only covers those things that are of a certain type to justify the legally mandated punishments that accompany its restrictions. It seems then, that the first question for Mill in *On Liberty* is: “is there harm to others?”<sup>121</sup> If the answer to this question is “yes,” then society *may* intervene to prevent it—though this does not mean they *should* on balance. Mill often claims that it may be better not to intervene in some cases.<sup>122</sup> From there, a second question that seems to follow is: “if society may intervene, in what manner should they do so?” or “If the harm is enough to warrant interference, then when is legal interference appropriate?” Mill lays out some vague criteria that I believe we may use to derive a legal harm principle that is both broad and useful and I will address the criticism that it covers too much or not enough.<sup>123</sup> When assessing Mill’s understanding of harm in chapters 3 and 4, I will attempt to make the distinction between the general harm principle that Mill outlines and the legal harm principle that I am forwarding in order to understand how the harm principle can become a principle to determine criminal legislation. However, before delving into this quagmire, there is a bit more preliminary work that must be done to understand what Mill’s general harm principle covers.

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<sup>120</sup> I will discuss these in chapters 3 and 4.

<sup>121</sup> For an interesting discussion on this point, see Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle.”

<sup>122</sup> Mill, *On Liberty*, I: 6, I: 11, II: 44, etc.

<sup>123</sup> For the argument that Mill’s principle covers too much, see Bernard Harcourt, “The Collapse of the Harm Principle.” For the argument that it does not cover enough, see Feinberg’s *Offense Principle*, Michael Moore’s *Legal Moralism*, and Sara Conly’s *Legal Paternalism*.

## **2.2 Harm to Others: Necessary and/or Sufficient Condition for Justifying Coercive Interference?**

One of the first things that is often discussed in order to understand Mill's formulation of the harm principle is if/how the principle uses harm to decide the permissibility of the coercive interference of others. In other words, is harm or the likelihood of harm a necessary and/or sufficient condition for the legitimate interference in the liberty of others? Though there are different interpretations on where Mill stands relative to this question, part of this confusion rests on a few different confluences of what Mill is doing in *On Liberty*. There are two primary interpretive difficulties that we need to address to sort out the confusion.

### *2.2.1 Some Interpretive Confusions*

First, we need to understand that Mill is not focused on the legal question only. Mill does not separate his discussion of the general harm principle and the legal harm principle. Once we are clear on that, we can recognize that some interpretive difficulty is a result of theorists failing to make this distinction or failing to maintain adherence to this distinction. The second thing we need to keep in mind is what the scope of the harm principle is for Mill. This will help us to understand what he is actually trying to do. Mill is attempting to lay out the domain or the jurisdiction of society in interfering with individual liberty and is only then looking at potential justification of the interference, though he does mention and discuss both in various contexts. For instance, he seems to argue pretty strongly in his formulation of the harm principle that harm or likelihood of harm is necessary but it is not always clear if he thinks it is sufficient for both deciding the jurisdiction of society and justifying interference in liberty. And when we introduce the potential of a legal harm principle, there is further confusion as to whether harm is sufficient for justifying coercive legislation specifically because Mill is not attempting to actually create or

outline the conditions for a legal harm principle (OL V: 3).<sup>124</sup> I will proceed in my investigation by highlighting and focusing on the various confusions and conflations that arise when discussing what the conditions of the harm principle are attempting to define and then I will propose a solution as to how the confusions may be solved.

### *2.2.2 Necessary Condition for Justifying Coercive Interference*

To me, it is pretty clear that when Mill formulates the harm principle he means for harm or the likelihood of harm to be a necessary condition for justifying coercive social interference in the liberty of others as well as for determining the jurisdiction of social interference. Indeed, Mill appears to define the harm principle in such a way that harm or the likelihood of harm is a necessary condition for allowing interference in the liberty of individuals and the harm principle serves as the only legitimate principle governing coercive human interaction. Brink claims that “Mill clearly says that harm prevention is a necessary condition for restrictions of liberty to be permissible. [But] It is not clear whether he thinks that harm prevention is sufficient to justify restrictions on liberty.”<sup>125</sup> So here Brink is highlighting one of the difficulties that arises, namely that between conditions for restrictions on jurisdiction and justifying such restrictions.

### *2.2.3 Jurisdiction Versus Justification*

As Brink notes, in places Mill gives the impression that harm is sufficient “to make the conduct eligible for regulation”<sup>126</sup> but it is not clear that harm justifies such regulation. Again, part of the reason for this confusion is that Mill was not concerned to make this distinction. For

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<sup>124</sup> For an opposing position, see Currin V. Shields “Introduction” to *On Liberty*.

<sup>125</sup> Brink, *Mill’s Progressive Principles*, 137.

<sup>126</sup> *Ibid.*, 176.

instance, when talking of the social obligations that citizens have toward one another—not to injure the interests of others (harm them) and to bear one’s fair share in the labors and sacrifices—Mill states that these societal obligations “society is justified in enforcing, at all costs to those who endeavor to withhold fulfillment” (OL IV: 3). This suggests that society is justified in enacting and enforcing laws (at all costs this suggests) as well as less invasive forms of interference that prevent harm or risk of harm. This seems to introduce and discuss a sort of legal harm principle as distinct from the general harm principle. But this does *not* include *all* harm or risk of harm because Mill claims that the sorts of acts which society is “justified in enforcing, at all costs” are “certain interests, which, either by express legal provision or by tacit understanding ought to be considered as rights” (OL IV: 3). Since not all instances of harm to others are rights violations or infringements, it seems that at least in this case harm or risk of harm *as such* is not sufficient to justify legislative interference (or maybe even extra-legal interference, we do not yet know). So, it seems that certain sorts of interference may always be justified, namely those that protect others from rights violations, and thus may be sufficient for justifying interference.<sup>127</sup> This seems to suggest that harm or risk of harm *as such* may not be sufficient for justifying coercive intervention.

A further confusion is then introduced when Mill claims later in the same passage that “As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it” (OL IV: 3). If society has jurisdiction over all harmful (prejudicial) acts, then it seems that harm or risk of harm is a sufficient condition for justifying coercive interference in the liberty of others. However, deciding the jurisdiction of society is different

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<sup>127</sup> I make a distinction that I believe is found in Mill that rights-infringing harm and rights violations are distinct. Rights violations are justified, rights infringements are put into the domain of the law but legislation may not on balance be justified. See chapter 6.5.4 for instance.

than justifying coercive interference. The harm principle decides that harm is necessary and sufficient for the *jurisdiction* or domain of coercive interference but this does not mean that it *justifies* all instances of coercive interference even if there is harmful other-regarding behavior (which presumably is the domain or jurisdiction of the harm principle).<sup>128</sup> Brink makes this distinction clear when he claims that “for society to have jurisdiction over harmful conduct means that the conduct is in principle eligible for regulation or perhaps even that regulation of that conduct is in fact permissible. But neither of these claims implies that regulation is required or obligatory.”<sup>129</sup> This seems correct. However, he then says that this “demonstrates that Mill is not committed to a simple version of the sufficiency of harm for restrictions on liberty.”<sup>130</sup>

#### 2.2.4 Mill's Two Maxims

I believe that there is a passage in chapter V of *On Liberty* that can clear up some of these issues. Mill claims that the “doctrine of this essay” is divided into “two maxims” which together define the harm principle and must be “balanced” in order to determine “which of them [the maxims] is applicable to the case” (OL V: 1–2). First, he has the general harm principle to decide the domain of acceptable coercive interference (when society has jurisdiction) which he says is other-regarding harmful behavior. He claims that his first maxim holds “that the individual is not accountable to society for his actions, in so far as these concern the interests of no other person but himself” (OL V: 2). This defines the self-regarding realm which is not open to discussion of interference in liberty (unless it interferes with the interests of others).

This is the main limitation on coercive interference because there is no harm to others. In

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<sup>128</sup> Thanks to Richard Lee for pressing me on this point.

<sup>129</sup> Brink, *Mill's Progressive Principles*, 176.

<sup>130</sup> *Ibid.*, 176.

the second maxim Mill defines the other-regarding sphere as an appropriate domain for *discussing* coercive interference as well as *justifying* it. He claims that “for such actions as *are* prejudicial to the interests of others, the individual is accountable, and *may* be subjected to either social or to legal punishments, *if society is of the opinion that the one or the other is requisite for its protection*” (OL V: 2 Emphasis added). This latter part of the second maxim suggests that there is something further needed to *justify* the actual interference once the domain has been established. So, individuals *may be* subjected to the law or extra-legal intervention *if* certain other things are considered. This is one of the places in *On Liberty* where Mill seems to recognize the need for sub-principles, such as the legal harm principle. He actually seems to use his second maxim, which is itself something like a sub-principle, to build these sorts of subsidiary principles into the general harm principle which may expand the scope and usefulness of the harm principle as a method for determining legislation.

### 2.2.5 Jurisdiction

So, I suggest that the discussion of necessary and sufficient conditions in relation to the harm principle rests on a confusion as to what the harm principle’s main goal is. The harm principle, while worried about justifying coercive interference, nevertheless focuses on determining the proper *jurisdiction* of the harm principle first (determining if society *may* interfere not saying it ought to). However, this is not to say that Mill ignores the need for justification when defining his harm principle. Indeed, he claims that while harm is necessary for determining justification of liberty invasion, there are several other balancing factors that may decide if society *should* interfere. When Mill claims that “... if society is of the opinion that the one or the other [social or legal interference] is requisite for its protection (OL V: 2),” or that

“the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion (OL IV: 3),” it is these sorts of claims that breed confusion as to whether harm or risk of harm serves as a sufficient condition for justifying interference in the liberty of others or serves as a sufficient condition for determining the jurisdiction of society, especially legislative interference.

When Mill introduces considerations of balancing to determine when society ought to interfere, he is building criteria for justification. So, when discussing “prejudicial” or harmful conduct he is specifying the domain or jurisdiction for discussing coercive interference. Once the acts are in the domain of the harm principle, Mill suggests that there are certain sorts of harm to others that are acceptably/justifiably interfered with by the law and those that are not. He claims that all agents have an obligation to refrain from conduct that injures the interests of others “or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights” (OL IV: 3). This begins his demarcation of a legal harm principle as distinct from the general harm principle. As will be discussed in chapters 3 and 4, it is in these cases that we may interfere with the liberty of others through the law.

Mill claims there are other cases in which we are not able to interfere using the law. These acts that may not be limited may include those that are “hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights” (OL IV: 3). Mill then claims that someone who acts in a manner that is hurtful (but not a rights violation) “may then be justly punished by opinion, though not by the law” (OL IV: 3). So, it seems that while Mill is claiming that with the harm principle harm or risk of harm is both necessary and sufficient for putting the act into the *domain* of discussion of interference by society, he is not really making any claims as to whether harm or risk of harm is sufficient for

*justifying* coercive interference. This is not to say that he does not *suggest* that it is *not* sufficient when he highlights several alternate considerations that would counter-balance or deny the justified interference in liberty as he does in the passage above.

For instance, Mill states that just because harm *can* justify intervention does not mean that it *always* justifies it (OL V: 3). If anything, Mill specifically states that he does not believe that harm is sufficient for justifying societal interference when he says that “it 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” (OL V: 3). In other words, harm or risk of harm to others is the only thing that *can* justify interference, but this does not mean that it *will* justify interference in each case or even most cases; countervailing reasons often arise.

### 2.2.6 *The Importance of Separating Justification from Jurisdiction*

However, Brink suggests that there is a problem if Mill does not hold that the harm principle is a sufficient condition for *justifying* interference because

if Mill wants to defend one very simple principle about restrictions on liberty, then harm prevention had better be a sufficient, as well as a necessary, condition for restriction. Because if harm prevention were only necessary, then it looks like we would need additional principles to determine if regulations were appropriate. So there is at least *prima facie* reason to treat Mill, at this point, as claiming harm prevention is both necessary and sufficient for restricting liberty.<sup>131</sup>

Indeed, later he claims that

if Mill rejects strong sufficiency then this compromises his one very simple principle. For only strong sufficiency shows that the harm principle is the complete guide to the regulation of liberty, telling us when regulation is permissible and when it is required. Even weak sufficiency [*pro tanto* or *prima facie*] implies that the harm principle must be supplemented with some other

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<sup>131</sup> Brink, *Mill's Progressive Principles*, 137.



principle, such as the utilitarian principle, in order to determine if regulation is permissible, much less required.<sup>132</sup>

However, while Brink earlier highlights the difference between jurisdiction and justification,<sup>133</sup> it seems that here Brink is failing to make this distinction clear. Once that distinction is made we can see that harm or risk of harm may be a sufficient condition for determining the *jurisdiction* of the harm principle but not for *justifying* legislation, which is what Brink seems to be discussing here. It need not be a sufficient condition for the latter because for the principle to be “simple” it need only have harm as a sufficient condition for determining jurisdiction not regulation because the harm principle as such is not even attempting to determine what legislation or regulation should or could be enforced. Mill is only, at this point, concerned with whether it is acceptable for society to interfere or not, and he is not really concerned overall in *On Liberty* to settle how society is to interfere (though he frequently discusses applying the principle of utility in the balancing of harms to make such a consideration).<sup>134</sup>

The harm principle is a very general principle and does indeed provide a basic guide to determine if society *may* interfere. Further principles may be necessary to determine *how* and *when* they should interfere. This, I believe, is what theorists, including Brink, often overlook. While Brink recognizes Mill’s mixed motivations he neglects to maintain this distinction and claims that while Mill is interested in “restrictions on liberty in various contexts” Mill is “perhaps most interested in cases where the state uses civil and criminal law to forbid conduct and applies sanctions for noncompliance.” And “it may be worth remembering the variety of

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<sup>132</sup> Brink, *Mill’s Progressive Principles*, 178.

<sup>133</sup> *Ibid.*, 137, 176.

<sup>134</sup> It is important to note that he is asking a domain question but addresses justificatory questions throughout, especially when discussing his examples and defending his argument in favor of free speech in chapter II of *On Liberty*. When discussing Mill’s second maxim, I discuss his inclusion of balancing considerations. See chapter 3.1.2.

restrictors and restrictions that concern Mill. But the central case that concerns him, it is still fair to say, is that of legal prohibition by the state.”<sup>135</sup> This view is mistaken. It seems that in our desire to apply the harm principle to legal regulations—which would be a useful tool—we miss the fact that Mill is not actually trying to do that with the harm principle. Though Mill seems to acknowledge that the law is appropriate in some situations and extra-legal means are appropriate in others, he does not use the harm principle to yet solve that problem. We do in fact need a secondary or sub-principle that determines how and when society can interfere but that is not to say that Mill is mistaken when he claims that this is the only principle necessary to determine “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*” (OL I: 9 Emphasis added). Because here, he even states that he is not concerned with *which* types of coercion is used, only *that* coercion occurs.

### 2.2.7 *The Use of a Separate Legal Principle*

Introducing a kind of legal harm principle that acknowledges and relies on the general harm principle that Mill supplies and interpreting Mill’s view on when and how society may step in would be beneficial and address Brink’s and other theorists’ concerns while also noting that Mill is less specific (because that is not his primary goal) on the necessary and/or sufficient conditions for justifying legislation. This is not to say that Mill is silent on the matter and indeed his discussions on the law and legal restrictions are part of what breeds confusion. When Mill discusses the sorts of regulations that may or may not be acceptable or legitimate for the law to enact, he seems to have specific sorts of harm in mind. This is most clear when he singles out

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<sup>135</sup> Brink, *Mill’s Progressive Principles*, 136.

“rights violations” as being justifiably limited through the law but harmful acts that do not violate rights are not justifiably limited through the law though they may be through extra-legal means (OL IV: 3).<sup>136</sup> He seems to consider the nature of the harm or potential harm, the seriousness of the harm, and the likelihood of the harm that the regulation would prevent and the harm that restriction would produce as being the primary considerations one ought to make when determining whether forbidding or restricting a potentially harmful act is justified through a particular method. Harm or risk of harm must occur, but the harm or risk alone is not always enough to justify interference legally or otherwise. Mill allows, as do most theorists, for there to be additional countervailing reasons not to regulate the behavior.<sup>137</sup>

This consideration may seem like a utilitarian proposal; however, preventing harm, on virtually all theories, is the (or at least “a”) primary concern of the criminal law, regardless of the theory.<sup>138</sup> Yet, if the harm in question is a relatively minor rights infringement or does not violate a “right” as Mill states it, then there is little reason to restrict the behavior and the harm in this circumstance would not provide a reason to enact any kind of penal regulation because the harm of the regulation in these cases is much more severe than the harm of the acts in question. Many theories rely on a balance test such as this.<sup>139</sup> Trivial occurrences are, on balance, too minor to be a decisive measure for the criminal law (though all harm, one could argue is relevant).<sup>140</sup> Such

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<sup>136</sup> This is the main discussion in my Chapters 3–4 below.

<sup>137</sup> See, for instance Joel Feinberg’s formulation of liberty limiting principles which “put fort[h] a kind of reason it claims always to be relevant—always to have some weight—in support of proposed legal coercion, even though in a given instance it might not weigh enough to be decisive, and even though it may not be the only kind of consideration that can be relevant” (*Harm to Others*, 10). See previous chapters for discussion.

<sup>138</sup> This consideration is really an anti-paternalistic policy and is attempting to distinguish those acts that may be interfered with and those that are not.

<sup>139</sup> Again, even Paternalists and Moralists such as Michael Moore and Patrick Devlin utilize such considerations and methods when determining regulation and legislation. I will discuss this balancing test further in chapter 6.6 though it is not the focus of my argument.

<sup>140</sup> Though perhaps Mill would argue some minor instances of harm would be appropriate for extra-legal interference.

trivial sorts of harm would generally not be enough to legitimize legislation and no one really believes that they ought to be covered through the penal law even if they are included in its domain. The harm that would happen to individual liberty if such acts were regulated, as well as practical considerations—like increases in taxes to cover the cost of imprisoning individuals for minor infractions—would be much more harmful than the initial act. And while it is the case that other-regarding acts of harm are sufficient for determining the jurisdiction of society under the general harm principle, there is a threshold of harm to others under which even Mill believes individual liberty ought to prevail against the interference of others. This is seen when Mill argues that in some instances of harm to others the individual him/herself may be the best means for preventing the harm because any interference by others in any manner would be more harmful than the initial harm.<sup>141</sup>

Brink, acknowledging Mill's utilitarianism, later argues that Mill seems to support a "weaker version of sufficiency" based on the idea that there is a *prima facie* or *pro tanto* case for regulation whenever one is harmed or is likely to be harmed.<sup>142</sup> He rightly claims that "if the regulation is more harmful than the behavior in question, it may be best not to regulate, despite the *pro tanto* case for regulation."<sup>143</sup> This seems relatively straightforward and uncontroversial but still seems to miss the point of what Mill is doing. Again, yes. Mill believes that harm provides a *pro tanto* or *prima facie* case for regulation but regulation is only one means of interfering in the liberty of others and regulations and the law are only a steeper consequence or more formal sanction than extra-legal interference which is often the more appropriate means of

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<sup>141</sup> Though he does not always indicate which acts these may be, throughout *On Liberty* there are examples (some may be found in chapter V). One example that Mill addresses is alcohol use. While we may claim that drinking is bad and that others should not drink because some people are prone to violence when they drink, prohibiting drinking based on these cases would be more harmful than beneficial because of the level of interference in liberty would not be less than the initial drinking.

<sup>142</sup> Mill, *On Liberty*, I: 11, Brink, *Mill's Progressive Principles*, 176–7.

<sup>143</sup> Brink, *Mill's Progressive Principles*, 177.

interference according to Mill's harm principle.

However, if Mill supports a “weak sufficiency,” as it appears, then Brink still contends that “this compromises [Mill's] one very simple principle” because the harm principle must rely on other principles, such as the principle of utility or Mill's two maxims<sup>144</sup> (to which we know Mill appeals) and what Feinberg calls mediating maxims<sup>145</sup> (which may include the former two principles). However, claiming that the harm principle is the primary or “absolute” governing principle (OL I: 9) does not necessarily preclude other sub-filters or balancing considerations from aiding in determining the *application* of the harm principle as it relates to regulation especially considering that Mill's overall goal is much broader than just legislation or legal restrictions and applies to *all* interventions in liberty. I will discuss this question of application and mediating maxims in chapter 6.

### **2.3 Justifying the Harm Principle: The Tyranny of the Majority**

Mill claims that *On Liberty* is concerned with the “limits of the power which can be legitimately exercised by society over the individual” (OL I: 1). While I, for the most part, am concerned with the legitimate limits of the penal law (not even of government generally) Mill concentrates here not only on the limits of government and the criminal law, but also (or according to some interpretations, perhaps primarily<sup>146</sup>) on the limits of society and its pressures on individuals. Mill believes that societal pressures can be as invasive, sometimes much more so, than governmental intrusion into the lives of individuals because there are pressures that

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<sup>144</sup>These maxims are discussed above.

<sup>145</sup> I will discuss this in Chapter 6.6.

<sup>146</sup> For example, Currin V. Shields, in his introduction to *On Liberty* claims that while this text is often “praised as a classic statement of the case for individual liberty from governmental control [,] ... such praise misses the mark” because he is primarily concerned with liberty that “does not directly concern the government” xix.

individuals can put on others that are more constant than legal strictures, such as customs, morals, and rules of conduct (OL I: 6), over which the government generally does not, and ought not, have any say. Mill claims that the oppression that stems from the “tyranny of the majority” goes further and oftentimes is more nefarious than political oppression because “it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself” (OL I: 5).

It is important to stop and explain what Mill means by tyranny of the majority because it brings to mind the idea of numerical majority and it need not be an actual majority. Indeed, when Mill discusses ideas of liberty he notes that in reality, neither government of oneself by oneself nor the will of the people is an accurate depiction of what tends to occur because there is a community in which certain ideas tend to dominate and this may lead to subjugation of others in the community. He claims that

The ‘people’ who exercise the power are not always the same people with those over whom it is exercised; and the ‘self-government’ spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power (OL I: 4).

The majority, then, may very well be those with the requisite power, even if they are few in number. They may manage to make their concerns, opinions, and interests of primary importance and attempt to quell opposition to the status quo through either social control or, if they have it, political control. Mill admits that until people stop to think about the influence of custom, for the most part they tend to be more concerned with abuses of political power (OL I: 5). However, even if the majority (or most powerful) do not manage to gain political control, those who are powerful or more numerous or even those that shout the loudest can often manage to exert

control through customs, morals, and sheer force of will.

This social tyranny, when endorsed as a public morality, can oftentimes be translated into a principle of law (legal moralism). Because of this, Mill believes that steps must be taken to ensure protection of certain basic individual liberties. He points out that

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression ... Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them ... There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism (OL I: 5).

In this instance, the law can actually serve as a useful tool in curbing the illegitimate extra-legal means of coercion that Mill cites by enacting legal barriers which protect against the tyranny of the majority. However, Mill's concern is what happens if we were to allow prevailing opinion to impact and dictate laws because this would then interfere in the lives of individuals with a view in opposition to the norm. Mill believes this interference would "fetter the development and ... prevent the formation of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of [the majority's] own" (OL I: 5). This would be detrimental to society as truth, justice, and happiness for Mill seem to depend on individuality and the ability to question and reason for oneself. While controversial, I agree with Mill that it is more difficult to arrive at the truth or to be happy if one is told what to do rather than determine and reason for oneself what one ought to do. In Chapter II of *On Liberty*, Mill emphasizes the idea that freedom of speech, thought, and press are necessary components of liberty and getting at the truth and thus have a high utility for society which I will return to in chapters 5 and 6 when

discussing hate speech.<sup>147</sup> If we allow legal moralism or social tyranny to take hold, then we are compromising not only society and liberty but the progress of mankind.

### 2.3.1 *The “Good Life,” Diversity, and Liberty*

In chapter III of *On Liberty* Mill claims that the ability to act on those things which one feels is best is of the utmost importance for humans because if we only allow people to act and think to fit one particular understanding of “the good life” then we are not really living a good human life at all and are more like machines or automata. Mill states that “Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing” (OL III: 4). Furthermore, it is not only the case that truth requires individuals to discuss different views and opinions, but Mill claims that to be happy and live a good life, one needs to be able to choose to be the sort of person and live the sort of life that is most conducive to what one believes one needs. He claims that

If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate. The same things which are helps to one person towards the cultivation of his higher nature, are hindrances to another. The same mode of life is a healthy excitement to one, keeping all his faculties of action and enjoyment in their best order, while to another it is a distracting burthen, which suspends or crushes all internal life. Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable. Why then should tolerance, as far as the public sentiment is concerned, extend only to tastes and modes of life which extort acquiescence by

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<sup>147</sup> I will discuss speech in Section III, Chapter 5.



the multitude of their adherents (OL III: 14)?

The idea of fixing the morals and actions of men based on the general tendency or feelings or views of the average person is problematic when we consider the diversity that many people recognize as necessary for happiness and watering this down by an appeal to a set morality or code of behavior that is not one's own seems not only unreliable but counterproductive.<sup>148</sup>

### 2.3.2 *Opinion Versus Principle*

But while the progress of mankind and the good life is incredibly important, the main reason that the tyranny of the majority is problematic is that it is generally based on nothing more than feelings, intuitions, and preferences, that is to say, there are no real *reasons* or *principles* upon which such rules, customs, or laws are based.<sup>149</sup> Those who are in a position to dictate what becomes law or custom have “occupied themselves rather in inquiring what things society ought to like or dislike, than in questioning whether its likings or dislikings should be a law to individuals” (OL I: 7). Such a method for morality and rules (based on morality) seem problematic because forcing someone to do something for no other reason than you think it is the good thing to do is mere adherence to habit or custom and provides no set of reasons or justification to those who do not believe it is the good or right thing to do. Mill claims that “People are accustomed to believe, and have been encouraged in the belief by some who aspire to the character of philosophers, that their feelings, on subjects of this nature, are better than reasons, and render reasons unnecessary.”<sup>150</sup>

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<sup>148</sup> I will return to the value and importance of diversity in chapter 6 when discussing hate speech.

<sup>149</sup> This is not to say that this is the case for all rules, customs, or laws. Some do have reasons and principles behind them.

<sup>150</sup> This view of the common morality is attractive to the positive legal moralist because it does not appeal to any kind of philosophical principles or overly reasoned understanding of right and wrong. In other words, it really amounts to the morality of the people or common-sense morality and when the everyday person who we find in a

An example of this tendency and encouragement can be found in *The Enforcement of Morals* by Patrick Devlin.<sup>151</sup> Devlin defines the “right-minded” person as the “reasonable man.”<sup>152</sup> Yet, he claims, the

reasonable man ... is not to be confused with the rational man. He is not expected to reason about anything and his judgments may be largely a matter of feeling. ... For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.”<sup>153</sup>

Devlin believes that this understanding of those who decide on the public morality which influences social pressure and sometimes even legal coercion (which is what Devlin, a legal moralist, is calling for) is consistent with the way in which society actually makes moral decisions and should not be a matter of academic deliberation or reasoned thought. This is because “the man in the jury box is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him.”<sup>154</sup> However, again, because these feelings are very changeable, frequently based in ignorance, prejudice, and are irrational, it is difficult to make a case that these are what *ought* to govern the behavior of citizens. Mill describes why when he states that

The practical principle which guides them to their opinions on the regulation of human conduct, is the feeling in each person’s mind that everybody should be required to act as he, and those with whom he sympathizes, would like them to act. No one, indeed, acknowledges to himself that his standard of judgment is his own liking; but an opinion on a point of conduct, not supported by reasons, can only count as one person’s preference; and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people’s liking instead of one (OL I: 6).

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given society feels overwhelming feelings of “intolerance, indignation, and disgust” (17) toward particular acts, they ought to be prevented.

<sup>151</sup> For a different discussion on the rational man see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>152</sup> Devlin, *The Enforcement of Morals*, 15.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, 21.

These prejudices and feelings of “intolerance, indignation, and disgust”<sup>155</sup> (as Devlin would describe them) are mere preferences and are as changeable as they are (generally) irrational. And yet we see even today that these are the feelings on which citizens frequently base their political and community decisions. To prevent such a gross misappropriation of liberty, legal penalties ought to be in place to prevent such unreasoned/unprincipled, thus illegitimate, pressures. And while Devlin is calling for—and Mill is arguing against—such feelings to be the basis of law, they generally take the form of extra-legal social pressure and are less frequently seen as physical or legal coercion. While such interference comes in many forms, such as pressuring, ostracizing, shunning, or even rebuking and nagging, utilizing a principle, namely, the harm principle, as a method of determining legitimate and illegitimate interference in the liberty of individuals, is as useful as it is necessary. Indeed, Mill believes that the harm principle governs both the unofficial social pressure and the legal pressures.

### 2.3.3 *Legitimate Social Coercion*

Once an acceptable principle is put into place, some forms of coercion, while invasive and pervasive, may not always be illegitimate. Indeed, even Mill repeatedly claims that preventing harmful behaviors is not only part of the law, but it may also be necessary for society via extra-legal and/or moral pressure to step in and prevent behaviors that are too minor for the law to safely be applied (OL I: 9, I: 11, III: 1, IV: 3). Sometimes social rules and customs *are* reasoned and legitimate and these rules are frequently the best method of preventing harm. According to Mill, when a person harms someone and the law is too blunt of an instrument to use or the harm does not infringe the rights enough for it to be considered a violation of

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<sup>155</sup> Devlin, *The Enforcement of Morals*, 17.

someone's rights<sup>156</sup> there are other extra-legal means of interfering such as shunning or ostracizing or informing others of the individual's transgressions, i.e. applying morally and socially coercive, though extra-legal, methods. Though these forms of pressure *are* very difficult to escape and Mill argues that they are oftentimes felt more frequently and are much more present in the daily life of individuals than that of physical coercion, governmental coercion, or governmental restriction, they are not always unreasoned or illegitimate.

While Mill stresses the pervasiveness of peer pressure, one difference that Mill does not really make between such community obstruction and physical (or governmental<sup>157</sup>) coercion is the extent, or perhaps more to the point, significance or nature, of the invasion of liberty. It seems that while it is difficult, perhaps impossible, to avoid peer pressures, one *is* still able to do what one wants without much extreme coercive repercussions; however, with physical pressure, threat of legal consequences, or institutional coercion one has a much more difficult time avoiding such coercion and it is much more invasive of liberty. If society were able to not only apply verbal pressures and coercion, *but also* readily and systematically employ physical or institutional means of coercion, individuals would be much more likely to have their liberty invaded arbitrarily. By taking this general ability out of the hands of the general public<sup>158</sup> and institutionalizing such pressures, regulation into which behaviors and pressures are acceptable can be created.

Because of this, while Mill's comments on societal pressures are important and informative, the examination of the limits of government is especially useful when discussing the

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<sup>156</sup> I will discuss rights in Chapters 3–5. But a rights infringement is any harm to a person that implicates that person's rights. A rights violation is a harm that on balance is judged to be sufficient to warrant interference. A significant enough rights infringement amounts to a rights violation.

<sup>157</sup> Though governmental coercion is not always physical, i.e. it may rely on threats and pressures, the consequences of defying governmental pressures is a "legitimate" physical coercion. So, I may frequently use the two interchangeably but I recognize that there is a distinction.

<sup>158</sup> Though see below for a discussion on when society via extra-legal means is able to use physical coercion.

importance of individual liberty and autonomy because without such legal limits over individuals within society, society, through its actions, would be better able to control individuals among them arbitrarily and/or illegitimately using such pressures as morality and custom. Furthermore, without some structure in place, it seems that individuals would be much more prone to physical coercion from society as well. However, Mill believes that “the practical question, where to place the limit—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done” (OL I: 6). Answering this question is the purpose of *On Liberty* and Mill’s harm principle is the result because, he argues that “All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. What these rules should be, is the principal question in human affairs” (OL I: 6).

If the law has limits on what individuals may or may not do to others, then there is some protection against certain encroachments of liberty by individuals in society. If, as Mill claims, the tyranny of the majority is such a great concern and even legitimate liberty invasions have the potential to morph into illegitimate pressures, then it seems deriving a legal harm principle is one step toward protecting individuals from a more pervasive form of liberty invasion. Thus, if there is legislation in place to aid individuals in their legitimate expressions of liberty and this legislation protects them against its encroachment from others, then the societal pressures via social tyranny are reduced to a more manageable and legitimate nuisance.<sup>159</sup>

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<sup>159</sup>This is not to downplay the seriousness of societal pressure and custom. Oftentimes custom is understood as being more important or as stronger than law. Also, there are instances where pressures become such that a person becomes terrorized, these become instances of harassment and are very much harmful and would be covered by the proposed liberty limiting principle discussed. Other instances of societal pressure becoming more invasive of rights occurs when the (legal and legitimate) contrary behavior of the individual leads others to directly impact the agent’s interests, such as job prospects (i.e. I am not going to hire her, she does undesirable behavior X, say smoking). Again, though this social pressure could be stopped once it hits such levels through the proposed harm principle

## 2.4 The Various Means of Interference in the Liberty of Others

It may be useful to pause here and (very briefly) discuss a rough sort of taxonomy of the variety of ways that an individual may have his/her liberty infringed since it seems that in many cases Mill and others believe that the law is appropriate in some contexts, extra-legal means are appropriate in others, and some contexts preclude the use of coercive interference. There are a variety of ways in which agents can interfere in the liberty of others. Some are acceptable and some are not. Mill, while mentioning different types of interference, does not generally indicate which types of interference are acceptable in which situations nor does he always explicitly explain the various types of interferences. Because he does not do this (which was not his goal) it may result in some confusion as to what he believes society may do extra-legally (and legitimately) to interfere in the liberty of others, what society may do through the law, and what society may not do. I will briefly discuss some different ways in which society can and does coercively interfere in the liberty of others in an attempt to shed some light on what Mill intends the general harm principle to cover and hopefully give an idea of when a legal harm principle may come into effect.

### 2.4.1 Legitimate Interference

Some interference is seemingly always legitimate in that it does not infringe on the liberty of others in a way that would justify coercively preventing it, i.e. it may be considered “bothersome” but not harmful. For instance, encouraging, pleading, and education<sup>160</sup> are such

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because it is interfering in the liberty of the individual to choose to participate in the undesirable behavior. This will be discussed more below.

<sup>160</sup> For Mill on education see, *On Liberty*, I: 9. When individuals are being educated, they are not fully at liberty and their liberty is interfered with but not to a significant degree. Furthermore, this may generally happen at an age at which it is acceptable and even right to educate (i.e. those in their “nonage” who are dependent on others for their care. See Mill, *On Liberty*, I: 10. “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

that they are not generally considered to be illegitimately coercive or really, they cannot properly be called coercive in the general sense. Other sorts of interference in the liberty of adults, such as persuasion, pleading, encouraging, influencing, and other types of appeals, while a type of interference and may be considered invasive or “coercive” to some extent when they are done when another wished that it was not done, are seemingly well within the rights of others and do not interfere to a significant enough degree to impede others in their liberty (either because preventing them would be more harmful than allowing it<sup>161</sup> or the acts in question cannot properly be called harmful or coercive). These are mere *intrusions* and are more like *inducements* than coercion. It seems that Mill believes that this sort of “interference,” which I will label as inducement, is always or generally acceptable. When describing the harm principle Mill claims that an agent’s own good or benefit or self-regarding conduct is not to be considered acceptable grounds for interference but when we dislike something another does “remonstrating with him, or reasoning with him, or persuading him, or entreating him, [are acceptable] but not ... compelling him, or visiting him with any evil in case he do otherwise” (OL I: 9). And later that “Advice, instruction, persuasion, and avoidance by other people ... are the only measures by which society can justifiably express its dislike or disapprobation of his [self-regarding] conduct” (OL V: 2). This points to the line that Mill creates between acceptable interference and illegitimate interference or those situations in which individuals have no claim to prevent others

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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. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage”). Though of course, there is a difference between education and indoctrination or brainwashing. Education may be coercive in that it is sometimes forced upon you, whether you want to learn it or not, but in many cases, it differs greatly from brainwashing and indoctrination.

<sup>161</sup> One instance in which Mill seems to allow for coercive interference in the lives of others even if it is a self-regarding act would be if preventing the coercive act would be more harmful than the interference. In these cases, he believes that the agent that is coercively interfering should “punish” him/herself because any other sort of interference would be worse than the initial act.

from interfering with them—if the sort of interference is a mere inducement. Indeed, Mill seems to think we may have an obligation to help others see reason or become better people. If this is the case, then it may be our duty to induce others to do otherwise when they do acts that we consider to be bad, distasteful, sinful, etc. (OL I: 9–10).

If this is the case, then perhaps getting clearer on what we mean by “coercion” is important since some interference into the liberty of others is acceptable (beneficial interference and inducements for example) and some is not (coercion). Because Mill does not really provide an explanation here, we need to develop conditions that would lead to Mill’s understanding of the different means of coercion. Mill variously uses terms such as “compulsion and control,” “power ... exercised over,” “force,” “against his will,” (OL I: 9) and “external control” (OL I: 10) to describe coercive interference in the liberty of others. This all involves some sort of invasive practice that is forceful or threatening and would not generally be considered acceptable in circumstances in which there was not harm to others. Mill suggests two coercively invasive sorts of conduct: moral coercion (OL I: 9) and physical coercion. These two forms of coercion can be used either legally or extra-legally.<sup>162</sup>

#### *2.4.2 Extra-Legal Interference*

Let us first consider the extra-legal forms of coercion, which are generally less invasive than legal coercion. A category of extra-legal interference which Mill describes is something like peer/social pressure or verbal coercion, which he refers to as “moral” coercion (OL I: 9). Moral coercion is generally negative interferences and interventions in the liberty of others through

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<sup>162</sup> Again, the term ‘extra-legal’ refers to those things that are not covered by the law or under the authority of the law. This does not mean “illegal” or outside of the law but instead refers to those kinds of coercive interferences that others, such as citizens and civilians, perform in a non-legal capacity.



non-physical means. Shunning, reproaching, ostracizing, and other forms of pressure such as these are examples of moral coercion. These are “moral” in the sense that they are attempts to prevent others from performing acts or to perhaps shame them into ceasing to perform acts which are deemed wrong. Moral coercion may be used legitimately when it is to prevent harm to others. These sorts of coercion are sometimes subtle but often result in the social tyranny that Mill spends the first part of *On Liberty* denouncing.<sup>163</sup> These sorts of interferences in liberty may then become more insidious when such social pressures become institutionalized and part of the law when they are unjustified.<sup>164</sup> This sort of coercive influence Mill often argues is not acceptable because it interferes in primarily self-regarding behaviors and prevents agents from obtaining the liberty that is necessary for living the sorts of lives that lead to happiness.

While they are sometimes used to invade self-regarding and consensual acts that do not impact the liberty of others, there are some circumstances in which people cause harm to others and social pressures, ostracizing, shunning, and morally coercing individuals are the appropriate methods of dealing with those harm doers because stricter or more serious sorts of interference and coercion are too strong because they are overly invasive.

The second sort of extra-legal coercion that Mill mentions in *On Liberty* is physical extra-legal coercion. This may happen illegitimately if citizens take the inducements and social

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<sup>163</sup> Mill, *On Liberty*, I: 2, 6, 14, much of chapter II, among others.

<sup>164</sup> Indeed, when Mill is discussing the idea that ideas should only be free to be expressed when they are expressed in a mild or temperate manner, claims that not only are extra-legal methods problematic but “still less could law presume to interfere with this kind of controversial misconduct” (II: 44). And in II: 11 he is discussing the idea that the law ought not interfere in instances of freedom of speech. At II: 18 he claims that “It will be said, that we do not now put to death the introducers of new opinions: we are not like our fathers who slew the prophets, we even build sepulchers to them. It is true we no longer put heretics to death; and the amount of penal infliction which modern feeling would probably tolerate, even against the most obnoxious opinions, is not sufficient to extirpate them. But let us not flatter ourselves that we are yet free from the stain even of legal persecution. Penalties for opinion, or at least for its expression, still exist by law; and their enforcement is not, even in these times, so unexampled as to make it at all incredible that they may some day be revived in full force.” And in II: when discussing infidelity and religion Mill claims that “It is, however, obvious that law and authority have no business with restraining either...”

pressures/coercion further into the coercive realm and “visit others with evil” or physical coercion (OL I: 9). This sort of coercion interferes with the liberty of others more directly and obviously and there are more limitations placed on this sort of interference because it is much more difficult to ignore or stop. However, in certain situations it may be acceptable for “society” or individuals in society to physically prevent an agent from performing an act that may be harmful. In self-defense, defense of a fellow person, or during harmful, reckless, or risky behavior it may be acceptable to physically stop someone from doing something. This is coercive in that it is exerting external control on another individual but in many circumstances, it is justified.

In other situations, this method of stopping an agent may not be justified. If for instance, a person punches another, it would be acceptable to physically restrain the actor that is causing the harm, but it seems the appropriate response or invasion of liberty would not be to shoot the harming agent because the level of harm in the first case does not warrant the response. In the one case, you are preventing harm and invading the harming agent’s liberty in the other you are causing more harm than you are preventing. That seems to be one of the main criteria for Mill’s determination of acceptable versus unacceptable interference. Mill even allows for bystanders to stop an agent that is about to do something risky or harmful to himself (self-regarding harm), but only to inform of the impending risk. If, once informed of the risk or harm, the agent decides to carry on, Mill does not allow for further interference. Here I am alluding to Mill’s famous bridge crossing example where he claims that

If either a public officer *or any one else* saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, *without* any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. 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: in this case, therefore, (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty) *he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it* (OL V: 5 Emphasis added).

So, it seems in some cases it is acceptable for society to interfere extra-legally and *physically* coercively in the liberty of their members in order to prevent harm to others. Other methods of constraining, restraining, and coercing, seem to be too invasive for Mill to deem legitimate for extra-legal coercion.

### 2.4.3 Legal Interference

Analogously, there are two sorts of legal interference, morally coercive and physically coercive. Moral coercion appears in the law both in terms of beneficial and restrictive inducements (i.e. tax breaks for certain sorts of behavior). The penal law generally involves those acts that are physically and financially coercive and in Mill's estimation seem to be that this is the proper avenue for the law in general. The law in general, as noted previously, includes far more than the penal law. There are regulatory laws, such as traffic laws, administrative laws, civil laws, and tort laws in addition to penal laws that may be used by the government for a variety of infractions, some harmful, others not. For instance, traffic laws tend to be enacted to facilitate the smooth running of the roads (which also may aid in preventing harm). Hence, while it does not harm someone to park a certain direction on a street or in a parking garage these sorts of regulatory rules help to facilitate the use of automobiles. In these situations, the appropriate penalty would not be death or imprisonment, but perhaps a small fine (or a warning, etc.). Some of these may serve as a method to prevent some kind of harm to others but do not interfere too greatly in the liberty of others, or perhaps I should say do not cause more harm than good. In

those instances, however, which are very harmful or risk great harm to others, Mill believes that the law ought to step in and coercively prevent the harm.<sup>165</sup> Those acts that impose great harm ought to be restricted to prevent greater harm but the punishment must fit the crime and not interfere too greatly. These sorts of acts that are justifiably interfered with through the law Mill identifies as *serious* rights-infringing harm—rights violations.

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<sup>165</sup> At V: 5 Mill claims that “One of these examples, that of the sale of poisons, opens a new question; the proper limits of what may be called the functions of police; how far liberty may legitimately be invaded for the prevention of crime, or of accident. It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards. The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitory function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency. Nevertheless, if a public authority, or even a private person, sees any one evidently preparing to commit a crime, they are not bound to look on inactive until the crime is committed, but may interfere to prevent it.” At V: 6 he claims that “The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment.”

## Chapter 3

### Understanding Harm: Toward the Construction of a “Millian” Legal Harm Principle

#### 3.1 Introducing the “Legal Harm Principle”

In *On Liberty* John Stuart Mill describes harm very generally in an attempt to assess what society may consider “its business” or as a proper realm of interference in the liberty of its individual members. It seems he does not always focus very much on the varieties of harm that can occur, on defining what exactly he means by harm, nor on devising the appropriate method for preventing harm to others.<sup>166</sup> Because of this, his description of harm and the harm principle can be seen as vague, unhelpful, and even insufficient for many purposes. However, it is important to keep in mind that in *On Liberty*, Mill is attempting to outline the conditions under which it is acceptable for society to coercively interfere with the liberty of others, i.e. he is attempting to determine the *jurisdiction* of society generally. Because he is attempting to determine the jurisdiction or domain of societal interference, he therefore considers harm in *all* its forms and does not really need to be specific in defining “harm” to others since even minimal amounts of harm are seemingly within the jurisdiction of society (though society may judge that it is inappropriate to actually interfere<sup>167</sup>).

In other words, Mill wants to know what sorts of actions or what sorts of behavior are in the sphere of individual liberty or the “self-regarding sphere,” which he considers to be inviolate, or the sphere of coercion or the “other-regarding sphere,” in which it *is* acceptable to consider coercive prevention if there is harm. The short answer to this question is that it may be acceptable to coerce individuals if there is or is likely to be harm to others. The actual answer is

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<sup>166</sup> For an interesting discussion on this point, see Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle.” Though Mill does attempt to provide some examples in the final chapter of *On Liberty*, it is for illustrative purposes and not definitional. Again, while Mill may discuss these things, it is briefly and is not the primary goal of his work.

<sup>167</sup> This is what I will call the balancing principle. See chapter 3.1.2 below.

often seen as a bit more complicated than that, in part because Mill is describing a general harm principle which covers *any* and *all* acceptable types of coercive intervention from minor social pressures to legal intervention and while harm is *necessary* to *justify* acceptable versus unacceptable intervention in liberty, it is not *sufficient* to do so (though it is sufficient to determine the domain).<sup>168</sup>

Because theorists come to *On Liberty* with a specific agenda, myself included, and Mill's principle is so general, it is not always clear to theorists what exactly Mill is concerned with and they often ask if Mill's harm principle is primarily concerned with social interactions and pressures such as custom and morals and is thus attempting to prevent social tyranny<sup>169</sup> or if his harm principle is primarily a legal principle which is concerned with establishing conditions for legitimate penal legislation.<sup>170</sup> These questions are missing the point and should not be a disjunction but rather a conjunction since, as I have been highlighting, Mill is concerned with both. Nevertheless, these questions are attempting to draw a distinction that I wish to focus on, namely, when someone causes or risks harm to others and the behavior falls into the domain of the general harm principle, how exactly do we determine when the criminal law is the appropriate domain for coercive intervention as opposed to extra-legal means? In other words, I wish to define the domain or jurisdiction of the criminal law using Mill's general harm principle in *On Liberty* as a platform. Within Mill's analysis of harm and liberty infringement he provides several different avenues for exploring what he believes counts as harm and further, I believe he indicates when the criminal law is the appropriate domain for harm prevention. Using this and statements in *Utilitarianism* I can construct such a principle.

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<sup>168</sup> See my chapter 1 for a discussion on necessary and sufficient conditions for the jurisdiction and justification of the general harm principle.

<sup>169</sup> See Currin V. Shield's "Introduction" to Mill's *On Liberty*.

<sup>170</sup> See David O. Brink's *Mill's Progressive Principles* for an example.

### 3.1.1 Mill's Two Maxims Revisited

While Mill's general harm principle is an overarching and general principle, it has (at least) two distinct mechanisms in which to prevent harm to others: legal and extra-legal.<sup>171</sup> At the beginning of chapter V of *On Liberty* Mill even claims that there are two maxims that describe the harm principle—"two maxims which together form the entire doctrine of this Essay" (OL V: 1). The first maxim is concerned with separating those acts that can be legitimately interfered with by society (harmful, nonconsensual, other-regarding acts) from those that cannot (those in the self-regarding sphere). The first maxim claims that "the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself" (OL V: 2).<sup>172</sup>

I believe the second maxim of the harm principle, on the other hand, is used to determine when and which method of intervention may be used to prevent harm. Mill recognizes in *On Liberty* that there are two separate and general ways in which we can deal with illegitimate harm to others—both of which fall within the domain of the general harm principle—namely, through social extra-legal coercion and through legal coercion. The second maxim states "that for such actions as are prejudicial [harmful] to the interests of others, the individual is accountable, and *may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection*" (OL V: 2 Emphasis added).<sup>173</sup>

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<sup>171</sup> Remember, here extra-legal coercion is just coercion that is not done through the law. This does not mean that it is illegal, only that it is done by those outside of the law, such as individual citizens or society in general. For Mill, this usually takes the form of social pressures or what he calls "moral coercion" though this can also be physical coercion by those who are not representatives of the law.

<sup>172</sup> I discussed this aspect of the harm principle in chapter 1.

<sup>173</sup> I also discussed these maxims briefly in Chapter 1.

### 3.1.2 Maxim 2: The Jurisdiction Principle and the Balancing Principle

I believe that what Mill is saying with his second maxim is that once we apply the first maxim (determining which actions “are prejudicial to the interests of others”) and we see that a certain behavior *is* harmful to others, then we determine *which* domain is appropriate under the second maxim of the harm principle—individuals “may be subjected either to social or to legal punishment.” I will refer to this part of the second maxim as the jurisdiction principle. I believe that Mill uses the jurisdiction principle as a way to divide the domains within the harm principle. Mill thinks that some harmful acts fall within the domain of the law and some fall outside of this domain but remain housed within the extra-legal domain (it is harmful but not the kind that is in the domain of the law). Once we understand which domain is to be used to prevent harm to others, i.e. apply the jurisdiction principle to determine the domain of the criminal law or the domain of extra-legal coercion, society then determines if the behavior *should*<sup>174</sup> be covered by its proper domain, i.e. society then applies the final part of the second maxim.<sup>175</sup>

This latter part of maxim 2, namely when “society is of opinion that the one or the other is requisite for its protection,” I will call the balancing principle. The balancing principle addresses the practical question of applying the harm principle to determine 1. whether we

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<sup>174</sup> Because the practical principle involves application of balancing principles, the “should” here always implies “should on balance” or “should, all things considered.”

<sup>175</sup> Here I suggest that there are two avenues for coercion and that once we figure out which type of coercion is acceptable we can then deliberate on whether we *should* on balance cover it (i.e. I am addressing a question of domain, not a question of “should there be a law?”). However, there is another way to understand this. It could be the case that this means that all harmful acts can be covered by one of two ways (legal or extra-legal) and it is the job of society to then determine how they are to punish the harmful acts. In other words, there is no proper domain of the law, it is only society’s opinion on what they would like covered and how they decide they should punish it that determines whether it is covered by the law or extra-legal means. This essentially removes any kind of principled approach for a legal harm principle and the only real principle that is applied is whether or not there is harm under the general harm principle. This, to me, seems to go contrary to Mill’s project as a whole. While his project is general, he claims a desire for principled legislation in this work and he also seems to provide, as I will argue in this chapter, that there is a principled division between those acts that can be prevented through the criminal law and those that cannot.



*should* use legal coercion when a harmful act falls in that domain, 2. if we *should* use extra-legal coercion even though it falls within the legal domain, 3. if we *should* use extra-legal coercion when it falls in the extra-legal domain, or 4. if we *should not* use extra-legal coercion even though it falls in that domain but should instead rely on the individual to punish him/herself. Mill suggests that the balancing principle is applied by determining whether preventing the acts that fall within the domain would cause more harm than good, relying on utilitarian considerations such as seriousness, probability, risk, and importance of harm. In some cases we ought not, for instance, prohibit the harm to others through the legal/extra-legal domain because the harm of regulation would be more harmful than the initial harmful act.<sup>176</sup>

### 3.1.3 The Harm Principle as a Multi-Stage Process

So, I contend that Mill seems to recognize the general harm principle as a sort of multi-stage process in which we first determine 1. whether a given act is harmful, which would indeed allow society to consider interference since it has jurisdiction over harmful other-regarding acts (maxim 1). Then, once we determine that there *is* in fact harm or risk of harm to others, i.e. it is covered by or within the domain of the general harm principle, 2. we/society next need to determine *how* we are allowed to interfere (or not), i.e. whether the domain is social/extra-legal or legal (the jurisdiction principle). And finally, 3. we/society then determine if we *should* interfere, i.e. apply practical consideration and principles such as the principle of utility or other mediating maxims to determine if regulation/prohibition is more harmful than allowing for the act to occur (the balancing principle).

Again, using maxims 1 and 2 in *On Liberty* Mill claims that once we determine that there

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<sup>176</sup> I will return to this balancing principle in chapter 6.6.

is harm to others, the behavior can be prevented through one of the two domains but on the face of it he does not seem to clearly delineate a method to determine which sort of interference is appropriate.<sup>177</sup> He says things such as, acts may be punished “by law, or, where legal penalties are not safely applicable, by general disapprobation” (OL I: 11) and “the offender may then be justly punished by opinion, though not by law” (OL IV: 3). He points to the idea that in some cases it is not appropriate for the act to be covered, say, by the law, and so extra-legal coercion is the appropriate method to curb the undesirable behavior and in other cases social pressure is not enough to prevent the harm to others.

This highlights the fact that we should understand the general harm principle as a multi-stage filtering process and that further investigation is necessary to uncover the jurisdiction principle and determine when criminal legislation is the appropriate domain and when it is not. In other words, the jurisdiction principle is where the need to develop a legal harm principle enters. The harm principle, as Mill states it generally, does not do this, nor does Mill purport to do this in *On Liberty* but it seems that he is aware that the harm principle only really answers the question of *when* society can interfere in the liberty of others very generally, and that something further is necessary to determine *which method* is the appropriate domain for interference.<sup>178</sup> I acknowledge that Mill does not define a second principle in *On Liberty*; however, this does not mean that one is not present (the jurisdiction principle) and chapter V of *On Liberty*, as well as the other passages referenced above, suggest that he acknowledges a jurisdictional divide between the legal and extra-legal domains and because he claims that he wishes to provide a

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<sup>177</sup> See Mill, *On Liberty*, I: 11 “If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation” and IV: 3 “The offender may then be justly punished by opinion, though not by law. 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.”

<sup>178</sup> See for instance, Mill, *On Liberty*, I: 8, I: 11. See Piers Norris Turner for a discussion on Mill’s general goal in defining harm and the harm principle.

principled method for determining appropriate interference in the liberty of others, a principled method for legal intervention seems to be a part of this broad goal (OL I: 7–11). My goal here is to suggest a division that seems to be present in Mill.

In the previous chapter I laid out Mill’s general harm principle which sets conditions for the jurisdiction of society generally regarding interference in liberty (maxim 1) and, as I have highlighted, this principle looks to *all* instances of harm (even very minor ones) to others in order to define the general domain of acceptable liberty invasion by society. Once Mill’s general harm principle determines which behaviors fall into the coercive domain (i.e. harmful, nonconsensual, other-regarding acts), then the second stage of measurement can occur in which we determine which general method of intervention is acceptable: extra-legal or legal intervention. In this chapter, I will focus on deriving such a legal harm principle from Mill’s general harm principle—the jurisdiction principle. This, then, can provide a useful and principled tool for legislatures to use when crafting and interpreting whether something *should* become part of the criminal law—the balancing principle.<sup>179</sup> In order to make the distinction as to which domain is appropriate for legislation and, more specifically, understand when the criminal law *may* step in to prevent harm, several interrelated terms and conditions that Mill discusses in *On Liberty* must be defined. These notions determine whether society in the form of extra-legal social pressures or the law is the appropriate method of interference in individual liberty. This determination highlights a more specific and narrow version of the harm principle which I have

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<sup>179</sup> While figuring out the domain of the criminal law (the jurisdiction principle) is the goal of this work, I am not going to provide a detailed response as to how to apply the balancing principle though chapter 5 will focus on Mill’s analysis of speech and will apply both the jurisdiction principle and the balancing principle in an attempt to use the principle in actual cases. Mill states generally that determining whether something should be covered amounts to figuring out if there is more harm when the acts are regulated or more harm when they are not. In the final chapter I will address speech and harm and I will offer suggestions as to what I believe ought to be covered or not but this will not be a detailed analysis of the balancing principle but will give suggested considerations that may be applied in actual cases.

been calling the “legal harm principle” or “jurisdiction principle.”

### 3.1.4 Rights Infringements and the Legal Harm Principle

As subsequent theorists frequently rely on Mill’s *On Liberty* to determine which sorts of behavior are legitimately prevented through the law and which are not, it seems that deriving a legal harm principle from Mill’s own work is important and, (seemingly) according to the jurisdiction principle of maxim 2 of the harm principle, completely within the scope of his general principle.<sup>180</sup> A careful reading highlights the instances in which Mill discusses, or at least hints at, some requirements for a legal harm principle and we can gain an understanding of what this principle may look like. This, I will argue, is most easily done by looking to what Mill calls “rights” violations (OL III: 3, III: 9, IV: 3, IV: 6, IV: 7, V: 11). Mill seems to suggest that it is where harm and rights intersect that we find the boundary line between the domain of the legal and extra-legal. I will argue that certain sorts of harm, namely rights-infringing harm, determine the domain of the law. However, just as he does not provide a clear definition of harm, Mill does not provide a clear definition of rights in *On Liberty*.

To define the domain of the law, I will do two things. 1. I will unravel and explain the many (intertwined) concepts found in *On Liberty* that help to explain Mill’s concept of rights and 2. since Mill does not go into much detail about rights in *On Liberty*, I will look to chapter V of *Utilitarianism* for an understanding of what he means by rights and how they are relevant to the law. To address the first, I will look to the concepts that seem central to finding this jurisdictional division. Among the notions in *On Liberty* that are most significant for understanding rights and their relationship to defining a legal harm principle are the concepts of interests, duties, and

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<sup>180</sup> See among others, Feinberg, *Moral Limits of the Criminal Law*; Simester and von Hirsch, *Crimes, Harms, and Wrongs*; Hart, also *Law, Liberty, and Morality*; Duff, et al., *Criminalization*.

liberties and how they interact with and play off one another to give a clearer understanding of harm. While these ideas are often defined in reference to one another, I will attempt to explore them each separately in order to show how each idea correlates with the legal harm principle and thus helps to define what Mill means by “rights.”

### 3.1.5 *Utilitarianism and Rights*

To address the second, I will turn to chapter V of *Utilitarianism* which provides a more in-depth analysis of Mill’s understanding not only of rights but many of the other terms Mill relies on in *On Liberty*. Chapter V of *Utilitarianism* is not only consistent with what he says in *On Liberty* but is useful in providing a framework for the jurisdictional division between legal and extra-legal coercive intervention because it is in this chapter that Mill discusses his theory of justice and its connection to rights (as well as utility/the expedient) much more clearly than he does virtually anywhere in *On Liberty*. If one reads chapter V of *Utilitarianism* as a supplement to and an extension of *On Liberty*, many questions that are left at the end of *On Liberty* regarding rights are answered. Though of course while the whole of *Utilitarianism* provides a particular framework for understanding its last chapter and this normally cannot be ignored, I am reading chapter V through the lens of *On Liberty* which may alter the interpretive framework. I will rely less on the arguments in *Utilitarianism* than others who approach chapter V because what I really want to understand is Mill’s view on rights, harm, justice, and the law and less what Mill’s utilitarian commitments are.<sup>181</sup>

My argument will not depend on whether or not *On Liberty* is consistent with Mill’s

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<sup>181</sup> Turner in “Harm and Mill’s Harm Principle” claims that rights-based theories do this and are mistaken because it does not provide interpretive aid to the harm principle. However, this is only if you are concerned with the General Harm Principle and not the sub-principle that is concerned with the law.

utilitarian commitments in *Utilitarianism* as a whole, but will focus on the consistency of Mill's understanding of rights between the two texts; it does not matter, then, which text was written first and the order of publication does not affect my interpretation or methodology.<sup>182</sup> What matters for my purposes here is whether the idea of rights found in *Utilitarianism* can aid in developing a legal harm principle from the general principle described in *On Liberty*, which I believe it can.<sup>183</sup> When discussing the limits of the law, there is talk of rights around every turn. Understanding what Mill says about rights is key to understanding what Mill says about a specifically legal harm principle and so looking at chapter V of *Utilitarianism* will help to tease out the boundary between the domain of the legal and extra-legal.

### 3.1.6 A Matter of Domain (or the Jurisdiction Principle)

It is also important to highlight that what I am doing in the next two chapters is determining a question of domain. I am concerned with what *may* be covered by the criminal law (the topic I believe is at the heart of what I have been referring to as the jurisdiction principle)

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<sup>182</sup> Indeed, at times it may seem like I am discussing *Utilitarianism* as an extension of *On Liberty* and vice versa, but really, for my argument it does not matter that *On Liberty* was written first or that it was likely that Mill had his *Utilitarianism* defined before he wrote *On Liberty*. I am not reading these two texts as a historian of philosophy but rather in an attempt to get clear on a matter of definition. The timeline of these texts does not impact my argument and I will often travel back and forth between these texts in order to make my argument. What does matter is that *Utilitarianism* chapter V has the potential to fill a lacuna found in *On Liberty* and can help to explain the legal harm principle I am attempting to define. In his autobiography Mill claims that *On Liberty* especially, but all his works were heavily influenced by his wife. He claims that *Utilitarianism* was taken from work which had previously been written during the last several years with his wife, which suggests a continuity of ideas between the two works. "I took ... a portion of the unpublished papers which I had written during the last years of our married life, and shaped them, with some additional matter, into the little work entitled "Utilitarianism"; which was first published, in three parts, in successive numbers of Fraser's Magazine, and afterwards reprinted in a volume" (A VIII: 30).

<sup>183</sup> In "Harm and Mill's Harm Principle," Turner also believes that this methodology is mistaken. He claims that "a rights-violation reading is not implied or suggested by the relevant passages in *Utilitarianism* and that such a restriction would be unambiguously at odds with the text in *On Liberty*" (304). However, this is only the case if one is already reading Mill's general harm principle as a legal harm principle *only* and not accounting for a more general goal which covers a multitude of harm and actually incorporates what Turner calls his "expansive" notion of harm. I believe my interpretation which utilizes those passages of *Utilitarianism* is able to avoid the pitfalls that Turner relies upon to criticize rights-based theories. I am also not convinced that Turner is giving a completely fair reading of some of the theories he attacks.

and am not providing an opinion on whether such laws *should* be enacted (the balancing principle).<sup>184</sup> In what follows I will argue that the boundary between the legal and extra-legal domain is drawn depending on whether an act of harm is a rights infringement or not. In other words, I will argue that if an act *is* a rights infringement, then the legal harm principle *may* prevent it from occurring, i.e. has jurisdiction over it. If it is *not* a rights infringement, then it is *not* the sort of harm that can be covered by the legal harm principle (though they may be covered through the extra-legal domain). Ultimately, the distinction between the legal harm principle and a general harm principle is determined based on the sort of harm that occurs, i.e. rights-infringing harm.<sup>185</sup>

I will begin by linking Mill's understanding of harm to invasions of interests and liberties of individuals. This will help us later to understand how he views duties and rights. I will then analyze what Mill claims is the relationship between duties and rights. This section will begin to tie in Mill's chapter V of *Utilitarianism*. Understanding this provides clues as to the role that Mill thinks rights have in morality and justice because some duties are duties precisely because they are rights and obligations of perfect duties correlate with certain kinds of rights. Then in the remaining sections I will move back and forth between *On Liberty* and chapter V of *Utilitarianism* to discuss how Mill's understanding of rights in the latter helps us to inform how rights are related to the legal harm principle which I believe is an essential piece of Mill's more general harm principle in the former.

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<sup>184</sup> Though my final chapter will touch on some of this practical application when discussing speech acts, specifically hate speech.

<sup>185</sup> While I have not yet defended this position, in this chapter I will argue that it is the "sort of harm" that determines the demarcation of the legal harm principle and the "sort of harm" for Mill is whether it is a "rights-infringing harm" or not.

### 3.2 Harm as Interference in the Interests and Liberty of Others

When Mill describes his general harm principle, he defines it in terms of an idea of “harm to others.” This idea of harm is supposed to draw the line between acceptable and unacceptable interference in the lives and actions of others. However, if we look for a clear definition of harm in *On Liberty*, we find that he does not actually define or describe harm very thoroughly in the text and in fact uses the term only about a dozen times. Interestingly, Mill more often relies on other terms to express harm, and indeed uses the term “evil” more frequently than “harm.”<sup>186</sup> This failure of definition is one of the most pervasive criticisms of this text and later theorists define it to suit their needs. Indeed, while the harm principle “served as a bulwark of liberty and a limitation on the scope of government power” in the nineteenth century, more contemporary interpretations have turned the principle into “an engine of social control that is said to justify major government intervention in all its manifestations ... [and] far more content has been poured into the exception ‘harm or evil to others’” than is justified by the term.<sup>187</sup>

There are many issues that arise because of Mill’s less-than-ideal description of harm, as he sometimes seems to be using the idea of harm pretty widely as *any* negative effect on others. Piers Norris Turner argues that such an “expansive” sense of harm is the only one that is consistent with Mill’s utilitarian goals though it may have negative consequences for his “liberal commitments.”<sup>188</sup> Yet in defining his self-regarding and other-regarding realms Mill makes a distinction between harm and offense, which suggests that he does not mean harm to be so expansive as to cover *all* negative consequences, only those that affect others and are in the

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<sup>186</sup> OL I: 8–9, I: 11, II: 1–2, II: 4, II: 19–20, IV: 4, IV7, among others.

<sup>187</sup> Richard A. Epstein, “The Harm Principle—And How it Grew,” (*The University of Toronto Law Journal*, 45, no. 4 (1995): 369–417) 371.

<sup>188</sup> Turner, “Mill’s Harm Principle,” 300.



other-regarding realm.<sup>189</sup>

Nevertheless, however we come to define Mill's idea of harm, as narrow or expansive,<sup>190</sup> it need not really impact or have many consequences for how we come to understand a *legal* harm principle. The general harm principle is seeking the jurisdictional line between social interference and non-interference. Understanding how harm impacts the legal harm principle forces us to focus our attention on those passages that highlight or hint at a division *within* the general harm principle. So, in other words, we already know harm *is* in fact occurring before we turn to the legal harm principle. What we need to get a handle on is when the law is the proper domain of interference. To understand this division, then, it is important to find those instances where Mill mentions harm—or harm placeholders—in order to determine its specific domain.

### 3.2.1 *Interests*

Once we assess the passages in which Mill discusses harm, it seems more relevant to a legal harm principle, and indeed necessary, to focus attention on what role “invasions of interests” play because throughout *On Liberty* he focuses on how these sorts of invasions are harmful, evil, etc. and it is really invasions of interests that begin to formulate and define Mill's understanding of harm that is relevant for deriving a legal harm principle. We first encounter the idea that certain “interests” are relevant to Mill's understanding of harm in Chapter I of *On*

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<sup>189</sup> The issue between harm and offense also arises in the final chapter on speech.

<sup>190</sup> For instance, Turner in “Mill's Harm Principle” criticizes David Brink, Alan Fuchs, Wendy Donner, Daniel Jacobson, Joel Feinberg, and John Rawls as utilizing a too-narrow version of harm that he believes is inconsistent with Mill's general harm principle while he defends what he calls an “expansive” understanding of harm which covers “any negative consequence” (319). I believe that an expansive reading of harm does not impact my interpretation of a legal harm principle because I am not attempting to define harm for the general harm principle but rather when harm crosses the domain from extra-legal to legal. Whether harm is limited or expansive is not really detrimental to a legal harm principle because it is only concerned with things that we already know to be harmful and fall on the more serious side of the scale. Those minor harms that the general harm principle would potentially include on an expansive account would not be considered as relevant for a legal harm principle as I will show below.

*Liberty* when he claims that his argument depends upon “utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people” (OL I: 11). So, it is not surprising, given Mill’s utilitarian commitments, that he believes that harm depends on utility. However, the idea that the utility he is referring to in turn depends on the permanent interests of people is interesting. But note that it is not all permanent interests that society may interfere with but only those that concern others. Interests, then, specifically the “permanent interests” related to the progressive nature of humans seem to be key to understanding what Mill intends to count as harm because if these interests are encroached, such encroachments are “hurtful” and “If any one does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation” (OL I: 11). He then states that “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” (OL I: 11). So, one way in which agents can harm others is by infringing or violating their permanent interests which are to be protected by society.

When the “permanent” interests of others are invaded, there is harm to them and such harm ought to be prevented. Mill even claims that in instances where the law and even extra-legal coercion is too invasive of liberty—for instance when it is more harmful than allowing the behavior to occur without coercive intervention—that

the conscience of the agent himself [the individual who is infringing or violating the interests of others] should step into the vacant judgment seat, and protect those *interests* of others which have no external protection; judging himself all the more rigidly, because the case does not admit of his being made accountable to the judgment of his fellow-creatures” (OL I: 11 Emphasis added).

He repeatedly marks the important or permanent interests of others as being under the domain of society via the general harm principle.<sup>191</sup> Again, this suggests that Mill believes that “interests” are central to the idea of harm which he uses as the benchmark for acceptable and unacceptable interference. Interests, then, seem to be intimately connected to understanding the domain of the harm principle.<sup>192</sup> Indeed, in chapter III of *On Liberty* Mill claims that regarding individuality and the sphere of self-regarding acts, which are outside of the domain of the harm principle, we ought to be free to pursue our individuality and well-being so long as these are “within the limits imposed by the rights and interests of others” (OL III: 9).<sup>193</sup> *Interests* of others again restrict and bind individuals in their actions.

Later, in chapter IV of *On Liberty* when discussing the domain of the harm principle Mill asks, “how much of human life should be assigned to individuality, and how much to society (OL IV: 1–2)?” He responds that “each will receive its proper share, if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society” (OL IV: 1–2). If, then, the interests of society (or others) are invaded, there is harm done because as Mill elaborates, “as soon as any part of a person’s conduct affects prejudicially the interests of others,

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<sup>191</sup> See Mill, *On Liberty*, I: 11, II: 37, III: 9, IV: 2–3.

<sup>192</sup> Following Mill who claims citizens ought not “injur[e] the interests of one another,” Feinberg defines harm as an interest a person has; however, he thinks ‘interest’ too is vague (OL IV: 3). Interest can be defined as a desire a person has or as something that is in an agent’s ‘best interest’ or well-being. However, for the purpose of determining an interest in relation to the harm principle, Feinberg turns to legal writing to clarify its meaning. In the law, there are different classifications of interest for the degree of harm that is imposed on the victim. The harm principle covers those harms that are “humanly inflicted” and Feinberg claims these harms are conceived as the violation of one of a person’s interests, an injury to something in which he has a genuine stake. ... An interest is something a person always possesses in some condition, something that can grow and flourish or diminish and decay, but which can rarely be totally lost (SP 26).

This idea of interest allows an analysis of those things that should or should not be regulated by the law. When an individual’s interests have been compromised, this person has been harmed.

<sup>193</sup> In this passage Mill is discussing the importance of individuality. While he is not talking in terms of interests in this passage, he believes that individuality is an important part of well-being and well-being, is one of the permanent interests of mankind.

society has jurisdiction over it” (OL IV: 3). This particular passage seems to confirm my point that Mill relies on the idea of interests as being a key feature of harm. When Mill claims that society has jurisdiction when harm occurs and that harm is the necessary feature, then says that when “any part of a person’s conduct affects prejudicially the interests of others” he pretty clearly seems to be suggesting that harm to others amounts to or is defined as occurring when “any part of a person’s conduct affects prejudicially the interests of others” (OL IV: 3). Both this concept and harm seem to be equivalent. Mill seems to propose this as a placeholder for harm. And since Mill is discussing jurisdiction here, he is suggesting a relatively broad understanding of harm and perhaps Turner is correct to consider Mill as discussing harm as “any negative consequence” *to interests*. There are a variety of interests that we may have, some minor and some major but the general harm principle is discussing all of these. It seems that Mill believes that *any* harm to others puts the action into the domain of the harm principle but he then claims that those significant or more important interests place them within the domain of the law.<sup>194</sup>

Mill further argues that society has no jurisdiction in a case “which does not affect the interests of others in their relations with him” (OL IV: 6). This suggests a wide range of interests, some which cross the boundary between the sphere of individual liberty to the sphere of other-regarding behavior. While it may be difficult to define the interests that fall on this lower line and different theorists determine this harm differently, it is not this lower level that is of interest to me but rather those that clearly fall within the domain of society but rest on the line between legislatable and non-legislatable.

Finally, the importance of interests regarding the legal harm principle is most clearly stated in Mill’s maxim 2.<sup>195</sup> Here Mill claims that “for such actions as are prejudicial to the

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<sup>194</sup> More on this in the next section.

<sup>195</sup> See chapter 3.1.2 for a discussion on Maxim 2.

interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of the opinion that the one or the other is requisite for its protection” (OL V: 2).<sup>196</sup> Interests, then are an important part of the very definition of the harm principle, as he relies on interests in his maxims which are used to define his general harm principle. Interests of others do seem to be quite general according to Mill, however, this does not mean that all interests of others are relevant to the *legal* harm principle (more on this below).

### 3.2.2 A Division of Interests

Mill refers to interests both generally and more narrowly when he, in places, discusses those that are “permanent” (OL I: 11) or “important” (OL V: 11). This distinction seems to be intentional. For instance, when defining harm in terms of invading interests, Mill also suggests that invasion of *certain* liberties are invasions of important interests as well (OL IV: 3). This makes sense if one considers that Mill spends a significant amount of time highlighting the importance of certain liberties that individuals have. If these liberties are as important to individuals as he seems to suggest, then humans have a significant/permanent/important interest in maintaining them against encroachment. This also ties the maxims to the general harm principle more clearly because if we are talking about individual liberty and freedom of action as being a dividing line between acceptable and unacceptable interference in the general statement of the harm principle (OL I: 9), then it seems that when the maxim defines this same line in

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<sup>196</sup> Quote in context: “the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself ... for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection” (V: 2); He also utilizes talk of interests elsewhere when he claims: “Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society” (V: 4); “A person is bound to take all these circumstances into account, before resolving on a step which may affect such important interests of others; and if he does not allow proper weight to those interests, he is morally responsible for the wrong” (V: 11).

terms of interests (OL V: 2), we have a link between the two concepts which ties together much of his exposition in *On Liberty* regarding harm.

Because Mill believes that his principle is based on “the permanent interests of man as a progressive being” (OL I: 11) and his principle is one that looks to protecting the private (self-regarding) sphere of individual liberty, those three divisions of individual liberty he outlines are important interests he discusses. Mill seems to be describing the sphere of self-regarding liberties as being part of those permanent and significant interests when he claims that “there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation” (OL I: 12). It seems that Mill argues that certain forms of liberty, certain basic liberties, then become permanent interests of humans with which society may no longer interfere and “this, then, is the appropriate region of human liberty” (OL I: 12). These basic liberties are types of behavior in the private sphere that include “Liberties of conscience and expression,” “Liberties of tastes, pursuits, and life-plans,” and “Liberties of association” (OL I: 12).

### *3.2.3 Liberties and Interests*

Describing the liberties of conscience and expression is Mill’s concern in chapter II of *On Liberty* and

it comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it (OL I: 12).

Chapter III of *On Liberty* outlines the harm principle's relationship to the liberties of tastes, pursuits, and life plans and this amounts to "framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong" (OL I: 12). This is a liberty of personal choice or autonomy. And finally, liberties of free association in which "each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived" (OL I: 12). The goal of the general harm principle is to protect these liberties and interests either through legal or extra-legal means.

Part of the reason why Mill believes that certain liberties in the private sphere are permanent and inviolable (unless exercise of such liberties threaten harm to others) is that this type of liberty or freedom is not only valuable but, in a way, necessary for a happy/good life because it is a key component of such a life. Mill claims that "the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" (OL I: 13). Mill spends chapter III of *On Liberty* defending just this. These liberties that are in the private sphere are some of the interests that Mill believes we have a duty to protect against encroachment from others. Indeed, early on Mill connects these ideas of liberty, interests, and duties<sup>197</sup> when he is discussing the history of the tension between authority and liberty and the attempts to curb undue liberty invasions. He claims

The aim, therefore, of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what

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<sup>197</sup> Duties will be discussed below.

they meant by liberty. It was attempted in two ways. First, by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specific resistance, or general rebellion, was held to be justifiable (OL I: 2).

By framing the text in relation to the historical development of liberty he is better able to highlight the ways in which these ideas contribute to interpreting the harm principle and its use. This shows that the goal of “patriots” was to define a self-regarding realm which defines liberties and *important* interests of humans as rights, and when these rights were infringed, the ruler (or those who infringe them) were violating a duty to others and this allows for interference to prevent the infraction. We thus begin to see the connections that Mill makes between the law, liberties, duties, and rights very early on. These connections help to define the domain of the legal harm principle; however, much more needs to be said on the notion of duty because it is this idea coupled with the idea of rights, both of which are briefly introduced in *On Liberty*, which helps to bridge the chasm between the general harm principle and chapter V of *Utilitarianism*. This connection, in turn, helps to make the domain of the legal harm principle more apparent.

### **3.3 Duty and Harm**

In *On Liberty* Mill argues that agents have a variety of moral duties which they may be required to do or be punished/made responsible for not doing. He states that there are some acts, “things which whenever it is obviously a man’s duty to do, he may rightfully be made responsible to society for not doing” (OL I: 11).<sup>198</sup> While Mill believes that individuals ought to be required to fulfill their duties, as he indicated above, there are a variety of ways in which this

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<sup>198</sup> This specific passage on duty at I: 11 in *On Liberty* is particularly intriguing and seems to be a bit difficult to make consistent with things Mill says about the harm principle. I will examine the full paragraph in chapter 4.



may be done. This is significant because it contributes to the explanation Mill has for the different ways in which interference may be legitimate for society more generally (extra-legal pressures) but not the government (law enforcement) and vice versa. It also allows us to understand those instances in which it is not appropriate for either society or the law to interfere (i.e. in the private sphere of self-regarding conduct and even some instances of other-regarding conduct).

### 3.3.1 Duty Enforcement and Harm

Mill claims that “if anyone does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation” (OL I: 11). This is where public pressure comes into effect as a means of duty enforcement. He further states that in some cases there are reasons, such as expediency or balancing harm, for *not* punishing individuals for failing to perform their duty and in many of these cases the law is not the proper avenue for enforcement and in other instances neither the law nor society are the proper means to enforce a duty or an obligation, and “when such reasons ... preclude the enforcement of responsibility, the conscience of the agent himself should step into the vacant judgement seat, and protect those interests of others which have not external protection” (OL I: 11).<sup>199</sup> So even if there are not formal sanctions for duty violations, there is always some means of enforcing the duty, even if it rests on the agent to enforce his/her own misdeed.

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<sup>199</sup> Quote in context: “there are often good reasons for not holding him to the responsibility [his duty]; but these reasons must arise from the special expediency 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 the attempt to exercise control would produce other evils, greater than those which it would prevent. When such reasons as these preclude the enforcement of responsibility, the conscience of the agent himself should step into the vacant judgement seat, and protect those interests of other which have not external protection.”

This sentiment can also be found in *Utilitarianism V* when Mill claims that by stating that someone does something wrong “we mean to imply that a person ought to be punished in some way or other for doing it; if not by the law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience” (U V: 14). This links wrongdoing to harm because if society has jurisdiction then there is harm occurring that is thought punishable. This is further connected to duty because the sentence immediately following the above quote discusses how duties are things that we believe others may be compelled to perform and when agents do not perform their duties, we believe they ought to be punished for it (i.e. it is wrong). So, harm is related to duty because Mill suggests that if one fails to perform his or her duty to others then it is wrong and when it is wrong, they ought to be punished because they are causing harm to the others. However, by dividing duties into those that may be prevented through the law and those that may not, Mill is claiming that there are certain acts with which the government may not interfere.

So, Mill seems to think that there are different types of duties and these types inform us as to the many ways in which agents can be required to discharge them. For Mill, extra-legal social pressure—such as shunning or reproaching—is often an effective way in which agents can be induced to do their duty.<sup>200</sup> For instance, Mill believes education is the best tool to “cultivate” the social and self-regarding virtues and “works by conviction and persuasion as well as by compulsion, and it is by the former only that, when the period of education is past, the self-regarding virtues should be inculcated. Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter” (OL IV: 4). But if education fails, in some cases “the offender may then be justly punished by opinion,

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<sup>200</sup> See my Chapter 1 section 8 for a discussion on inducement versus coercion.

though not by the law” (OL IV: 3). In these cases, while agents are encouraged to fulfill their duties through extra-legal social pressures, the general harm principle is applicable though the legal harm principle is not (OL IV: 5).<sup>201</sup> This seems to introduce either a hierarchy of duties, some more important (or perhaps serious) than others, or at least a division among duties. Those most important of the duties or duties of a certain kind, it seems, are subject to law enforcement while others are left either to extra-legal societal pressures or else the individual him/herself. It will be beneficial to examine these duties.

### 3.3.2 *Duty, Interests, and Others*

While Mill does not always make the connection between duties and harm to others explicit in *On Liberty*, he alludes to the relationship between duties, interests, and other-regarding acts when criticizing Christian morality. He claims that by stressing the need to obey and submit, Christian morality succeeds in “disconnecting each man’s feelings of duty from the interests of his fellow-creatures, except so far as a self-interested inducement is offered to him for consulting them” (OL II: 37). This suggests that, for Mill, duties and the interests of others are intimately connected through morality. When an agent has duties to assignable individuals it fosters and creates an atmosphere of mutual interest. When someone claims that obeying orders

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<sup>201</sup> Mill claims that “We have a right, also, in various ways, to act upon our unfavourable opinion of any one, *not to the oppression of his individuality*, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it (*though not to parade the avoidance*), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates. We may give others a preference over him in optional good offices, except those which tend to his improvement. In these various modes, *a person may suffer very severe penalties at the hands of others*, for faults which directly concern only himself; *but he suffers these penalties only in so far as they are the natural, and, as it were, the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment.*” [Emphasis added]. This seems to suggest that we can apply pressure to others and this does not yet infringe on their rights or illegitimately harm them but when it does pass this point into oppression, then we have crossed the line of legitimacy into rights infringement.

and submitting to authority are the reasons to perform duties, the connections and interactions among individuals is lessened and thus the importance of others in morality is diminished.

When we connect duties and others, especially duties to refrain from harming others, we highlight the social aspect of morality while at the same time recognizing the liberties that others have. Mill states that acts that primarily concern the self

may be proofs of any amount of folly, or want of personal dignity and self-respect; but they are only a subject of moral reprobation when they involve a breach of duty to others, for whose sake the individual is bound to have care for himself. What are called duties to ourselves are not socially obligatory, unless circumstances render them at the same time duties to others. The term duty to oneself, when it means anything more than prudence, means self-respect or self-development; and for none of these is any one accountable to his fellow creatures, because for none of them is it for the good of mankind that he be held accountable to them (OL IV: 6).

Mill argues that whether the acts of an individual are primarily self-regarding or other-regarding “makes a vast difference both in our feelings and in our conduct towards him, whether he displeases us in things in which we think we have a right to control him, or in things in which we know that we have not” (OL IV: 7). And it is the conduct that breaches duties to others in which Mill believes we have a right to control others.

However, if the individual is not breaching a duty that he has toward others, then he is merely “displeasing” us and

we may express our distaste, and we may stand aloof from a person as well as from a thing that displeases us; but we shall not therefore feel called on to make his life uncomfortable. ... if he spoils his life by mismanagement, we shall not, for that reason, desire to spoil it still further: instead of wishing to punish him, we shall rather endeavour to alleviate his punishment, by showing him how he may avoid or cure the evils his conduct tends to bring upon him. He may be to us an object of pity, perhaps of dislike, but not of anger or resentment; we shall not treat him like an enemy of society: the worst we shall think ourselves justified in doing is leaving him to himself, if we do not interfere benevolently by showing interest or concern for him (OL IV: 7).

So, if an individual is only “harming” himself or performing self-regarding or consensual acts,

we may show our concern and act benevolently, we can ignore him and separate ourselves from him but we may not interfere with his liberty or significant interests because he is not interfering with ours and he is not harming or violating a duty to others.

However, when discussing acts that cross from self-regarding to other-regarding, Mill notes that

It is far otherwise if he has infringed the rules necessary for the protection of his fellow-creatures, individually or collectively. The evil consequences of his acts do not then fall on himself, but on others; and society, as the protector of all its members, must retaliate on him; must inflict pain on him for the express purpose of punishment, and must take care that it be sufficiently severe. In the one case, he is an offender at our bar, and we are called on not only to sit in judgment on him, but, in one shape or another, to execute our own sentence: in the other case, it is not our part to inflict any suffering on him, except what may incidentally follow from our using the same liberty in the regulation of our own affairs, which we allow to him in his (OL IV: 7).

So, again the primarily self-regarding acts in the sphere of liberty are outside the domain of public coercion. Yet, as soon as an act leaves this sphere and enters the sphere of other-regarding conduct, society does indeed have jurisdiction because these are “questions of social morality, of duty to others” and “the opinion of the public ... though often wrong, is likely to be still oftener right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practised, would affect themselves” (OL IV: 12). In other words, as soon as the interests of others or our “duties to others” are invoked, the public not only has a right to interfere, but they are the ones best able to judge the act because it is their interests that are impacted.

Interestingly, Mill notes that even behavior that generally falls within the self-regarding realm that interferes with the individual’s ability to perform an obligation/duty to others leaves the self-regarding realm and becomes other-regarding. For instance,

when a person disables himself, by conduct purely self-regarding, from the

performance of some definite duty incumbent on him to the public, he is guilty of a social offence. No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. 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 (OL IV: 10).

But, while it is clear that Mill believes that some duties require coercion and some of that coercion should come from the law, as this passage suggests, it is not always clear which particular duties should be covered through the law and which should not. Here he mentions both the law *and* morality (or the sphere of moral pressures) as being appropriate but he does not lay out which is relevant for which case and why.

### *3.3.3 Utilitarianism V and Duty: Duties of Perfect and Imperfect Obligation*

It is at this point that chapter V of *Utilitarianism* provides interpretive assistance. For instance, in that chapter Mill claims that “it is a part of the notion of Duty *in every one of its forms*, that a person may rightfully be compelled to fulfil it. Duty is a thing which may be exacted from a person, as one exacts a debt. Unless we think that it may be exacted from him, we do not call it his duty” (U V: 14). However, while duties are things we may be expected to do and coerced to perform, there are different manners of duties and, as we know, different manners of coercion and punishment.

In this chapter of *Utilitarianism*, he discusses perfect and imperfect obligations which provide a clue as to which types of duties Mill believes are relevant for the legal harm principle. He claims that “in the more precise language of philosophic jurists, duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right” (U V: 15). However, while duties of imperfect obligation are not correlated with a right in another, they are

still obligatory and are still thought to be duties that one has. Mill states that “though the act is obligatory, the particular occasions of performing it are left to our choice, as in the case of charity or beneficence, which we are indeed bound to practice, but not towards any definite person, nor at any prescribed time” (U V: 15). In other words, morality demands that we observe these imperfect duties, but it does not indicate a particular individual to whom our duty is toward and we can exercise our own free choice in how we perform our duty.

With duties of perfect obligation, on the other hand, we do not have a choice in the matter. With these sorts of duties there *is* a correlative right in another assignable person.<sup>202</sup> As I will explain below, Mill believes that duties of perfect obligation are connected to morality through justice. Duties of imperfect obligations, while within the domain of morality, are not in the domain of justice or the law. We may have a moral obligation to perform a particular act but it is not a duty that relates to specific assignable others, and thus is not something that justice demands, though it is something morality demands. This sentiment is also consistent with views expressed in *On Liberty*, especially when Mill claims

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by *conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself*; the inconvenience is one which society can afford to

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<sup>202</sup> Mill seems to be relying on a distinction that is found in Jeremy Bentham’s *An Introduction to the Principles of Morals and Legislation*. When Mill discusses the idea that wrongs and harms that are a matter of justice must correspond to an “assignable individual” he is alluding to a division of Bentham’s. When discussing the consequences of “mischievous acts” Bentham claims that mischief can be divided into a primary and secondary category. The primary category affects an assignable person (i.e. an assignable person suffers the ill effects) and the secondary acts of mischief do not have an assignable individual but “extends itself either over the whole community, or over some other multitude of unassignable individuals” (XII: 3). He further states that

The primary mischief of an act may again be distinguished into two branches: 1. the *original*: and, 2. The *derivative*. By the original branch, I mean that which alights upon and is confined to any person who is a sufferer in the first instance, and on his own account: the person, for instance, who is beaten, robbed, or murdered. By the derivative branch, I mean any share of mischief which may befall any other assignable persons in consequence of his being a sufferer, and no otherwise.

These persons must, of course, be persons who in some way or other are connected with him. (XII: 4)

This division seems to be present in Mill and indeed, it is a likely influence on his interpretation of assignable individuals here.

bear, for the sake of the greater good of human freedom (OL IV: 11 Emphasis added).

Thus, while we may be morally bound to do or avoid doing things, justice is not always what demands this but it does demand that other-regarding conduct which violates duties to others are avoided.

### 3.3.4 *Separation of Morality and Justice*

By separating justice from morality more generally in chapter V of *Utilitarianism*, I believe Mill is highlighting the distinction between those things that the law can require and those things that are a part of morality (and are even other-regarding behavior) but are not within the domain of the law. So, it seems that duties of perfect obligation in which others have a claim on us are not only relevant for rights but they also—and more centrally—correspond to the legal harm principle because there is an assignable person who makes a claim on us that we are duty bound by justice to obey (as well as morality more generally since justice is a part of morality).

Though Mill allows for other considerations of justice to outweigh such general rules, for instance if the harm that would occur because of the legal compulsion to perform a duty would be more harmful than allowing the duty infringement to occur, then it may not be the proper avenue for enforcing such duties.<sup>203</sup> Because duties of imperfect obligation are those that we have but because they are not towards any definite person, it seems that a lesser sort of coercive interference would be the appropriate avenue for enforcement. It may be that society can apply “moral pressures” to ensure that people perform these imperfect obligations. However, it is not even clear that Mill would endorse this position because these may be instances in which

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<sup>203</sup> See for instance, Mill, *Utilitarianism*, V: 15; Mill, *On Liberty*, I: 11, V: 11. This is a matter of applying the balancing principle and will be discussed further in chapter 6.6.



individuals would be better left to their own devices and since there is not a specific “other” that is being harmed, it is not clear that Mill would on balance allow for coercive interference though these fit within the domain of society. Imperfect duties, then, are things over which we may have a moral obligation but it is not to an assignable person<sup>204</sup> and thus, because there is not assignable harm to others is not a proper domain of the law (and perhaps in certain circumstances not through social pressures either). If we cannot point to those who are wronged, it seems Mill believes it is not appropriate to prevent the behavior in question through the law.<sup>205</sup>

Mill further argues that while we may be morally bound and have a duty to be charitable, for instance, that charity is not assignable to any particular person. These sorts of duties are not something over which the law ought to have any say because they are things that we would *like* or *prefer* that people do and would make people “good” but these duties do not have an assignable person to which we are obliged to give. Some, including Alan E. Fuchs, claim that Mill here is talking about supererogatory acts, which if he is correct, would *not* fall within the domain of society because they are not causing harm.<sup>206</sup> Others, such as Piers Norris Turner, would argue that since there are negative consequences of not giving to charity, for instance, and it is a part of morality, that they *are* in fact within the domain of society and any negative consequence is harm on Mill’s account.<sup>207</sup> Because my focus is not on the general harm principle or harm on the lower end of the spectrum, it does not matter for my purposes who is correct in this matter—whether violations of imperfect obligations cause harm or fail to benefit.

Furthermore, in highlighting the difference between duties of beneficence, which we want people

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<sup>204</sup> Mill seems to borrow this idea from Bentham, *Principle of Morals and Legislation*, XII: 3–4.

<sup>205</sup> This is perhaps a bit over simple. It is not just that you need to be able to point to an assignable individual but rather that the assignable individual has a claim on the agent because of the duty the agent has—there is a causal factor not a mere contributing factor in the harm. This will be discussed more below.

<sup>206</sup> Alan E. Fuchs, “Mill’s Theory of Morality,” in *The Blackwell Guide to Mill’s Utilitarianism*, (Hoboken, NJ: Blackwell, 2006) 147–50.

<sup>207</sup> Turner, “‘Harm’ and Mill’s Harm Principle,” 300, 319–26.

to fulfill and which we ought to attempt to teach others, and duties to not harm, Mill claims that “in inculcating on each other the duty of positive beneficence [we all] have an unmistakable interest, but far less in degree: a person may possibly not need the benefits of others; but he always needs that they should not do him hurt” (U V: 33). This passage of *Utilitarianism* highlights the hierarchy of interests, some more important to the interests of humans than others.

### 3.3.5 A Hierarchy of Interests

This hierarchy also seems to be present in chapter IV of *On Liberty*. Here Mill makes the connection between duties, harm, and others much more directly when he claims that “everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest” (OL IV: 3). These duties toward society, for Mill, are two-fold. One involves a straightforward duty not to harm others (perfect duties) and the other seems to involve duties of beneficence and/or positive aid toward society and individuals within it (imperfect duties). The first sort of duty or societal obligation is a statement or summation of the general harm principle and is useful for further examining what Mill intends to count as “harm” for the harm principle both generally and more specifically as it relates to the law. The second supposed social obligation or duty seems (initially) to go against many claims Mill makes in *On Liberty*, specifically regarding the limits of the harm principle. Leaving aside the second for now, I will focus on the first.<sup>208</sup>

On the social duty regarding conduct aimed toward harm prevention, Mill says, “this conduct consists, first, in not injuring the interests of one another; or rather certain interests,

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<sup>208</sup> I will examine the second criterion later in chapter 4.4 when discussing the inconsistencies that may appear in *On Liberty*.

which, either by express legal provision or by tacit understanding, ought to be considered as rights” (OL IV: 3). This particular line of thought connects much of what Mill says about harm and important interests to rights. The connections made here are important in understanding the legal harm principle, namely, the relationship between interests (of a specific kind), duty, the law, and rights. He introduces the idea that the types of interests he discusses here, which he appeals to throughout *On Liberty*, are or “ought to be considered rights” (OL IV: 3). This connection of interests and of rights is noteworthy in that it links the harm principle more directly to the law and helps to point more explicitly to what Mill believes the role of the law plays in legitimately limiting liberty. As I will discuss in the next chapter, Mill believes that when an act interferes with certain duties to others—perfect duties—it is a rights infringement and is an unacceptable sort of harm to others that affects a special sort of interest that individuals have and the government may interfere to either prevent a violation or punish after the fact.<sup>209</sup>

This is consistent with the general harm principle which states that harm to others (especially their permanent and more important interests<sup>210</sup>) is the only legitimate interference in the liberty of others. As mentioned in the previous section, Mill argues that

Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a *prima facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation (OL I: 11).

These interests are those that are essential to the liberty of citizens. So, we have perfect duties to respect the permanent interests of humans, which Mill frequently defines as liberties. Such liberties and interests, when of a certain type are then rights, and when we seriously infringe

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<sup>209</sup> More on Mill’s incorporation of punishment will be explored below.

<sup>210</sup> See chapter 4.

these rights we are failing to fulfill these certain duties (perfect) which causes harm to others.

Then, it seems, we have duties not to violate rights. And when these rights are violated, Mill here suggests that the law is the appropriate domain.<sup>211</sup>

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<sup>211</sup> While I will have more to say on the matter below, it may seem as though Mill suggests that breaches of duty can be punished by social extra-legal means (“general disapprobation”) I will argue that this is only when society is of the opinion that while the law is the appropriate domain for these violations, it would not be practical or would cause more harm by prohibiting the violation. Because of this, it falls into the domain of extra-legal coercion and ought to be prevented that way instead.

## Chapter 4 Rights and the Domain of the Legal Harm Principle

### 4.1 Rights and the Legal Harm Principle

If, as I claim, Mill depends on an idea of rights to inform where the domain of the legal harm principle begins, then what does he mean by “rights” and how does this help us to further understand the legal harm principle as distinct from Mill’s general harm principle? This connection between rights and the harm principle is an important feature because it provides another clue into what Mill intends the harm principle to cover regarding the law and interference in certain interests of others, which we now know to be “rights” (OL IV: 3). Indeed, he says that these rights may come from “express legal provision” (OL IV: 3). This relationship is notable because one of the criticisms of Mill is that he lacks a certain depth of explanation regarding his understanding of harm in *On Liberty* that makes what he is doing unhelpful or too vague for practical application.<sup>212</sup> If we can look to what he says of rights to inform us of what he means by liberties, interests, and harm, we can utilize the harm principle more easily to interpret the legitimate domain of the penal law. Unfortunately, he does not say much about rights as such in *On Liberty* and what he does say does not seem to be particularly illuminating. For instance, Mill states that “as much compression as is necessary to prevent the stronger specimens of human nature from encroaching on *the rights of others*, cannot be dispensed with” (OL IV: 3). He recognizes that preventing agents from encroaching the rights of others interferes with these agents’ liberty but claims that

for this there is ample compensation even in the point of view of human development. The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly

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<sup>212</sup> Feinberg, *Harm to Others*, 25–6; Richard A. Epstein, “The Harm Principle—And How it Grew,” 371; David O. Brink, *Mill Progressive Principles*; Johnathan Riley, *Mill On Liberty*; Simester and von Hirsch, *Crimes, Harms, and Wrongs*.

obtained at the expense of the development of other people. And even to himself there is a full equivalent in the better development of the social part of his nature, rendered possible by the restraint put upon the selfish part. To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object (OL III: 9).

This passage suggests that compulsion and coercion of individuals is acceptable to prevent harm to others where such harm occurs when others' rights are encroached because it is good for everyone, even the agent being restricted yet he still does not say what he means by rights here. This ties harm prevention and the protections of rights to morality and justice and highlights that the harm principle is based not on individuality but on community. He hints that others are injured when rights are infringed and that rights help in the "development of other people," and that they relate to the "good of others."

At times Mill seems to use "rights" interchangeably with "liberties." Indeed, when he is setting the stage for his discussion in *On Liberty* he claims that when citizens were attempting to determine the proper limits of the government, they were detailing "certain immunities, called political liberties or rights" (OL I: 2). This suggests that (legal/political) rights and liberties are intimately connected and may perhaps be one and the same or perhaps these liberties are a sort of right.<sup>213</sup> Nevertheless, if Mill understands right infringing harm as that which determines when the law may step in (which I will argue below), then we need to get a better handle on what he means by rights. And if we can use Mill's own view and explanation in *Utilitarianism* to understand his view of rights, then we can look to him instead of later theorists who may not use the same theory or idea of rights.<sup>214</sup>

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<sup>213</sup> For a detailed discussion of rights and liberties and how they differ, see Wesley Newcomb Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, CT: Yale University Press, 1919). Much of what Hohfeld says may be consistent with Mill though Hohfeld does go to great lengths to distinguish claim rights from liberty rights. And his language is very careful whereas Mill frequently uses placeholders and alternate terms for his definitions.

<sup>214</sup> This is referring to the current tendency to look to Feinberg for elaboration of harm and rights instead of Mill because many believe that Mill does not effectively discuss what he means by these terms and Feinberg's excellent

#### 4.1.1 Right Versus Rights

While it is easy to import many things into talk of “rights,” Mill is a Utilitarian and does not believe in inherent rights in the way that many theorists describe them. In *On Liberty* he claims “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: but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being” (OL I: 11). He categorically rejects any interpretation of rights that is not based on utility—or “the Expedient” as he sometimes calls it in *Utilitarianism* (U V: 1). However, because the term ‘right’ is not univocal and is used in many ways, the two most common being ‘right’ as in a protected interest and ‘right’ as in right and wrong, it is not clear which term Mill is using here. Indeed, throughout *On Liberty* he discusses both. So, it may seem that here he is talking of “abstract right” in terms of right and wrong because he does not talk of rights (with an s) which is perhaps more common. However, because of the context, i.e. he is talking of the principle of liberty and interests that individuals have as well as coercion and later he discusses legal penalties, I take him to be discussing rights (with an s). This seems to be confirmed when he discusses interests—specifically those that are based on utility grounded in permanent interests—as rights (OL I: 11, IV: 3).<sup>215</sup> In *Utilitarianism* chapter V, he also discusses rights in terms of justice and interests and there, as I will explain below, he ties the idea of rights to utility and justice, which also seems to confirm my interpretation.

However, even if he is speaking of ‘right’ in terms of right and wrong, he would provide a similar answer to any talk of legal and/or moral rights. He would still demand all talk of such

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and thorough work does this much more obviously. While at times this practice is useful and easier, some of what Feinberg says is not entirely consistent with Mill.

<sup>215</sup> While Mill connects rights and interests in *On Liberty* as I argued above, this connection becomes very apparent in *Utilitarianism* V.

interests to be strictly in terms of utility and forgo any notion of natural or abstract rights of which he was very aware that utilitarian Jeremy Bentham famously and colorfully called “nonsense on stilts.”<sup>216</sup> So even if I am incorrect in interpreting this particular ambiguous passage as discussing “rights” rather than “right,” the overall methodology of Mill in both *On Liberty* and chapter V of *Utilitarianism* supports use of this passage as evidence or explanation for the idea that rights are nothing more than interests that have a very high social utility and are not innate or part of natural law.

Further evidence for this occurs early in *On Liberty* when Mill is describing the harm principle. He claims that

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).

While again, this passage may also be discussing ‘right’ in terms of right/wrong, Mill seems to be claiming that individuals have certain rights surrounding self-regarding conduct when he states that individuals have “sovereignty” over their own body and mind. Mill could mean nothing more than it is proper, correct, right (as opposed to wrong) that individuals have absolute power over their mind and body but by invoking sovereignty, he seems to be making the claim that individuals have *a* right to this because sovereignty is frequently coupled with “rightful” or “legitimate” or some kind of “authority” all of which seems to refer to a significant interest that individuals have that ought to be protected.

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<sup>216</sup> Jeremy Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, eds. P. Schofield, C. Pease-Watkin, and C. Blamires (Oxford: Oxford University Press, 2002) 330 [written in 1795].



#### 4.1.2 Interpretations of Rights

Some contemporary theorists, Joel Feinberg among them, rely on rights talk that is not properly utilitarian, and it is possible to take much of what Mill says about rights and interpret it in, for instance, a Kantian manner or in terms of natural rights. While my interpretation of Mill does not depend on strict adherence to utilitarianism, it is important to keep in mind that some interpretations of rights are a loose—or perhaps directly contrary—way in which to use Mill’s understanding of rights. Because Mill believes that there are degrees of pleasures and goods which make up those things that provide happiness and that some goods are qualitatively better, or have greater utility, than others, he can talk of rights as those things that are a necessary or significant part of happiness or a good life while still adhering to the Principle of Utility and his utilitarian commitments.<sup>217</sup> Rights, then, are things he believes are beneficial in a greater sense than many other “goods” as they are “grounded on the permanent interests of man as a progressive being” (OL I: 11). In chapter II of *Utilitarianism* Mill defines rights as “legitimate and authorized expectations” (U II: 23) which seem to suggest that the permanent interests he is discussing are legitimately expected.

Many of the things he—and others, such as Feinberg and even Kant—understands to be rights would be things that others with different interpretations of rights would also agree constituted rights and the benefit of Mill’s method is that even when talking about rights through

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<sup>217</sup> Mill, *Utilitarianism*, II: 6, “A being of higher faculties requires more to make him happy, is capable probably of more acute suffering, and certainly accessible to it at more points, than one of an inferior type; but in spite of these liabilities, he can never really wish to sink into what he feels to be a lower grade of existence. We may give what explanation we please of this unwillingness; we may attribute it to pride, a name which is given indiscriminately to some of the most and to some of the least estimable feelings of which mankind are capable: *we may refer it to the love of liberty and personal independence*, an appeal to which was with the Stoics one of the most effective means for the inculcation of it; to the love of power, or to the love of excitement, both of which do really enter into and contribute to it: but its most appropriate appellation is a sense of dignity, which all human beings possess in one form or other, and in some, though by no means in exact, proportion to their higher faculties, and *which is so essential a part of the happiness of those in whom it is strong, that nothing which conflicts with it could be, otherwise than momentarily, an object of desire to them.*” Emphasis added.

a utilitarian theory he can allow for the rights that we have to change as society and even technology changes. In other words, it is entirely possible and plausible for more rights to be acquired (that were in fact not rights before) based on the idea that humans are progressive and that the important interests of humans evolve and develop in such a way that the rights that are of greatest importance are rights for which we previously had no need (either because they are based in a new advance in technology or else the needs and expectations of individuals in society change). As long as we can demonstrate that a particular right is highly socially useful, it seems Mill would allow them within the theory. This makes many of the things that Mill says regarding the general harm principle consistent with a variety of interpretations of rights (even some that upon first blush may seem opposed to a utilitarian interpretation—such as those based on duty) and it is where the concept of rights—no matter the theory—coincide that we have a relatively universal, descriptive, and usable understanding of rights which seems to provide substance for the legal harm principle (but this is getting ahead of myself).

#### **4.2 Connecting Rights to Justice, Morality, and the Law**

For Mill—and most others—the law is inextricably intertwined with morality and justice. The harm principle is essentially a principle of justice which upholds certain moral ideas. Mill believes that justice is a subspecies of utility and he claims that “justice remains the appropriate name for certain social utilities which are vastly more important and therefore more absolute and imperative, than any others are as a class” (U V: 38). Mill also connects justice directly to morality by claiming it is an attribute of morality (he explicitly says “justice, like many other moral attributes ...” (U V: 2)). Indeed, it is exactly this point—that justice is a feature of morality and that it is best understood as protecting those interests that are more important than

others—that Mill is trying to make in chapter V of *Utilitarianism*. He claims that “people find it difficult to see, in Justice, only a particular kind or branch of general utility, and think that [Justice’s] superior binding force requires a totally different origin” (U V: 2). He believes that in order to understand why this is the case, we must “attempt to ascertain what is the distinguishing character of justice, or of injustice: what is the quality, or whether there is any quality, attributed in common to all modes of conduct designated as unjust” to highlight the difference between justice and mere disapproval (U V: 3).

#### 4.2.1 *Some Common Attributes of Justice*

In *Utilitarianism* Mill considers five (possibly six) common aspects of justice that are presumably universal, or at the very least common, though none are “regarded as absolute” (U V: 4–8). He claims that

to find the various attributes of a variety of objects, it is necessary to begin by surveying the objects themselves in the concrete. Let us therefore advert successively to the various modes of action, and arrangements of human affairs, which are classed, by universal or widely spread opinion, as Just or as Unjust. The things well known to excite the sentiments associated with those names, are of a very multifarious character (U V: 4).

His method here may be interpreted in at least two ways. Either Mill is attempting to list all the various things that people tend to think about justice, whether they are an actual part or not, or else he is listing those things that most people agree to be essential (though perhaps not necessary) “common attributes” of justice. I take him to be doing the former because in his description and explanation that follows, he seems to be attempting to show that these attributes of justice stem from a single thing, namely, social utility but that we may be mistaken in some cases because we do not refine our thoughts and feelings appropriately. The commonalities that Mill discusses “rapidly in review, without studying any particular arrangement” are 1. It is unjust

to violate a legal right, 2. It is unjust to violate a moral right, 3. Individuals should get what they deserve, 4. It is unjust to break faith, and 5. It is unjust to show partiality. There is perhaps a sixth common attribute that Mill discusses, namely it is just to treat people with equality though it may be that this is an explanation of or addition to the attribute of impartiality (U V: 4–9).

When people discuss justice, one of the first things that comes up is individual rights to certain liberties, which are generally thought to be granted and defined by the law. When something that is thought to be a right is not covered by the law, one of the first steps of activists is to attempt to change the law to account for such rights. When such a right is violated, it is generally considered to be unjust and those who violate such rights may be held criminally liable. Thus, it is descriptive legal rights with which Mill begins (and uses to segue into moral rights). He claims that “in the first place, it is mostly considered unjust to deprive anyone of his personal liberty, his property, or any other thing which belongs to him by law. . . . It is just to respect, unjust to violate, the *legal rights* of anyone” (U V: 5). However, this, in a way, Mill admits is too simple. For instance, there are some rights that ought not to belong to individuals even if their legal code grants such a legal right to them because the law that grants the right is itself unjust, bad, or illegitimate. Mill recognizes that there are different responses to this problem and different calls to action (or inaction) which are expressed by the public even now. For instance, it may be the case that one believes that no matter how bad the law is, it ought never to be violated and violating a law, any law, is unjust. Those who hold this view believe in “maintaining inviolate the sentiment of submission to law” (U V: 6).

On the other side, it may be the case that individuals believe that it is acceptable to violate an unjust or bad law. Mill outlines three cases where some may think it is acceptable in certain circumstances to violate certain laws. The first is that some believe that “any law, judged

to be bad, may blamelessly be disobeyed, even though it be not judged to be unjust, but only inexpedient” (U V: 6). In the second case, those who would allow for the willful disobedience of the law “confine the license of disobedience to the case of unjust laws” (U V: 6). Finally, some believe that all inexpedient laws are unjust laws because “every law imposes some restriction on the natural liberty of mankind, which restriction is an injustice, unless legitimated by tending to their good” (U V: 6).

However, even in cases in which individuals believe the law, whether good or bad, just or unjust, ought to be followed, most agree that the law is *not* synonymous with justice and when “a law is thought to be unjust, it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely by infringing somebody’s right” (U V: 6). However, because these rights cannot be considered (descriptive) legal rights, there must be some other kind of right that we recognize: moral rights. So, at this point Mill notes that there are two primary understandings of rights. These understandings of rights, namely legal rights and moral rights, may, and frequently do, overlap. Some moral rights are also (descriptive) legal rights and some moral rights are not (descriptive) legal rights. And while it would seem that one could argue that all legal rights are moral rights, Mill would not go so far because there are some legal rights that ought not to be legal rights (they are descriptive but not normative). As noted above, they are derived from a bad law or an immoral law and thus ought not to be a right that one has. If, however, all legal rights were derived from legitimate laws, it seems that they would be a subspecies of moral rights (they would be prescriptive or normative).

The third widely accepted understanding of justice is that each person should get what he or she deserves “whether good or evil” (U V: 7). This concept of desert is present in many accounts of justice and regulations concerning the criminal law, and in some cases, is believed to

be a necessary feature of any criminal law. Mill states that most people believe that those who do bad things should be punished and those who do good things should not (and some believe that those who do good should get goodness in return, though constructing the criminal law is a bit different than understanding justice). Mill believes that in the average person, this understanding of justice is the most pervasive and common.

The fourth commonly held characteristic of justice deals with the idea that it is unjust to go back on your word or to “break faith” with another. He claims that it is unjust “to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily” (U V: 8). Lying, cheating, breaking contracts, breaking promises all seem to fall under this idea of (in)justice and all are thought to be unjust, though we admit in many cases that there may be circumstances in which other obligations of justice outweigh or “absolve us from our obligation” (U V: 8). Again, as Mill admits, “like the other obligations of justice already spoken of, this one is not regarded as absolute” for a variety of reasons (U V: 8).

The fifth concept that is common to ideas of justice is the idea of impartiality, which is often cashed out in terms of equality (perhaps a sixth commonality), though they are not synonymous. When you show favoritism to individuals or groups “in matters to which favour and preference do not properly apply,” it is generally understood to be unjust (U V: 9). While this does not really specify much, Mill recognizes that “impartiality, however, does not seem to be regarded as a duty in itself, but rather as instrumental to some other duty” (U V: 9) and in some (many?) instances, favoritism is not unwarranted but rather is quite acceptable and in fact expected. For instance, in many cases, we expect people to give preference and priority to their family over others and would tend to believe they are not behaving as they should if they did not.

While it is obviously the case that there are circumstances in which it is wrong to give partiality to family—for instance, we generally disapprove of nepotism—in many cases, such as providing food, shelter, and affection, we are generally supposed to favor our family over others. However, Mill correctly states that “impartiality where rights are concerned is of course obligatory; but this is involved in the more general obligation of giving to everyone his right” (U V: 9). I believe this rests on the common attribute that each person should get what he/she deserves. And further, it may be the case that rights are essential to getting what one deserves because rights are those things that are owed to us as Mill claims they are “legitimate and authorized expectations” (U II: 23) that seem to be grounded on the permanent interests that we have.

This idea of impartiality is further connected to the idea that in matters of determining claims against one another, one ought to consider only desert (which is a matter of impartiality). “In short,” Mill claims, “as an obligation of justice, [impartiality] may be said to mean, being exclusively influenced by the considerations which it is supposed ought to influence the particular case in hand” (U V: 9). And as Mill recognizes, it is difficult to talk about impartiality without also talking about the related concept of equality because, for many, being impartial and being just amount to “giving equal protection to the rights of all” (U V: 10). However, Mill observes that the ideas of equality and impartiality vary greatly. Indeed, this idea was developed by Amartya Sen when he argued that the idea of equality was not really a uniform or consistent thing. Indeed, most ideas of equality are based on whatever it is that one is arguing in favor of. If one favors equality of choice or of income or of rights or whatever else it is that, as Mill would say, one finds most useful or valuable, then that is how the idea of equality is to be interpreted. It is important to note that these ideas may differ fundamentally.<sup>218</sup>

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<sup>218</sup> Amartya Sen, “Equality of What?” *The Tanner Lecture of Human Values*, (Stanford University, May 22, 1979); Amartya Sen, *Inequality Reexamined*, (Harvard: Harvard University Press, 1992).

Mill claims that if we are talking of equality of rights, even those who enjoy more rights than others, in part due to radically unjust systems, still believe that *theoretically* even those with very little rights ought to have them protected, as meagre as those rights may be. Mill claims that even in a society which endorses and enforces slavery, the masters of the slaves would admit that the rights of slaves ought to be upheld, even though those rights are few and far between. He further states that such slave owning individuals would argue that if these rights are *not* upheld, such systems are “wanting in justice” (U V: 10) though, interestingly, these individuals would think the institutions that withhold rights to the slave are not unjust. This is because, as Sen and Mill would claim, the equality of upholding the rights is understood as valuable or useful/expedient but ridding oneself of the unjust institution is not.

Mill recognizes that while pervasive and deemed by most to be fundamental types of justice, “it is a matter of some difficulty to seize the mental link which holds them [impartiality and equality as well as the other common ideas of justice] together, and on which the moral sentiment adhering to the term essentially depends” (U V: 11). To “seize the mental link” between the various understandings of justice, Mill turns to the etymology of justice to show that it is primarily derived from either “positive law” or “authoritative custom” and is more closely connected to the law specifically than morality generally (U V: 12). He claims that “the courts of justice, the administration of justice, are the courts of law and administration of law” and “there can, ... be no doubt that the *idee mere*, the primitive element, in the formation of the notion of justice, was conformity to the law” and it was not until Christianity came about that the connection to enforcement of *all* moral ideals broadly became featured (U V: 12).<sup>219</sup>

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<sup>219</sup> Indeed, he claims that conformity to the law “constituted the entire idea [of justice] among the Hebrews, up to the birth of Christianity; as might be expected in the case of a people whose laws attempted to embrace all subjects on which precepts were required, and who believed those laws to be a direct emanation from the Supreme Being. But other nations, and in particular the Greeks and Romans, who knew that their laws had been made originally, and still



It is this attempt or tendency to make all of morality a feature of the law which I believe led to the confusion and conflation between morality and justice (which in turn confuses which things ought to be considered rights relevant to the law). Because the idea of justice surrounded a conformity to the law, justice continued to be connected to the law and most “knew that their laws had been made originally, and still continued to be made, by men, [and] were not afraid to admit that those men might make bad laws; might do, by law, the same things, and from the same motives, which, if done by individuals without the sanction of law, would be called unjust” (U V: 12).

Because of these two features (connection to the law and realization that humans could create bad laws) justice continued to be connected to the law but

the sentiment of injustice came to be attached, not to all violations of law, but only to violations of such laws as *ought* to exist, including such as ought to exist but do not; and to laws themselves, if supposed to be contrary to what ought to be law. In this manner the idea of law and of its injunctions was still predominant in the notion of justice even when the laws actually in force ceased to be accepted as the standard of it (U V: 12).

So, while it is the case that justice and the law are intimately connected, most recognize that they are not synonymous in actuality and that it may be the case that a law is unjust or that justice demands that certain things not be enforced through the law. This does not mean that the law is not a function of justice, only that we as humans may get it wrong. This also does not mean that we should not attempt to create principles that govern the law as it *ought* to function and to determine which things *ought* to be considered rights within the law. Indeed, it seems that the purpose of deriving a legal harm principle from Mill’s general one is to create a principled way in which to decide which sorts of behavior properly belong within the domain of the criminal

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continued to be made, by men, were not afraid to admit that those men might make bad laws; might do, by law, the same things, and from the same motives, which, if done by individuals without the sanction of law, would be called unjust.”

law, which are rights, and which are not. Whether we then actually prohibit these actions through the law is a different question altogether.

Understanding which “rights” *ought to be* legal rights seems to be the focus of what Mill is doing in *Utilitarianism* chapter V and is key to understanding my account of the legal harm principle. In other words, Mill looks at common notions of rights in order to delineate justice and morality. In doing so, he refines these ideas of rights in order to pinpoint matters of justice. I believe this refinement and the definition of rights provides the division between the general harm principle and legal harm principle. This shows the way in which moral duties and obligations overlap with and inform rights and obligations of justice but also helps to show how they come apart.<sup>220</sup>

#### 4.2.2 Separating Justice from General Morality

To Mill (and most others) it is obvious that we apply the idea of justice to things which we believe the law should not interfere, which further supports the idea that the law and justice in the real world are not synonymous. It seems that for Mill, the domain or jurisdiction of legal enforcement depends on where the line is drawn which separates justice from morality more generally. It is at this point in chapter V of *Utilitarianism* that Mill suggests that there is something incorrect about the way we tend to discuss, describe, or understand rights because they are derived from obligations and duty and it seems like all obligations, as they have been described thus far in *Utilitarianism* V, can be described in pretty much the same way. By rights most people (as indicated by the beginning of Mill’s chapter) think they are things that are due to us or things that morality demands we get, but this would not distinguish morality and justice

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<sup>220</sup> This is my focus in the next section.

and he argues (and most of us tend to agree here) that morality and justice are not the same (and since they are not the same we need to be clearer on what is meant). That morality and justice are different is evident when we study our feelings which indicate that in many cases we do not want the law to interfere in “the whole detail of private life” (U V: 13) and that it may be an injustice to have the law cover some things to which we may think morality demands.<sup>221</sup> Mill claims that as he has described it thus far, justice does not appear to differ from an idea of moral obligations in general and all of what he has said so far also applies to how we tend to view morality as a whole.

He believes his account of the commonalities and etymology of justice are accurate and are “a true account, as far as it goes, of the origin and progressive growth of the idea of justice. But we must observe, that it contains, as yet, nothing to distinguish that obligation from moral obligation in general” (U V: 14). He claims that both justice and morality contain the idea that each should get what he/she deserves and that when someone does something that goes against this (i.e. something wrong), there ought to be repercussions. But there must be something that separates them still further because we recognize that they are not always the same and different methods of interference are necessary in different cases.

When Mill begins to separate the role of justice (those things that may be covered by the law) from that of morality, he highlights this disparity and focuses on the idea that morality is separated from general utility through duty and our notions of desert/punishment and wrongfulness. He claims that though we do not want the law to interfere in many things that we consider to be “wrong,” “it would always give us pleasure, and chime in with our feelings of

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<sup>221</sup> Though he admits that we are generally pleased when those who do things we consider to be unjust are punished, we still do not really think it is practical for the courts to interfere and we also accept that there are many instances in which minor injustices or inconveniences are not fit for legal regulation.

fitness, that acts which we deem unjust should be punished, though we do not always think it expedient that this should be done by the tribunals” (U V: 13). This, I believe is where problems regarding alternate liberty limiting principles, such as legal moralism and paternalism, occur because the overlapping ideas of morality and justice cloud where the proper realm of legitimate government intervention falls. Because we often conflate morality as a whole and the specific narrow version of morality that is justice, we fail to maintain a clear and principled division.<sup>222</sup>

Mill claims that

the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by the law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience (U V: 14).

Yet, it is finding the line between legal punishment and societal/moral pressures that creates a tension with rights enforcement.

Mill claims that what distinguishes morality in general from utility is 1. We believe the act to be wrong and 2. We demand/expect/desire punishment for the act (whereas utility focuses on the useful or expedient and withholds any opinion on matters of punishment). While these two criteria are also a part of justice, there is something more that distinguishes justice from morality more generally. The rest of *Utilitarianism* chapter V explores this differentiation and rests upon a notion and refinement of rights which in turn defines justice and the proper domain of the law.

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<sup>222</sup> While the legal moralist maintains that some things that morality demands ought not to be covered through the law, they have a more difficult time in presenting and maintaining a consistent and principled line to make the distinction between those things that ought to be covered and those that ought not.

#### 4.2.3 Utilitarianism Chapter V: Rights, Perfect Obligations, and the Law

So, *Utilitarianism V* indicates that Mill believes there are different criteria for those moral “rights” that are subject to the law through, what I call, the legal harm principle. Both morality and justice require 1. a wrong done and 2. a desire for retribution but justice adds another criterion, namely, 3. harm to an assignable person—a claim. This is where Mill brings in the notions of perfect and imperfect duties.<sup>223</sup> Perfect obligations seem to align with the domain of the legal harm principle and notions of justice. Mill claims that “in our survey of the popular acceptations of justice, the term appeared generally to involve the idea of a personal right—a claim on the part of one or more individuals, like that which the law gives when it confers a proprietary or other legal right” (U V: 15).<sup>224</sup> So, while morality generally covers a broader class of things, justice (as a narrow part of morality) covers something more specific in demanding a claim-right. Morality covers all wrongs, such as a failure to be generous or beneficent, justice covers those wrongs to which others have a claim against us. This claim is that some other has violated something which is due to the victim.

Mill’s idea of justice, then, relies on a wrong done to some assignable person (i.e. a harm done to an assignable person). This contrasts with morality more generally which also includes imperfect duties and obligations (which morality demands of us) which do not violate or infringe right-claims when we fail to fulfill these obligations. Mill claims that with those things that ought to be rights/comprise justice

Whether the injustice consists in depriving a person of a possession, or in breaking faith with him, or in treating him worse than he deserves, or worse than other people who have no greater claims, in each case the supposition implies two things—a wrong done, and some assignable person who is wronged. ... It seems to me that this feature in the case—a right in some person, correlative to the moral

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<sup>223</sup> I discuss perfect and imperfect duties in chapter 3.3.3.

<sup>224</sup> This highlights the idea that Mill is attempting to define rights in terms of what *ought to be* in the domain of the law and separate it from actual descriptive legal rights that “most people” discuss.

obligation—constitutes the specific difference between justice, and [moral obligations in general such as] generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right (U V: 15).

So, it seems that (moral) rights are those that we can claim as our due from another. While we may have a variety of moral duties, not all are toward specific individuals and if specific individuals cannot claim it as their due, there is not a correlative rights-claim that is being infringed or violated. So, Mill refines what he means by rights here. All moral obligations and duties then, are not “rights” in this same sense because there is not a claim by an assignable person in some cases, such as Mill’s examples of beneficence and generosity. Mill claims that “wherever there is a right, the case is one of justice, and not of the virtue of beneficence: and whoever does not place the distinction between justice and morality in general where we have now placed it, will be found to make no distinction between them at all, but to merge all morality into justice” (U V: 15). This, of course, is a critique of legal moralism and paternalism which attempt to overextend the idea of justice to incorporate more wrongs into the domain of the law that are not rights violations or infringements (where an assignable individual has a claim on another) but rather are issues of moral obligations more generally.<sup>225</sup>

This helps to make a distinction between harm that is within the domain of the law and harm that is not. In both morality and justice there is a likelihood of a violation if harm is done. However, the key distinction rests on whether there is a claim or not. Mill states that “the two essential ingredients in the sentiment of justice [which is conceptually related to the law] are, the desire to punish a person who has done harm [i.e. done wrong], and the knowledge or belief that

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<sup>225</sup> This applies to legal moralism when it attempts to include “harmless wrongs” or wrongs/harms for which others do not have a claim on the one doing the supposed wrong. This applies to paternalism which attempts to include things like self-inflicted harm, which cannot be a rights violation because there is not another person who has a claim on the individual.

there is some definite individual or individuals to whom harm has been done [i.e. infringed or violated a right]” (U V: 18). If an individual causes a rights-infringing harm (harm to an important and significant interest as progressive beings), the law may be invoked. If an individual fails to prevent harm or contributes to harm (but does not cause it), then it is not a rights violation or infringement but is still harm and can still be covered by the general harm principle, though not the legal harm principle.

For instance, in “bad Samaritan” cases where individuals fail to prevent already occurring harm but do not cause it, they could be censured by social/moral pressures but not by the law. We may have a “right to life” which means we have a right not to be (unjustly) killed by another but this does not mean that others must give us things that are not ours in order to keep us alive, i.e. no one owes us things that would save us such as food or water—they only owe us not to harm us. We may have a “right to food” but this is just a right to that which we already have but we do not have a right that anyone give this to us, only that they not take it from us. Others have moral obligations to help others but others do not have this as their due. We do not owe specific individuals food or assistance (unless there is a special relationship such as parental or familial obligations, etc.) but if we give it to them, we are doing a morally good thing. We have this extra-legal (imperfect) moral obligation but it is not a legislatable moral right that can be demanded of us through the law.

In the case of the general harm principle’s use of moral pressures, it seems that one can argue that any time harm to others occurs, whether there is a duty toward the specific individual or not, society may step in in the form of moral pressures. So, when someone is being harmed, *even if the other agent did not cause the harm or the individual being censured by moral pressures contributed to the harm though did not violate or infringe another’s rights*, society can

legitimately step in to prevent the harm using moral pressures. So, if I have the means to give to charity and do not and harm occurs that could have been prevented, society may criticize and ostracize me for the harm but may not create a law demanding that I give charitably. If I offend someone else's moral sensibilities or say something shocking, I may be causing harm but I am not violating or infringing their rights (there is not a significant interest not to be offended and indeed Mill would likely argue that offense does not even count here) and so may be subject to social controls but not legal.

#### *4.2.4 But What of Retribution?*

One potential issue that arises when discussing the division between justice and morality generally is that we often talk of a desire for punishment even when there is not a rights-infringing harm. However, this retributive element is still consistent with a division between morality and justice. When we talk of a desire that we have that those who do a wrong be punished, sometimes we may mean nothing more than wrongdoers getting what they deserve and that may mean nothing more than being called out for doing something wrong (i.e. application of moral pressures, extra-legal social pressures). Mill even says that we may be obligated to help people and inform them when they are doing something we think to be wrong. But this does not mean they are infringing or violating a right. Furthermore, Mill claims "that the desire to punish a person who has done harm to some individual, is a spontaneous outgrowth from two sentiments, ... the impulse of self-defense, and the feeling of sympathy" (U V: 19). These two sentiments, according to Mill, are natural and "it is natural to resent, and to repel or retaliate, any harm done or attempted against ourselves, or against those with whom we sympathize" (U: V: 20). This sympathy, extends not only to ourselves and our offspring or family, but to *any other*



that we see as similar to ourselves, which is all of humanity because “a human being is capable of apprehending a community of interest between himself and the human society of which he forms a part, such that any conduct which threatens the security of the society generally, is threatening to his own” (U V: 20). This social element is what makes us consider the way in which our actions affect others and fosters a feeling of community which makes the important interests we have of a high utility. This creates a “rule of conduct, and a sentiment which sanctions the rule” which is “common to all mankind, and intended for their good” (U V: 23). Thus, when someone violates or infringes on a claim-right of another, this sense of community is threatened and the desire for retribution is a natural result.

#### *4.2.5 Defining Rights and Their Domain*

As Mill explains it, this rule of conduct is invoked when someone’s “rights (to use the expression appropriated to the case) are violated” (U V: 23). Here Mill defines what exactly he means by “rights.” He claims that “all that we mean when we speak of violation of a right ... When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion” (U V: 24). While I will come back to the latter part of this definition momentarily, it is helpful to look further at what Mill means by this definition. He states that

to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility. ... [which is derived] from the extraordinarily important and impressive kind of utility which is concerned (U V: 25).

This links rights more clearly to the harm principle that is found in *On Liberty* and more specifically to the legal harm principle because Mill is claiming that society ought to protect

against infringements on rights because they are “extraordinarily important and impressive” interests. If they are these sorts of interests, when they are infringed harm is being caused. So, to infringe or violate another’s rights, one is causing harm (it seems any amount of harm) to significant interests and the more important the interest/claim, the more society must protect it.

Mill continues his analysis of rights by looking at what he sees as the single most important and significant of the social utilities to which we have a right. This key interest he is describing is security. Security of self and one’s possessions is a common feature that is presented as an essential claim that individuals have on one another. Mill states that

The interest involved [in rights] is that of security, to everyone’s feelings the most vital of all interests. Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves. Now this most indispensable of all necessities, after physical nutriment, cannot be had, unless the machinery for providing it is kept unintermittedly in active play. Our notion, therefore, of the claim we have on our fellow-creatures to join in making safe for us the very groundwork of our existence, gathers feelings around it so much more intense than those concerned in any of the more common cases of utility, *that the difference in degree* (as is often the case in psychology) *becomes a real difference in kind* (U V: 25 Emphasis added).

Here Mill makes clear that when it comes to those vital human interests, security is generally that which is considered the most important social utility and while it resides at the top of our list of goods, it also seems to change in kind in proportion to the degree of importance. This is in part because if we do not have security in our person and property, we are unable to flourish and be happy because we are in constant fear. If we have security, then we have the ability to strive for happiness without worrying that our lives or our liberty will be taken.

He claims that “the feelings concerned are so powerful, and we count so positively on

finding a responsive feeling in others (all being alike interested), that *ought* and *should* grow into *must*, and recognised indispensability becomes a moral necessity, analogous to physical, and often not inferior to it in binding force exhorted” (U V: 25). In other words, while it is the case that we *must* have food, shelter, and clothing to survive (we have physical necessities) without security, even *these* necessary features are in peril. So, justice and the legal harm principle focus on security—which focuses on protecting rights, or really protecting from certain harms which others have a claim on us to prevent—which is of utmost social importance, i.e. socially useful.

As Mill states it, justice is

incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual implies and testifies to this more binding obligation (U V: 32).

Because it is so important, this changes it to a kind of obligation toward others or right that we have to claim against others which is so binding that the use of legal force becomes the domain for enforcement and “the moral rules which forbid mankind to hurt one another (*in which we must never forget to include wrongful interference with each other’s freedom*) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs” (U V: 33 Emphasis added). It seems then, that this lends support not only for a separate legal criteria for the harm principle but also for the reason why we need a division, i.e. these sorts of harm *become a difference in kind*.

More evidence for a separate legal harm principle also seems to be suggested when Mill claims that as far as enforcement of interference goes, we have the highest interest in preventing these significant kinds of interference. He says that

in inculcating on each other the duty of positive beneficence [we] have an

unmistakable interest, but far less in degree: a person may possibly not need the benefits of others; but he always needs that they should not do him hurt. Thus the moralities which protect every individual from being harmed by others, either directly or by being hindered in his freedom of pursuing his own good, are at once those which he himself has most at heart, and those which he *has the strongest interest in publishing and enforcing by word and deed* (U V: 33 Emphasis added).

To me, the latter part of this quote suggests that since we have the “strongest interest” in preventing harm by others, which includes the self-regarding freedoms to pursue happiness, we have more of a reason to enforce, i.e. use legal recourse, these than any others and thus, they would fall into the jurisdiction of the legal principle.

He then seems to provide more explanation of the sorts of rights which fall within the legal harm principle. He says

Now it is these moralities primarily which compose the obligations of justice. The most marked cases of injustice, and those which give the tone to the feeling of repugnance which characterises the sentiment, are *acts of wrongful aggression, or wrongful exercise of power over some one; the next are those which consist in wrongfully withholding from him something which is his due; in both cases, inflicting on him a positive hurt, either in the form of direct suffering, or of the privation of some good which he had reasonable ground, either of a physical or of a social kind, for counting upon* (U V: 33 Emphasis added).

These cases of injustice echo those that are explored in *On Liberty* and seem to reinforce the idea that the legal harm principle protects individuals from certain liberty encroachments which cause rights-infringing harm.

#### **4.3 Is Mill’s Understanding of Rights Consistent with Other Theories?**

Interestingly, oftentimes when Mill speaks of rights he seems to talk as if there are things that ought to be treated as if they are rights and lays aside whether or not there are actually things that are in fact rights. He even uses this language in *On Liberty* when he discusses “certain interests, which, either by express legal provision or by tacit understanding, *ought to be*

*considered as rights*” (OL IV: 3 Emphasis added). Whether or not they are rights as a real and independent thing does not seem to matter for Mill because his purpose is to look to those things that are treated as rights. There are things that Mill classes as having more or less utility and justice amounts to protecting the rights that people have because they are grounded in the most useful and permanent social interests of people. So, Mill does not claim or purport to claim that Justice, rights, and interest are independent of utility. This is a useful thing to understand because it seems that those with differing interpretations of rights, i.e. the Kantian, could agree that rights are useful and important, indeed more important than other sorts of interest that humans have. Thus, it seems that (my understanding of) Mill’s explanation of legal rights as being the most useful and important interests we have (as progressive beings) is consistent with a myriad of moral and ethical views and as a legal principle can be maintained by most theorists no matter their personal morality.

Mill makes the claim that certain things he says are not inconsistent with Kantianism, specifically regarding rights and justice (U V: 22). Mill claims that justice is a social feeling that is derived from sympathy and self-defense. We do not wish to be harmed or have our rights violated, i.e. we seek security for ourselves and those like us (all of society). And while in particular cases we may not be thinking of the general good when we condemn an act that violated or infringed *our* rights, this does not mean that the principle or the general points Mill makes are wrong. Rather, he allows that “it is common enough certainly, though the reverse of commendable, to feel resentment merely because we have suffered pain” (U V: 22). However, this does not mean that the social feeling he describes is not a dictate of justice. Indeed, he claims that

a person whose resentment is really a moral feeling, that is, who considers whether an act is blamable before he allows himself to resent it—such a person,

though he may not say expressly to himself that he is standing up for the interest of society, certainly does feel that he is asserting a rule which is for the benefit of others as well as for his own. If he is not feeling this—if he is regarding the act solely as it affects him individually—he is not consciously just; he is not concerning himself about the justice of his actions. This is admitted even by anti-utilitarian moralists. When Kant ... propounds as the fundamental principle of morals, ‘So act, that thy rule of conduct might be adopted as a law by all rational beings,’ he virtually acknowledges that the interest of mankind collectively, or at least of mankind indiscriminately, must be in the mind of the agent when conscientiously deciding on the morality of the act. Otherwise he uses words without a meaning: for, that a rule even of utter selfishness could not *possibly* be adopted by all rational beings—that there is any insuperable obstacle in the nature of things to its adoption—cannot be even plausibly maintained. To give any meaning to Kant’s principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt *with benefit to their collective interest* (U V: 22).<sup>226</sup>

Mill creates a concept of rights that he carefully delineates, but there may be other people who bring up other ideas of rights and they are often completely consistent with Mill. And thus, what he says about justice and harm is not inconsistent with other theories. It may be derived from utilitarianism but that does not mean it is inconsistent with other theories and it seems that no matter a person’s personal morality, most would agree that in matters of social interaction and justice, the harm principle is necessary. Many specific rights that people claim to have fall under many of the rights that Mill talks about. We think that there is some special feature of justice that transcends utility but it really does not. It is merely a special form of utility. Especially when we consider the role of the law and what is typically demanded of it. It must consider the practical aspects of regulation, provide clear rules of conduct, and protect the interests of society and the individual. When we consider these aspects of the law, we can see that most of the rights that we consider to be in our significant interest are protected or outlined under the harm principle and

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<sup>226</sup> It is not clear here that Mill’s interpretation of Kant is actually Kantian. However, for my purposes it does not matter if Mill is relaying Kant correctly or misinterpreting Kant.

are consistent with a wide range of rights theories, most of which, like Mill's, center around the idea of security. There is a kind of communal and practical aspect of what is going on with the law that Mill can defend using his concept of rights. If it is useful, practical, and easy to implement, then it is more likely to be enacted through the penal law. One advantage is that it makes the notion of rights dependent on the needs and interests of society. As the times change, it allows a fluidity and alteration when situations change. For instance, you may have a right to protection or a "right to bear arms," but this does not mean (and should not mean) that we have a right to every means of protection at our disposal. Different forms of protection are, at different times, more and less useful and some forms of protection directly endanger the general safety and rights of others. If one form infringes on the rights or the liberties of others, then it may be the case that it is not a right which ought to be protected through the criminal law.

Interestingly, it seems that the harm principle and Mill's views on rights as related to a legal harm principle are not inconsistent with other moral views. Mill relies on Utilitarianism to justify when an act is or is not prohibited. But remember, the harm principle is not really answering a question of justification but rather one of domain. When addressing the balancing principle and attempting to decide *if* a particular act *ought* to be regulated, this is a matter of justification. Mill believes that Utilitarianism is the way to determine this justification. Other theories may be used to justify prohibition while adhering to the domain division Mill makes with the jurisdiction principle and adhering to what he says about rights in general. I even think that most theorists would agree with the claim (or maybe they would at least not dispute the claim) that rights are those things that are most socially useful and often focus on the security of citizens, which is what his idea of rights depends upon.

#### 4.4 Inconsistencies? Mill on Benefitting Others

It is now useful to stop and examine two passages in *On Liberty* that may seem on first read to present difficulties for the view I present. In chapter IV Mill presents the second of what he calls social obligations that individuals have toward one another. The other passage related to this idea of social obligations is in chapter I of *On Liberty* and is a section in which Mill makes some similar claims about duties that citizens have toward each other. These two passages are interesting because they tie into Mill's view of duties and obligations from *Utilitarianism* chapter V. They are also of note because upon first read they seem problematic and potentially inconsistent with the view of interests and rights of individuals that I present as well as the harm principle more generally. However, these conflicts are superficial and the claims Mill makes in these passages are consistent with his general harm principle as well as the legal harm principle I propose.

In chapter IV of *On Liberty* Mill claims that there are two social obligations that individuals have toward one another. The first social obligation covers conduct regarding rights infringements and "this conduct consists first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights" (OL IV: 3). This social obligation is not only consistent with my classification of the general harm principle but helps to construct my legal harm principle. However, the second required social duty toward others consists

in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing at all costs to those who endeavour to withhold fulfilment. Nor is this all that society may do (OL IV: 3).

This second social obligation still discusses the security and safety of others but also seems to



require quite a lot of citizens. This makes not only refraining from harming others an obligation but also protecting them from harm from others. In other words, it makes it a duty to prevent harm to others and by doing so, seems to require us to benefit others as well. Even if these are legitimate expectations of citizens, the government seems to be given quite a lot of enforcement power, i.e. “enforcing at all costs.”

Along a similar vein, in the earlier passage (I: 11) Mill claims that in addition to refraining from harming others and their interests,

There are also many positive acts for the *benefit* of others, which he may *rightfully be compelled to perform*; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform *certain acts of individual beneficence*, such as saving a fellow-creature’s life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man’s duty to do, he may rightfully be made responsible to society for not doing (OL I: 11 Emphasis added).

So, in these passages, Mill seems to suggest that it is not only the case that the state may coerce individuals when they cause harm to others but it may also interfere in the liberty of its citizens to require them to benefit others, to benefit the state, and to aid others.

In some cases, it actually seems as though Mill is allowing for legal moralism to sneak in and take over. However, I think that much of this apparent inconsistency in Mill can be explained away in one of two ways. First, it is important to remember that Mill is not only (or even primarily) discussing state coercion or interference in liberty, as noted throughout, he is also discussing societal pressures and pressures that one puts on oneself when other options are too invasive. Second, while some of these duties may seem to be overly invasive of the state, most (if not all) of them are in fact consistent with the harm principle.

Regarding interference in liberty, in both passages (at I: 11 and IV: 3), Mill is still speaking relatively generally and it is important to keep in mind that throughout *On Liberty* he

does not always distinguish between those acts that fall into the domain of moral/social pressures and those that the law may enforce. Furthermore, he does not distinguish between types of laws, such as tort and penal or administrative. It may very well be the case that the tort law may be called upon to remedy a supposed grievance against another, but this does not entail that the penal law is the proper avenue for restraint. Rather it seems to me that Mill is consistently providing examples that fit all the situations he discusses, whether the domain of the law, social coercion, or self-discipline. It is also useful to recognize that all the instances Mill lists as required of citizens in passage I: 11 are those in which harm is very likely to occur to others, so while the agent may not be *causing* the harm, the general harm principle applies to all duties that individuals have, including imperfect duties which oblige us to prevent harm, even if you are not the one to cause it. And while there are many ways to enforce moral duties, Mill does not indicate that the law is the domain of these duties.

That these acts are not intended to be within the domain of the law for Mill also appears to be the case because he is very reluctant to apply compulsion to acts that force an agent to prevent evil to others while he readily accepts the fact that preventing someone from “doing” an act that harms another is “the rule” and admits that “preventing” harm is “the exception.” Mill claims that

A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception. 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 the attempt to exercise control would produce other evils, greater than those which it would prevent. When such reasons as these preclude the enforcement of responsibility, the conscience of the agent himself should step into the vacant judgment seat, and protect those interests of others which have no external protection; judging himself all the more rigidly, because the case does not admit of his being made accountable to the judgment of his fellow-creatures (OL I: 11).

This highlights Mill's general way of speaking about harm in *On Liberty*. When he claims that inaction can cause harm he is highlighting instances of actually causing harm, though not all acts of inaction will cause harm (though many may contribute to the harm). He also recognizes that preventing evil to others is, generally speaking, morally required but this does not mean that others have a claim to this aid and that it should be covered by the law. However, he suggests that requiring (say through moral pressures) aid to others in some situations would actually cause more harm than good, so while it may be in the domain (the jurisdiction principle) of social pressures, there may be good reason *not* to punish (the balancing principle).

Similarly, when discussing those social obligations that individual have (at IV: 3) Mill claims that

The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law. 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. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences (OL IV: 3).

And while he claims that certain situations in which an agent's inaction or failure to prevent harm are grave enough to justify coercion, he is careful to note that this is an exception and he does not claim the law as the appropriate domain. However, again this is not clear and I think it

would be inconsistent if Mill believes that the penal law is the proper domain for this sort of harm prevention. Especially because he cautions on the exercise of compulsion in these cases it would seem that public pressure or moral education is the relevant answer to such inaction or failure. Another reason to think Mill would not apply the penal law in these cases is that he makes the claim that even acts that are specifically harmful to others are not always properly regulated through the criminal law because such penalties are not always “safely applicable” (OL I: 11). Even if one were to make the case that the harms that are not safely applicable are those that are too minor or would cause more harm if regulated, it seems that even a severe instance of harm that is allowed to occur or that is not prevented would not fit Mill’s criteria for legal penalties of the strictness that the penal law enacts for the same reasons.

Mill claims that because coercing someone because they failed to prevent evil is the exception to the coercive rule and I would argue that since it is an exception to the rule, it seems that even if Mill believes that “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” (OL I: 11) it does not necessarily follow that the part of the law responsible is penal law. It would seem that since it is an exception, tort law, a less serious form of coercion, would be a more appropriate avenue for compensation. If it is the exception, it seems the burden of proof would be to show that the case fits the exception and deserves a legal response. If it does not, then it seems that the social pressures become the relevant method of punishment.

It is in these two places above all others where it seems that Mill introduces an inconsistency into his discussion of the harm principle—1. we may be required to do things which benefit others and 2. We may be required to prevent harm (which we have not caused directly) from occurring to others. In the first case, one could argue that the “benefits” that Mill

provides as examples here would actually lead to or significantly risk harm to others. For instance, Mill claims that we may be required to

give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow-creature's life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury (OL I: 11).

These things seem to be instances in which there is *harm* to others but the agent in question is not the cause of the harm. In these cases, we may have a moral obligation to help but the victims in these cases do not have a right that we aid them.

Regarding Mill's claim that we may be required to prevent harm from occurring, not merely avoid causing harm, I believe that this is a non-issue for not only Mill but also for the legal harm principle I am suggesting. Essentially, we have a right that agents *not* harm us but we do not have a right that harm not befall us. This addresses the distinction between when social coercion can occur and when legal coercion can occur. If there is harm befalling us, we may (rightly or wrongly) expect that agents ought to aid us but we do not have a *right* to this. We have a right that agents not harm us but we do not have a right that agents aid us when we are in harm. If this were the case, then justice would demand all manner of things that would likely lead to more harm than good and to greater risk of danger for those who did not do anything wrong. We do however, expect that agents aid us in many situations where there is harm befalling another and we may think society may have jurisdiction over it since it affects others but we would not allow for the law to prevent it but rather, since there is not rights-infringing harm, we would expect extra-legal social pressures to be the appropriate domain for correction.

#### 4.4.1 *Why Certain Things are not Rights Infringements*

This may lead to the question of why some things that we have a substantial and important interest in are not considered to be rights that we have a claim to. For instance, what about things like food, water, and shelter? These are necessary parts of the good life and arguably security, i.e. you *must* have these in order to have anything approaching a good life, but are these things rights in the sense that Mill is talking about? It seems that they are not because while food, water, shelter, etc. are necessary and it may seem that everyone has a right to these things, we do not have a specific duty to an assignable individual to clothe and feed the individual (other than those toward whom we have a special relationship, such as children or those for whom we have accepted responsibility). We may, one could argue, have an imperfect duty toward individuals in these situations but we do not owe specific individuals these “benefits” and it is a sort of charitable giving when we do give them. These “rights” (food, shelter, etc.) are things which we have a duty, but not to assignable individuals and they more closely align with what Mill says about imperfect duties or duties surrounding special relationships.<sup>227</sup>

So, while we have a significant and important interest in these things, indeed we cannot live without them, we do not have a right that others provide them for us. Of course, while we have a right to them once we already have them and they cannot be taken away from us by force, we do not have proper rights claims on others that they give us food, shelter, etc. if they have it (or have extra of it). Do they have a moral obligation to give it to us? Yes, I believe they do and

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<sup>227</sup> This view admittedly seems to have certain problems, such as accounting for the injustices that are present in society that creates imbalances of goods for certain groups. However, I do not believe that this is a matter for the criminal law but rather for administrative laws or even education and civic engagement. There may even be social programs or laws that are implemented to remedy these imbalances that are incentives or social welfare programs which are entirely consistent with the legal harm principle and the general harm principle.

morality would dictate that if they have more than they need, they should share but this does not mean we have a *right* to the food nor does it mean that we can take it from them. Should we chastise and criticize and ostracize (apply moral pressures to) those who do not help others who are in need, yes. And the general harm principle rightly allows for this; however, we do not have the right to forcibly take it away from them or enact laws that require such “donation.” So, while it is clear that harm is occurring when individuals are starving or homeless and while I also believe that it is clear that, morally speaking, we *ought* to do something, I do not believe that, nor do I think Mill would believe that the law is the proper domain for such charitable, moral obligation.

#### 4.5 Conclusion

Some may think that this sort of a legal harm principle seems to open up legal punishment for a lot more than people generally expect<sup>228</sup> and lend credence to the view that such a legal harm principle is not useful because it includes even very minor harms as rights-infringing harms. While the domain of the legal harm principle is indeed quite wide on this account, I am addressing what acts may be *considered* for coercion. I am asking a domain question. And on this account *any* harm to a right is within the domain of the law. So, if we have a right to X and even a very minor harm to X occurs, it falls within the domain of the law. Importantly, there is no obligation to actually enforce these rights-infringing harms and indeed it seems that most infringements will either be judged to be too minor to fall within the law, or if it does fall within the law will require a much smaller censure than criminal legislation—which would only be reserved for the most egregious rights violations when the balancing principle is

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<sup>228</sup> And some may argue it covers too little.

applied. However, I think that Mill, in discussing a jurisdiction question, recognizes from the start that the harm principle and more specifically a legal harm principle must also take all those practical considerations (such as cost, balance of harm, etc.) into account and so it may be imprudent to cover many actions through the law, in which case, the social realm steps in and take care of the wrongdoing. Mill claims that “all that we mean when we speak of violation of a right ... when we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, *either by the force of law, or by that of education and opinion*” (U V: 24 Emphasis added). This, I believe, shows that even if the infringement is one of justice (or a rights-infringing harm) which would fall within the domain of the law, it may be judged to be even more harmful to regulate through the law, so it would instead be better regulated through the extra-legal domain. So, while a great many actions may in fact fall within the domain of the legal harm principle (or general harm principle), this does not mean that it *must* be covered by the law (or extra-legal means) only that it *may* be covered. It is a question of the jurisdiction principle—determining if the law or social pressures are the appropriate domain.<sup>229</sup> If it is deemed too harmful to cover through the law, which many of the things that fall within the domain may, it *will* be covered by the harm principle in some fashion (i.e. through the social pressures or individual reproach). Mill requires a separate justificatory question which falls to the balancing principle—if it is in the domain of the law (or society) *should* it be covered and to what degree (i.e. how steep should the penalty be)?<sup>230</sup> This means that those things toward

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<sup>229</sup> See Chapter 3.1.2 for a discussion of Mill’s 2 maxims and the jurisdiction principle and the balancing principle. The second maxim states “that for such actions as are prejudicial [harmful] to the interests of others, the individual is accountable, and *may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection*” (OL V: 2 Emphasis added). The jurisdiction principle is that individuals “*may be subjected either to social or to legal punishment*” and the balancing principle is that either social or legal punishment can be applied “*if society is of opinion that the one or the other is requisite for its protection.*”

<sup>230</sup> Again, because the question of the balancing principle involves application of balancing principles, the “should” here always implies “should on balance” or “should, all things considered.”



the top or middle of the harm scale, more specifically those acts that are rights-infringing harm, will always be covered or punished *in some way*. So, if in applying the jurisdiction principle the state/society decides that it is within the domain of the law but in applying the balancing principle they decide that it causes more harm to cover the act through the law, *it will still be covered* just not through the criminal law or even civil law. It will just fall to social pressures to prevent the act (or if it falls within the extra-legal domain, it may still be deemed too harmful to be covered by social/moral pressures and would thus be subject to individual reproach or conscience).

So, Mill's general harm principle may prevent *all* harm to others, potentially even those acts that the individual did not cause but failed to prevent, while the domain of the legal harm principle covers rights-infringing harms (of which there may be many more than people are comfortable with). However, if we decide that there is more harm caused by legislating the rights-infringing harm than not, it will fall to the general harm principle to prevent and the social pressures to punish those wrongdoers. Mill claims that justice is the social aspect of utility in which the law is called upon to protect those most useful of social utilities. If it becomes worse (more harmful) or less socially useful to cover something, then Mill allows that it should not in actuality be covered by the law but could then be covered through the realm of social pressures—though it is still within the domain of the law. Similarly, if the harms on the lower end of the scale (extra-legal) are deemed more harmful to discipline through social means, it is then left to the individual him/herself to rebuke.

All the harms to others on a higher scale (rights-infringing harms), on my view, can also be covered by those on the lower end of the scale. If something can be prevented or punished through a more invasive domain, it can also be covered by those that are less invasive. *All* harms

to others may be punished through individual reproach (i.e. the individual can punish him/herself), those more serious may be punished by both individual reproach and social/moral extra-legal pressures, and those most serious (i.e. rights-infringing harm) may be prevented through the law, social/moral pressures, or individual reproach. This process is not reversed—those on the lower end cannot be prevented through the level above because doing so would cause more harm than the initial harm that was committed and violate the purpose of the harm principle.

## Chapter 5 Liberties of Conscience and Expression: Mill on the Limits of Speech

### 5.1 Introduction

#### 5.1.1 *Speech and Harm*

In the spirit of Mill, I want to “offer, not so much applications, as specimens of application” to “illustrate the principle” I described (OL V: 1). In the next two chapters, I will attempt to apply my legal harm principle to a particularly tricky—yet important—area of other-regarding behavior that Mill spends a good deal of time on in *On Liberty*: expression of speech. Mill argues that we have a right to the expression and publication of speech because of its utility in our well-being and significant interests as progressive beings. So any infringement<sup>231</sup> (harm) to our right to free speech would violate our rights and place that action in the legal domain.

There is an important point to make regarding rights-infringing harm and rights-violating harm. Rights-infringing harm is *any* harm to a right.<sup>232</sup> Rights-infringing harm, I have argued, defines the domain of the law.<sup>233</sup> If it is a rights-infringing harm it falls within the *domain* of the law. If, when we apply our balancing tests, the infringement is judged to be serious or significant enough on balance to outweigh all other normative considerations, then it is a rights-violating harm and *should* be prevented through the law. Rights-infringing harm puts the act in the *domain* of the law (the jurisdiction principle), rights-violating harm *justifies* regulation (the balancing principle).<sup>234</sup>

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<sup>231</sup> I will show that he utilizes a seemingly absolutist interpretation of liberties to speech that is not actually consistent and that he does not actually hold. He frequently overstates his position.

<sup>232</sup> By this I do not mean there is harm or threat to actual “rights” but rather that there is harm to individuals that implicate rights. The harm is always to the individual and while I will utilize language that suggests the harm is to the rights but this is never the case. Such as protection of rights, violating rights, infringing rights, harm to rights, etc. In this instance I mean something like any harm to us that implicates our rights.

<sup>233</sup> See chapters 3–4.

<sup>234</sup> For my discussion on domain versus justification, see chapter 2.2.3. For my discussion on the jurisdiction principle and the balancing principle, see chapter 3.1.2–6. The second maxim states “that for such actions as are

But if, as I will argue, Mill's argument really rests on the idea that speech enhances our deliberative faculties<sup>235</sup> and that is why it is so valuable, then it seems that some speech does not do this and may be prevented. In some cases of speech, deliberative faculties may actually be enhanced by some speech being censored through the law. Mill, I believe, is not concerned in chapter II with a domain determination, he is concerned with whether or not we *should* restrict speech. He thinks we should not restrict speech generally because it is ultimately more useful to allow expansive speech rights than to restrict them but it is not clear that he does not think that they may fall within the domain of the law, only that they are more valuable or there is a higher utility in allowing speech to be expressed undeterred. This is not to say that expression of speech, especially published speech, is not in the legal domain, it is merely to say that most *should* not be regulated (or if it is, it may be better regulated through the extra-legal domain). This does not deny that some should fall within the domain of the law. There are some instances, instances in which Mill agrees, that expressions of speech themselves cause or are likely to cause rights-infringing harm. But when such expressions infringe on other rights, how do we determine whether we should prevent them through the law or leave it to less restrictive extra-legal or legal methods? In understanding Mill's position, I will focus specifically on hate speech in the next chapter. In applying the legal harm principle to hate speech I will need to go beyond my question of domain and attempt to apply the balancing principles Mill suggests are needed.

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prejudicial [harmful] to the interests of others, the individual is accountable, and *may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection*" (OL V: 2 Emphasis added). The jurisdiction principle is that individuals "*may be subjected either to social or to legal punishment*" and the balancing principle is that either social or legal punishment can be applied "*if society is of opinion that the one or the other is requisite for its protection.*"

<sup>235</sup> Brink, *Mill's Progressive Principles*, 152; Brink, "Millian Principles," 122–3. Chapter 7 of *Mill's Progressive Principles* is comprised of much of his article "Millian Principles, Freedom Expression, and Hate Speech" (*Legal Theory* 7 (2001): 119–57) though it was heavily edited and some of the points he makes in the article are not in the text. I will utilize Brink's terminology in what follows. His use of "deliberative faculties," "deliberative values," and "deliberative capacities" are useful classifications and reflect the core ideas of Mill's argument in favor of free speech in *On Liberty* as depending on active reflection, thinking, reasoning, and discussion.

### 5.1.2 Strategy

In this chapter I will first examine what Mill says about speech and why causing or risking harm to our liberty of speech expression may violate our rights, i.e. see why he thinks speech and expression of speech is an important interest in which we have a claim on others to respect us in performing. Next I need to show that Mill allows at least some limitations on speech. I will look to the corn dealer example (OL III: 1) to discuss a limit that Mill places on speech; where he thinks some speech causes rights-infringing harm and in principle actually falls within the legal domain.

Once I have determined that Mill, in principle, allows that speech may be limited, in the subsequent chapter I will then discuss Jeremy Waldron and Mari J. Matsuda's suggestions on the proper limitations to hate speech. Waldron and Matsuda propose that the dignity and equal status of individuals under the law are threatened by certain types of hate speech, specifically the publication of such speech. I believe that using their analysis of the harms that hate speech causes I can turn to Mill to show that Mill allows that we have a right that would correspond to such harms. I will look at two proposed rights that Mill suggests we have, namely equality or impartiality under the law (U V: 36) and the highly valuable interest we have in personal choice which involves individuality and diversity—as he puts it, liberties of “tastes, pursuits, and life plans.”<sup>236</sup> If it is the case that hate speech seems to infringe one of these rights (or both), then it seems that we may have a claim against others not to express hate speech in the form of publications and we can then proceed to the sorts of questions and balancing tests Mill may utilize to determine if legislation would be acceptable or not. I am not attempting to argue that we *should* enact legislation, but I want to explore ways in which such suppression may be

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<sup>236</sup> I will refer to this right as the right of personal choice as opposed to “tastes, pursuits, and life plans” because I feel it captures the nature of the right better.

acceptable to Mill.

Because my goal in constructing a legal harm principle was to maintain consistency with Mill as much as possible, I aim to do the same in applying the legal harm principle to hate speech. I will look to the various interests and rights Mill thinks are of most use in contributing to our well-being in order to evaluate hate speech. I will rely as much as possible on insights that Mill provides in *On Liberty* as well as sections of *Utilitarianism* and my attempts to fill in any gaps will rely on interpretations that I believe are consistent with Mill or if they are not, I will show why they may fit within the legal harm principle despite his reservations.

There are many suggested reasons for why some types of hate speech ought to be restricted. My question is not whether we *should*<sup>237</sup> adopt speech restrictions, but rather to determine 1. if some types of hate speech infringe rights and thus *may* fall within the *domain* of the legal harm principle, and 2. what sorts of Millian decision making procedures can we use to *justify* legislation (even if we ultimately judge such laws to be inappropriate). So the question is: what is the significant interest that such speech is infringing and would Mill support such restrictions? The arguments I present are not meant to be conclusive but are meant as an attempt to reevaluate some of the arguments against speech regulation that Mill presents in *On Liberty* as well as to apply them to a kind of speech to which he did not give adequate consideration—hate speech.

## **5.2 Rights and the Domain of the Law**

### *5.2.1 Rights-Infringing Harm*

The domain of the legal harm principle falls where a person causes or threatens harm

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<sup>237</sup> Again, because the question of the balancing principle involves application of balancing principles, the “should” here always implies “should on balance” or “should, all things considered.”

(any harm) to the rights of another—this is what I call rights-infringing harm. In the previous chapter I noted that once someone performs an act that harms or threatens harm to a right—even minimally—it falls within the domain of the law and may be *considered* for regulation.<sup>238</sup> Other sorts of harm, such as contributing to harm but not causing harm, allowing harm to befall an agent but not causing it, or failing to benefit an agent are all harmful and may be imperfect duties that we have toward others, but they do not infringe or violate the rights that we have toward others because they cannot claim these as their due. These latter harms would fall under the general harm principle though not the legal harm principle. So, the legal harm principle then, is a very broad category and is only helpful in narrowing the discussion of regulations so far.

We can see how general Mill's understanding of a rights-infringing harm is once we understand what he means by a right that one has. A right is 1. something that when encroached we consider to be a wrong, 2. Something that when encroached we demand the violator to be punished (in some way)<sup>239</sup>, and 3. Something we can claim against others as our due (U V: 14–5, V: 23–5). Mill argues that these correlate with perfect duties (U V:15). For instance, we have claims against others not to cause or unjustifiably risk causing hurt or harm to us. These have to do with safety and security and for Mill are the most significant sorts of claims we have against others because they are (the most) significant interests we have. So the risk of virtually any wrongful act done by another that physically or psychologically harms us or risks harm to us counts as a rights infringement and may violate rights—even minor ones. The job of determining if something fits within the domain of the law, then may *seem* relatively simple. Was a

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<sup>238</sup> A reminder that the harm is always to individuals and not to rights as such. Harm to a right roughly translates to harm to an individual that implicates a right that that individual has.

<sup>239</sup> These first two criteria are also criteria for imperfect duties which fall within the general harm principle. Adding the criterion of a claim is unique to the legal harm principle. So, demanding that one be punished does not require that the law be used, it only allows for the law to be considered.

significant interest that I have, one that contributes to my well-being, infringed by someone that has a duty to not interfere in my exercise of it (even minimally)? If the answer is yes, then it is in the domain of the law.

Now *should* we enforce these is a different question. Mill provides many different balancing principles that one can use in determining if regulation would be justified—if a rights *violation* occurs—but this is different than the question of domain. In most cases we should not regulate because the harm of regulating (as well as other normative considerations) would outweigh the harm of allowing it. Even being pinched for no good reason infringes my rights in bodily integrity because someone is unjustifiably, or without good cause interfering with a socially useful and significant interest I have (right). The mediating maxims<sup>240</sup> or the balancing principles must be brought in to evaluate the harm that is occurring. So it is a matter of applying the balancing principle which then weighs the relative strength of the claims against the harm that regulation would cause (as well as other relevant considerations). In an attempt to explain what Mill meant by rights, I assessed his discussion in *On Liberty* and chapter V of *Utilitarianism*.<sup>241</sup> However, even after analyzing what Mill says about rights and deriving a legal harm principle that depends on this endeavor, this principle is still admittedly vague. There is a question as to which sorts of values or interests are most socially useful and significant. And while Mill depends on these as an integral feature of the harm principle, he does not provide a method for determining this. Presumably because it is an empirical matter as to whether something is or is not in our interests and Mill would call for us to provide our best argument in defense of why such things are or are not significantly socially useful.

Again, while Mill seems to set out the criteria for rights-infringing harm, he does not

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<sup>240</sup> Feinberg's term in the *Moral Limits of the Criminal Law*.

<sup>241</sup> See chapter 4.



indicate a very clear method for determining what precisely we have a right to or which interests are more socially useful than others or contribute to our well-being as thinking beings. And while he mentions that it is rights-infringing harm to encroach on those liberties/values that are most socially useful and that we have the most significant interests in as progressive beings, the legal harm principle, as such, gives little help in either determining how to decide this or on application of these considerations to formulate legislation. Mill seems to provide some help when he lays out those self-regarding liberties which we have the strongest interests in because they are primarily in the self-regarding realm and most contribute to our well-being and individuality as deliberative beings. Yet, even looking to these three categories of liberty—“Liberties of conscience and expression,” “Liberties of tastes, pursuits, and life-plans,” and “Liberties of association” (OL I: 12)—offers little help. He also provides some insight in *Utilitarianism* when he highlights the significance of the claim right to safety and security. Because he focuses on the idea of claims as being significant in determining a rights-infringing harm, and he says that we also have liberty rights, it may be useful to pause and consider the difference.

### 5.2.2 *Claim Rights and Liberty Rights*

If it is the case that an act that results in a rights-infringing harm is what determines the domain, and a rights-infringing harm is defined as 1. any harm that encroaches on one of our significant interests as progressive beings; 2. a wrong thought to be applicable for punishment; 3. having a claim against another; and 4. the actor does not have just cause to perform such an act, then it seems that a great many acts fall within the domain of the law.<sup>242</sup>

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<sup>242</sup> These criteria are set out by Mill in *Utilitarianism*. He claims “Whether the injustice consists in depriving a person of a possession, or in breaking faith with him, or in treating him worse than he deserves, or worse than other

Because Mill discusses both our rights to certain liberties and claims that we have on others, it is important to make a distinction that Mill does not make clear between different kinds of rights. We have two general types of rights: claim rights and liberty rights.<sup>243</sup> Claim rights are rights “*to have done* (by someone else)” and liberty rights are rights “*to do* (yourself).”<sup>244</sup> All claim rights have three components: a subject, an object, and content. The subject is the person who has the right, the object is the person (or group) the person can claim the right from, and the content outlines that to which I have a right (our important interests as progressive beings according to Mill). These types of rights are called “claim rights.” The object of my claim right may be one person, it may be a group of people or it may be all of society. For instance, I have a claim right against everyone not to be (unjustly) killed. I also have that claim against a particular person in a given situation. In some cases, circumstances dictate a claim right I have against a particular person. I may have a claim right against my plumber to fix my pipes because he agreed to fix my pipes. I do not have this claim right against everyone.<sup>245</sup> Claims are correlated with duties and “in general, A’s claim against B that B do X is equivalent to B’s duty toward A to do X.”<sup>246</sup> The claim right that Mill discusses as being most vital to our well-being and deliberative faculties is our claim right to safety and security. Which is a claim that others not *cause* or *risk causing* us unjustified harm. Rights can only be violated or infringed by a person. We have

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people who have no greater claims, in each case the supposition implies two things—a wrong done, and some assignable person who is wronged. ... It seems to me that this feature in the case—a right in some person, correlative to the moral obligation” (U V: 15), “When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it” (U V: 24); “...to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility. ... [which is derived] from the extraordinarily important and impressive kind of utility which is concerned (U V: 25). See my chapters 3–4 for a discussion of rights.

<sup>243</sup> For a discussion of claim rights and liberty rights, see Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions” (W. Cook (ed.), New Haven: Yale University Press, 1919); Feinberg, *Social Philosophy*, chapter 4; and L.W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto, Canada: University of Toronto Press, 2004).

<sup>244</sup> Sumner, *The Hateful and the Obscene*, 6.

<sup>245</sup> *Ibid.*, 4–5.

<sup>246</sup> *Ibid.*, 5.

claims against people.

On Mill's account it is enough that someone do something that causes or risks causing a rights-infringing harm even if that person is not the person that actually violates the right. If my action (including speech acts) is such that it will likely cause another to violate your rights (even if I am not the one who violates the actual right), then I am doing something that may be considered for legislation. Your right was violated by X but X would not have done it if Y did not cause or increase the likelihood of X infringing your right. So both X and Y's action can be restricted because both lead to a rights-infringing harm that results in a rights violation.

Liberty rights on the other hand are liberties that you, the individual, have to do (or not do) something. For instance, you have a liberty right to use your property as you see fit. This may not appear to correspond to an obligation or duty on the part of you or anyone else but it in fact does. In general, these liberty rights are typically protected by a duty of non-interference on the part of others.<sup>247</sup> I have a liberty right to use my toothbrush and you have a duty not to prevent me from doing so. So, liberty rights also have a subject (the rights holder), and object (everyone has a duty of non-interference) and content (the use of the toothbrush in this case). Again, Mill claims that the three kinds of basic liberties that are necessary for well-being are "Liberties of conscience and expression," "Liberties of tastes, pursuits, and life-plans," and "Liberties of association" (OL I: 12).

All rights have restrictions or limits. Mill's restrictions are outlined by the harm principle but it is the balancing factors that actually determine whether a right is violated or not. These limits may result "from conflict between the right and some other normative consideration (such as a competing right) of equal or greater strength. In that case, the rival consideration can be said

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<sup>247</sup> Sumner, *The Hateful and the Obscene*, 6–7.

to override or trump the expressive right.”<sup>248</sup> Some rights are stronger than others. So the strength of the right may factor in on considerations of the limits of rights, “the strength of a right is its level of resistance to rival normative considerations, such as competing rights or the promotion of worthwhile goals.”<sup>249</sup> Rights protect individuals but they also have “a threshold.” And while “rights raise thresholds against considerations of social utility, ... these thresholds are seldom insurmountable.”<sup>250</sup> So what sorts of limits would Mill accept regarding our liberty right to speech? Where we seem to get the most help from Mill in determining the limits of speech is when he is talking generally about balancing and justifying the restrictions we have (applying the balancing principle).

### 5.2.3 *The Necessity of Balancing Principles*

The justificatory questions provide much needed information because the legal harm principle, and really any harm principle, is a general principle of justice and needs supplementary balancing principles to help in giving it any practical use in decision making. As Feinberg claims, these general principles often provide insufficient information for practical consideration because

genuinely problematic cases ... have a common form: a certain kind of activity has a tendency to cause [in my case, rights-infringing] harm to people who are affected by it, but effective prohibition of that activity would tend to cause [rights-infringing] harm to those who have an interest in engaging in it, and not merely in the often trivial respect in which *all* restrictions of liberty ... are *pro tanto* harmful to the persons whose alternatives are narrowed, but rather because other substantial interests [rights] of these persons are totally thwarted. In all such cases, to prevent A from harming B's interest in Y would be to harm A's interest in X. ... So the legislator must decide whether B's interest in Y is more or less important—more or less worth protecting—in itself ... than A's interest in X. ... The [legal] harm principle, as so far clarified, tells him that protecting B's interest

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<sup>248</sup> Sumner, *The Hateful and the Obscene*, 12.

<sup>249</sup> *Ibid.*, 9.

<sup>250</sup> *Ibid.*

from [rights-infringing] harm is a good and relevant reason for restraining A [i.e. placing it in the legal domain] but that is all it tells him.”<sup>251</sup>

This highlights a problem with the legal harm principle, it only considers whether something is a rights-infringing harm and if it is, it is a sufficient reason to *consider* it for prohibition. But it does not consider 1. how likely the rights-infringing harm is to cause or risk harm, 2. whether there is a competing right that would be infringed or violated were it to be restricted, 3. how harmful the act is that infringes the right, nor 4. how to balance these things.

The legal harm principle tells us how to put things into the legal domain. So, the question becomes, now what? In Mill’s argument in favor of free speech he relies on many of these balancing factors to show that it is, on the whole, more harmful to infringe one’s speech rights than to allow censorship of almost any kind. He focuses on showing the manner in which our rights are infringed when speech is subject to censorship.

### **5.3 Mill’s General Argument in Favor of Free Speech**

While Mill begins his general argument in Chapter II of *On Liberty* defending freedom of speech and thought as well as freedom of the Press (which he believes to be an extension of free speech), he begins laying the groundwork for his argument in Chapter I by outlining those areas of liberty to which we have a right. He claims that

the appropriate region of human liberty ... comprises ... the inward domain of consciousness; ... liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, *since it belongs to that part of the conduct of an individual which concerns other people*; but, being *almost* of as much importance as the liberty of thought itself, and resting *in great part* on the same reasons, is practically inseparable from it (OL I: 12; Emphasis added).

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<sup>251</sup> Feinberg, *Harm to Others*, 203.

Mill acknowledges that expressing and publishing ideas does indeed fall into the other-regarding realm but believes that it is so intimately connected to freedom of opinion that many of the reasons why freedom of opinion are essential to human well-being also apply to expression of such speech and its publication. Additionally, just because it falls into the other-regarding realm, does not automatically include it in the harm principle. It must also be likely to cause harm. Most speech does not do this.

### 5.3.1 “Absolute and Unqualified” Liberty of Speech?

On the whole Mill believes these liberties need to exist as “absolute and unqualified” freedoms (OL I: 12) which would mean they do not fall within the domain of the law. However, he then immediately claims that “the only freedom which deserves that name, is that of pursuing our own good in our own way, *so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it*” (OL I: 12; emphasis added). Despite the fact that immediately prior to this Mill claimed that these freedoms needed to be absolute, it seems that he allows for these liberties, specifically freedom of expression, to be restricted (not absolute) if they prevent or interfere with others in the others pursuing their own good. This seems to (rightly) open the door for some restrictions on the free expression of speech if it causes or threatens rights-infringing harm to others which would allow for it to (in some cases) fall within the domain of the law. So, if absolute, the right to free speech seems to include the clause: “unless such rights deprive others of their well-being or impede their efforts to obtain well-being,” in which case, it is not so absolute after all and open for consideration for legislation. As I will discuss below, Mill frequently overstates this position as an absolute position and I do not think he really means it to be.

However, in chapter II Mill again takes a seemingly absolutist position on freedom of thought and the press—despite his qualification that most liberties can be prevented if they cause harm or threaten harm to others. Mill begins his argument that free speech is necessary for our well-being by citing the great benefit of free speech (its utility). He claims that speech aims toward truth and when speech is silenced, it harms not only the individual silenced, but everyone else as well. The harm is a result of the suppression of truth—an important and significant good/interest. Speech is one of the most useful tools in getting at the truth and so suppression or interference in speech is generally unacceptable for Mill.<sup>252</sup> He claims that people are

capable of rectifying ... mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning. The whole strength and value, then, of human judgment, depending on the one property, that it can be set right when it is wrong, reliance can be placed on it only when the means of setting it right are kept constantly at hand (OL II: 7).

Mill argues that censorship can prevent us from learning the truth because if the opinion is true and/or contains a part of the truth, censorship could prohibit us from getting at the truth, in which case, he believes we all lose.

When one silences opinion, according to Mill, it both prevents individuals from learning and implies that those who silence are infallible (OL II: 3).<sup>253</sup> It is only through discourse and dialogue, Mill's argument goes, that we can fully express our individuality (autonomy) and diversity, better understand the truth, and have a fully robust liberty. Indeed, Mill believes that "truth gains more even by the errors of one who, with due study and preparation, thinks for

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<sup>252</sup> Brink, *Mill's Progressive Principles*, 152.

<sup>253</sup> Brink argues that this assumption of infallibility is an overstatement on Mill's part. It could be the case that the censor acknowledges that he/she may be wrong but believes that the arguments for censorship are stronger on the one side rather than the other. Brink, *Mill's Progressive Principles*, 153.

himself than by the true opinions of those who only hold them because they do not suffer to think for themselves” (OL II: 20). Thus, a robust liberty of speech is instrumentally valuable in that it allows one to aim toward true beliefs and use the “deliberative faculties” (to borrow the term from Brink), which Mill (and almost everyone else) believes is valuable, in order to fully utilize their liberty.<sup>254</sup> So he is showing that speech and a generally permissive attitude toward speech is an important interest we have. He is not in fact claiming that it does not in some cases fall within the domain of the law, only that it *should* not be regulated.

### 5.3.2 *The Two Horns of the Argument*

Mill’s argument for speech has two main points. First, he claims that if we censor speech that is true or partially true, we are causing significant harm to those censored as well as society generally because getting at the truth is of fundamental importance and is not only a socially useful interest that we have but is also a necessary tool to craft our character as “progressive beings” (OL I: 11) and to “assert our mental freedom” (OL II: 20).<sup>255</sup> The second point is that *even if* speech is false, it is *still* harmful and wrong to censor because by hearing false views and opinions we are able to better understand the truth because we are utilizing and exercising our deliberative faculties in order to improve ourselves and make choices that increase our autonomy and individuality.<sup>256</sup> He claims that “the fatal tendency of mankind to leave off thinking about a thing when it is no longer doubtful is the cause of half of their errors” (OL II: 30). It is the exposure to error that prevents dogma, according to Mill. He states that “we can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it

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<sup>254</sup> Brink, *Mill’s Progressive Principles*, 152; Brink, “Millian Principles,” 122–3.

<sup>255</sup> Brink, *Mill’s Progressive Principles*, 152, 154. Brink refers to this as the “truth-tracking defense.”

<sup>256</sup> *Ibid.*, 152. Brink refers to this as the “deliberative rationale.”



would be an evil still” (OL II: 2) because

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error (OL II: 1).

The main point that Mill is making about free speech is that we can never really know if what we are doing is silencing the truth or partial truths. And *even if we know* that the view is false, any such silencing is harmful if our goal is to exercise our deliberative faculties in order to get at the truth which is essential to enhancing our well-being.

### 5.3.3 *Deliberative Faculties as Progressive Beings*

Mill’s free speech argument relies on the premise that we are “thinking beings” that seek the truth in order to be happy and that such happiness rests on our nature as “progressive beings” (OL I: 11). So the interest we have in progressing as thinking beings depends on the exercise of what Brink calls our “deliberative capacities, especially our capacities for practical deliberation ... [which] involves reflective decision-making.”<sup>257</sup> This deliberation allows us to choose how we will live our lives and what “experiments in living” (OL III: 1) we will adopt, how we will utilize our liberties (of not only speech but life plan/individuality and assembly as well), and as Mill says “he who chooses his plan for himself employs all of his faculties. ... and when he has decided, [he uses] firmness and self-control to hold his deliberate decision” (OL III: 4). So, again, freedom of speech is an important value because of its indispensability in coming to understand the truth and because we need to interact with others in order to fully develop our deliberative capacities (OL II: 39) which, in turn, allow us to act in those ways that we believe

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<sup>257</sup> Brink, “Millian Principles,” 123.

are most conducive to our well-being.<sup>258</sup>

#### 5.3.4 *Limits to Speech?*

Mill goes so far as to claim that his argument in *On Liberty* shows the “necessity” of the freedom of opinion “on the mental well-being of mankind (*on which all their other well-being depends*)” (OL II: 40 Emphasis added). If all of our well-being depends on our mental well-being (utilizing our deliberative faculties), and truth enhances our mental well-being, then a robust freedom of speech does indeed seem essential to our overall well-being. Free speech then, seems to be the cornerstone not only of getting to the truth, as Mill argues, but also of self-expression, autonomy, and liberty. This focus highlights why censorship is problematic. Though, as Brink notes, “Mill’s appeal to deliberative values explains why it is *often* wrong to censor even false beliefs without implying that censorship is *always* wrong”<sup>259</sup> because in some cases, it may be that certain sorts of censorship actually do more to promote and enhance deliberative values than allowing such speech. Some censorship does so by recognizing that other liberties or rights than the liberty of speech may be necessary for the mental well-being of agents (and some liberties more so than others).<sup>260</sup> For instance, Mill suggests that his argument for speech also applies to the liberties of choosing our life plan. The liberty of acting on our choices is an additional way to exercise our deliberative faculties because thinking alone does not exercise our progressive nature; action and experience are also necessary to exercising our deliberative faculties. Our mental and deliberative faculties that are exercised are exercised so that we may act on them and express our individuality. So if speech interferes with our ability to put our choices into action,

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<sup>258</sup> Brink, “Millian Principles,” 125.

<sup>259</sup> *Ibid.* Emphasis added.

<sup>260</sup> *Ibid.*, 127.

there may be a conflict. In which case, restricting the speech may increase our ability to act on our liberty to express and seek our life plans which is another essential aspect of exercising our nature as progressive beings.<sup>261</sup>

Like Mill, Kent Greenawalt claims that “freedom of thought and expression promote individual autonomy.”<sup>262</sup> He further argues that even if free speech does not “actually [promote] autonomy and rational decision, granting liberty of speech may itself *constitute* a recognition of people, both speakers and listeners, as autonomous and rational. ... [and] free speech for all may constitute public recognition that people have dignity and are equal.”<sup>263</sup> A state that has expansive and (nearly) absolute speech rights may seem like a victory for truth, liberty, and autonomy as Greenawalt (and Mill) claims; yet, there are some controversial areas of free speech, more specifically “hate speech,” that many argue actually cause significant harm to vital interests we have (rights) and their arguments highlight instances in which deliberation and the utilization of our deliberative faculties are hindered (or even stopped) by certain types of speech by others because they prevent us from being able to seek our happiness or well-being as we see fit.<sup>264</sup>

#### **5.4 The Limits of Free Speech**

I hinted at a potential reason for limited free speech, namely, to enhance our deliberative faculties which, in turn, best promote our well-being as progressive beings. This limit may be

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<sup>261</sup> Brink, *Mill's Progressive Principles*, 159–60.

<sup>262</sup> Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, (Princeton: Princeton University Press, 1996) 5.

<sup>263</sup> *Ibid.*, 5 (italics in original).

<sup>264</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” (in *Michigan Law Review* vol 87, no 8 (1989): 2320–2381); Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012); David O. Brink, “Millian Principles, Freedom of Expression, and Hate Speech.”; David O. Brink, *Mill's Progressive Principles*.

approached when two or more of the liberties Mill argues for come into conflict. However, I want to look to Mill to see if and where he would begin to place the limits of speech. I will examine areas where Mill seems to suggest a limit.

#### *5.4.1 An Important Distinction: Harm and Offense*

As noted, some expressions of speech fall within the other-regarding realm but that does not necessarily mean that they may be prevented through even the general harm principle because they are not harmful. One widely held belief is that when people wish to prevent certain sorts of speech through the law, it is because such speech is *merely* offensive (and the assumption is that it is not harmful). This, I believe, is generally a misconception. The speech that is generally considered for legislation causes some kind of harm. The issue that such critics are alluding to is that certain sorts of speech are known to be offensive but what they fail to recognize is that they are *also* harmful. It is not the *offense* that is actionable. What is actionable about them is the oftentimes-unrecognized harm that they may cause. And if such speech acts are not merely offensive, but are also harmful, the question about prevention is really a matter of the harm not the offense. This is not to say that there is not speech that is in fact merely offensive (though some would argue that offense is at least minimally harmful to our interests<sup>265</sup>), but that when certain speech acts are to be considered for legal prohibition, it must be because the harm is such that it is rights-infringing.

Part of the reason that people confuse harmful speech with merely offensive speech is because of the focus we tend to have on physical harm. This is captured in the popular children's adage, "sticks and stones may break my bones but words will never hurt me." This is, strictly

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<sup>265</sup> Feinberg suggests this in *Social Philosophy* and Turner relies on this idea in "Harm and Mill's Harm Principle."

speaking, false. The focus that we have on harms that are physical ignores a large portion of harms, significant harms, which are not necessarily directly harmful to the body. But over time, the harms that are caused may be worse than physical harm. It used to be the case that verbal abuse was not thought to be a harm at all and especially not one that should be prevented. It even seems that Mill does not recognize certain forms of abuse as harmful in this way, in part because of the time in which he lived and ideas about mental abuse. Though I believe his empiricism would allow him to admit that these sorts of harms are indeed significant and ought to be regarded when considering harm. We now recognize the significant harm that verbal abuse can cause. If we only focus on those physical threats and ignore the verbal, we are doing not only a disservice to those whose rights are significantly impacted, but we are also violating the harm principle and doing more harm than good.

Another reason that confusion may arise regarding offense is that harm may be defined in many ways. One understanding of harm is that harm is *any* negative consequence that someone faces. This broad understanding of harm would also include harm befalling you such as dying a natural death, falling and breaking your own arm, getting pricked by a thorn, or being annoyed by a flying insect. This is how Piers Norris Turner believes Mill must understand the harm principle because, as a utilitarian, Mill ought to focus on harm as any negative consequence.<sup>266</sup> This, however, is not the typical understanding of harm that people use when understanding Mill's principle. And Mill himself makes an effort to separate harm and offense as I noted previously.<sup>267</sup>

However, even if offense is considered "harmful" there are two other important distinctions to make. The first is that we must have a claim against others not to offend us. Mill

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<sup>266</sup> Turner, "'Harm' and Mill's Harm Principle," 300–1.

<sup>267</sup> See my chapter 1, section 2.2

does not believe this is the case. Second and relatedly, there is a range of harms from less serious to more serious. And Mill would argue that we do not have a significant interest (right) not to be offended because it does not have any lasting effects on our ability to lead our lives and we do not have a claim on others that they not merely hurt our feelings or shock us. It is also important to keep in mind that Mill has a range of methods for interference from less invasive to more invasive or less coercive to more coercive, so even if one could argue that we have a right not to be offended and that offense is harmful, it would never be the case that mere offense would outweigh the value of expressing such views. We can see how the “punishment can fit the crime” so to speak, on Mill’s account. Those instances of harm—even to our significant interests—that are very minor Mill would argue ought to only be prevented through the extra-legal domain or if they should not be covered by extra-legal means, they will be restricted by the individual him/herself.

Again, it seems however, that Mill would not even class offense as harm. But if we understand harm as any negative effect then offense surely fits here. As Feinberg claimed, while states of offense are *technically* also harms (i.e. everyone has an interest in not being offended) it seems necessary to treat them as a separate category.<sup>268</sup> The reason for this, I believe is that if offense could be considered a harm (which I do not think we have any indication that Mill thinks it is), it falls toward the lower end of the scale and we do not have a significant interest in not being offended so it would not come close to the legal domain. However, the issue that arises is that there is a general overlap that occurs between those things that are offensive and those things that are harmful. In the case of speech, these two realms frequently overlap and when individuals claim that others are reacting to *mere* offense, it is often the case that the offense is not what

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<sup>268</sup> Feinberg, *Social Philosophy*, 28.

people are objecting to but rather they are objecting to the harmful aspect of such offensive (*and harmful*) speech. This seems to frequently be the objection to regulating hate speech.

If such speech acts are harmful, then they fall within the domain of the general harm principle. Many speech acts that fall within the domain of the general harm principle may be legitimately prevented or discouraged through the extra-legal domain and, in fact, in many places in chapter II of *On Liberty* Mill seems to suggest that this is the appropriate domain for preventing most of these harms caused by speech. But the question I want to address is, when they are harmful and fall within the domain of the general harm principle, when and why can such speech acts be classified as rights-infringing harms and fall within the legal domain?

#### 5.4.2 *Censorship and Preventing Rights Violations*

If Mill is serious both about preventing rights violations and enhancing well-being through the utilization of our deliberative faculties, then it seems that certain sorts of speech should be/may be prevented because they may cause or risk causing rights-infringing harm. As indicated above, it is implausible to claim that Mill would allow for absolute rights to speech, though it seems in some passages that he calls for exactly this. To revisit and expand on this problem, he notably claims

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; *demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.* The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being *almost of as much importance* as the liberty of thought itself, and resting in great part on the same reasons, is *practically inseparable* from it” (I: 12 Emphasis added).

This passage suggests that at least the liberty of thought is absolute. That we may not be

restricted in our opinions whatsoever. This, perhaps is not very controversial—we can indeed *think* whatever we want to think without much interference from others. But he links expression and publication to this absolute right because it is *almost* as important and is *practically inseparable* from it. The right to expression, though crosses into the other-regarding realm and has the potential to cause rights-infringing harm as a result. He then states that

Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others (OL I: 12).

These other liberties, of framing our life to suit our needs (autonomy) and liberty of assembly, are also listed alongside the liberty of speech. He does not suggest that they are any less significant than that of speech and actually claims that the argument for speech that he presents in chapter II of *On Liberty* may be applied in a similar manner to these other liberties. These are very strong claims.

Mill also boldly claims that

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; *and none is completely free in which they do not exist absolute and unqualified*. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest (OL I: 13 Emphasis added).

Much of *On Liberty* chapter II reflects this apparently absolutist sentiment. And Chapter III of *On Liberty*, which discusses the liberty to choose how one shall live one's life is similarly robust.

Importantly though, he notes throughout *On Liberty* and in the passage above that any



liberty right may be restricted if it causes or threatens harm to the significant interests (rights) of others. Mill, it seems, would allow us to legally prevent speech that is designed to “deprive others of [the pursuit of their own good], or impede their efforts to obtain it” (OL I: 12), that impede their efforts to live their life as they see fit (as progressive beings utilizing their deliberative faculties), or that prevent them from exercising their liberties (so long as they do not interfere with the liberty of others). This suggests that he recognizes the liberties of speech and of life pursuits may, at times, conflict. But because he frames the argument in terms of speech, it seems that he sets strict limitations on its interference that does not apply to the other liberties.

This interpretation would be a mistake because he claims that he is going to defend the idea that all the liberties he enumerates ought to be as robust as possible and

It will be convenient for the argument, if, instead of at once entering upon the general thesis, we confine ourselves in the first instance to a single branch of it, on which the principle here stated is ... recognised by the current opinions. This one branch is the Liberty of Thought: from which it is impossible to separate the cognate liberty of speaking and of writing. Although these liberties, to some considerable amount, form part of the political morality of all countries ... the grounds, both philosophical and practical, on which they rest, are perhaps not so familiar ... *Those grounds, when rightly understood, are of much wider application than to only one division of the subject, and a thorough consideration of this part of the question will be found the best introduction to the remainder* (OL I: 16 Emphasis added).

So, while he provides a strong defense of speech, the argument is meant to apply to all three areas of liberty. Because this is sometimes overlooked, his argument in favor of free speech has been used to defend certain types of speech that, I would say, Mill should want to prohibit either because they interfere with one of the other liberties or else they have the effect of reducing our deliberative faculties. This is to say, that while Mill provides a very strong defense of free speech, he recognizes its limits as well. To this end, Mill rather boldly overstates his position and later suggests when we may in fact limit speech.

### 5.4.3 Incitement and the Corn Dealer Example

After his strong defense of the (absolute?) liberty of speech and expression in chapter II, Mill himself provides what he sees as a reasonable limit to free speech when he says

let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, *so long as it is at their own risk and peril*. This last proviso is of course indispensable. *No one pretends that actions should be as free as opinions*. On the contrary, *even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act* (OL III: 1 Emphasis added).

Here he is making a distinction between freedom of opinion and freedom of expressing that opinion through acts which increase the risk of others' rights being infringed or violated. He is obviously setting at least one limit on the *expression* of free speech, so it is not absolute.

The example that Mill uses to highlight when “even opinions lose their immunity” is the corn dealer example where “the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act” (OL III: 1 Emphasis added). Mill claims

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost (OL III: 1).

In this example he is making a distinction between the harmless expression of an opinion and the expression of an opinion that causes what has been called an immediate breach of the peace or

imminent harm/violence/lawlessness.<sup>269</sup> At first glance it may appear that he is comparing verbal speech and published speech, but this is not the case because while he allows that the (written) opinion can be “simply circulated through the press,” the (written) opinion cannot be “handed about among the same mob in the form of a placard” and the verbal opinion is equally problematic in this case.

Speech that leads to an instigation of some physically harmful act, then, may be prevented because he believes we have a significant interest in not being physically harmed. Here he does not yet say *how* it may be prevented but if we read this as instigating an act of violence against another then it would be an instance of rights-infringing harm or a harm to the safety and security of others, because it “unjustifiably” (to use Mill’s term) increases the risk of rights-infringing harm. This type of act is commonly called “incitement” and is generally admitted as providing legitimate grounds for discussing legal interference.<sup>270</sup> However, his claim (OL III:1) seems to be much more general than discussing only physical harm as he claims “a positive instigation to some mischievous act” is enough.

What Mill seems to be doing here is looking to the situational context to determine the permissibility of the act and whether it is competing with other rights that we have. When an opinion is stated in a paper or other publication, Mill seems to suggest the risk of rights-infringing harm to another is low and perhaps there is not a duty that we have to refrain from expressing the opinion, we only have a duty not to express an opinion in a situation that is likely to cause rights-infringing harm. The expression of the opinion itself is a criticism of the way in which corn dealers conduct their business/participate in their occupation. On the other hand, if an

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<sup>269</sup> *Chaplinsky v. New Hampshire* (1942), <https://www.law.cornell.edu/supremecourt/text/315/568>; *Brandenburg v. Ohio* (1969), <http://caselaw.findlaw.com/us-supreme-court/395/444.html>

<sup>270</sup> Again, it puts it in the domain but may not justify actual interference. Though in most cases where it leads to an act of violence, it is seen as justifiably prevented.

angry group of people are exposed to the same speech expression and are likely to hear it as encouragement to a rights-infringing act, Mill allows that this is at least one case in which it may be prevented or punished. And it may be prevented because it unjustifiably *causes* or *risks* a rights-infringing harm. Mill claims that when a person performs something that is generally in the self-regarding realm in such a way that it crosses over into the other-regarding realm in which we have duties to others, then “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 (OL IV: 10).” If it risks damage to a significant interest we have—“if any one does an act hurtful to others, there is a *primâ facie* case for punishing him by law” (OL I: 11)—then it is a rights-infringing harm and is placed in the domain of the law.

#### 5.4.4 Incitement and Clear and Present Danger

As Brink notes, Mill seems to hold something like the “clear and present danger” test represented in the now famous example of falsely shouting “Fire!” in a crowded theatre. This act and those like them are seen to be not merely harmful but a rights-infringing harm because it is likely to cause a panic (in the case of shouting “Fire!”) or violent action (in the corn dealer case) which would, in turn, risk wrongful and unjustifiable harm to those present which could violate their rights.<sup>271</sup> This “clear and present danger” test was suggested by Justice Oliver Wendell Holmes in 1919. Holmes states that

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force [as in the

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<sup>271</sup> In these cases they would violate our rights because we have claims against others to not physically hurt us unjustifiably because we have a significant interest in not being assaulted. When they do this without just cause, then we think it is wrong and they deserve punishment.

corn dealer case]. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that ... [the law] has a right to prevent.<sup>272</sup>

The substantive evils that are rightfully prevented by government, Mill argues, would include causing wrongful acts of aggression (U V: 32)—it does not seem to matter whether the speaker is the one who does the actual assault, only that the speech is such that it caused the violation by the other—and the speech in this case does just that. It is wrongful in that it is knowingly false and done in a situation that is likely to escalate and an aggression in that it is inciting violence which is harmful to our interest in not being accosted. Because of the high risk of danger in the “Fire!” and corn dealer cases, most people correctly assess that such speech infringes the right to safety and security that individuals have because it is unjustly creating a dangerous situation.

This assessment is also supported by the criteria that Mill set out when discussing tyrannicide.<sup>273</sup> Mill claims in this case that advocating for tyrannicide is not enough. But rather, “the instigation to it, in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connexion can be established between the act and the instigation” (OL II: 1 FN1). This “probable connexion” is looking for the causal relationship between the two. If the act could be said to cause it or likely cause it (be probable) then it may be prevented. So it seems that Mill allows for restrictions in cases in which there is a likelihood of the event causing the rights-infringing harm. Feinberg describes it by claiming that the act in question “must have been a genuine causal factor (condition, element) in the production of the harm, and it must be an especially substantial (important, direct, crucial) causal contributor.”<sup>274</sup>

So, speech that is dangerous—read likely to cause harm to personal security (in this case

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<sup>272</sup> Schenck v. United States (1919), <https://www.law.cornell.edu/supremecourt/text/249/47>

<sup>273</sup> Sumner, *The Hateful and the Obscene*, 199.

<sup>274</sup> Feinberg, *Harm to Others*, 119.

bodily) which is a significant interest of individuals—may not be protected. In this case, the context and circumstances in which the speech is uttered becomes important. Additionally, I think that the context is important because in many cases they are uttered in situations which result in our deliberative faculties being overridden. In other words, such speech acts actually *prevent* us from deliberating and force us to react without thinking. They are relying on fear, intimidation, and threat, all of which impede our deliberative abilities.

If the situation in which the speech act is uttered unjustifiably increases the risk or causes rights-infringing harm, it is within the domain of the law. The central idea is that the crime would not have occurred or is less likely to have occurred if not for the encouragement. And in this case Mill would judge that it falls within the domain of the law and likely that such legislation is acceptable. This latter determination is exceeding the legal harm principle's domain question and is entering the determinations required by the balancing principle. If we are comparing the right to the liberty of expression of speech and a right to be free from violence (which would be a result of both our liberty right of life pursuits and our claim right of security and safety), Mill weighs our interest in avoiding harm as higher than the harm to our speech liberty.

However, according to Mill, this balancing test does not weigh in favor of restriction when an individual writes an opinion piece in a newspaper that merely argues that, for instance “corn dealers are starvers of the poor.” In the one case the context of the incident results in a harm that is a direct result of the opinion. In the latter the expression of opinion is worth more on balance than whatever harm may befall the corn dealers if this opinion is circulated in the papers (and I would assume did not cause another to assault the corn dealers as a direct result). This conclusion, I think is in part based on the idea that circulating the idea in the papers has a

tendency not to negate but engage our deliberative faculties.

I want to revisit my parenthetical assumption. This situation—where the opinion circulated directly led to some individual attacking the corn dealer—is interesting because if Mill would argue that such an opinion could be circulated in the paper even when it would directly cause another to violate the rights of the corn dealers, then it seems the difference may be how such speech would contribute to our ability to rely on our deliberative faculties or not. Perhaps the distinction is that in the incitement case our deliberative faculties are interfered with and overridden and so the cause of the harm is a direct result of the shouting “Fire!” or exclaiming that corn dealers starve the poor when we are already impaired, it is perhaps equivalent to a mental attack or “psychic assault.”<sup>275</sup> When such an opinion is circulated in the press on the other hand, our deliberative faculties are more likely to be engaged rather than overridden. This may also explain why we may think that the latter case, if it did result in harm to the corn dealer, say, the author would not be found at fault because rather than contributing to a rights violation, they would, on the whole, be doing us a favor by aiding us in getting to the truth. If this is an accurate account of what Mill would say, then would this analysis also hold for something like hate speech?

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<sup>275</sup> Greenawalt, *Fighting Words*, 49. Greenawalt uses the term “psychic assault” and I think it is a good description of what occurs, though in the context he is using it he claims it is does “not differ much from physical assaults, like slaps or pinches, that cause no serious physical pain.” I think that *some* psychic assaults may be this minor but in *others*, it may be more serious.

## Chapter 6 Hate Speech

### 6.1 Introduction

In the previous chapter I showed that, in principle, Mill allows limitations on at least one kind of speech—incitement or speech that risks or causes violence to occur (whether the speaker is the one who performs the violent act or another does). I think that he would allow such limitation not only through the extra-legal domain, but would also allow for such speech to be considered for regulation through the legal domain because it can cause or risk causing a rights-infringing harm. And in some cases, for instance the corn dealer incitement case, Mill would likely claim that legislation *should* be enacted because the liberty right of speech is outweighed by our claim right of protection from physical assault (right to safety and security, right not to be wrongly assaulted, liberty of personal choice) when he applies his balancing principle and thus a rights violation would occur.<sup>276</sup> My next goal is to determine whether there is a right that could be infringed that would place so-called “hate speech” in the domain of the legal harm principle and eligible to be considered for legislation.

In this chapter I will first briefly outline types of speech expression that fall within the category of speech before giving a definition and general description of hate speech. I will then turn to Jeremy Waldron and Mari J. Matsuda’s attempts to narrow the definition of legislatable hate speech and show that such hate speech risks or causes infringement of rights to dignity, safety, and equality. Using Waldron and Matsuda’s analysis, and considering Brink’s suggestion

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<sup>276</sup> Mill does not separate the domain and the justification questions so he addresses both simultaneously. He discusses the domain and justification questions together, which often causes them to bleed together. In this case he judges that these acts would be not only rights-infringing harm, which puts it into the domain of the law, but would be an actual rights violation once weighed against other balancing considerations—it is justified by the balancing principle as well.



that Mill's goal is to first and foremost enhance and utilize deliberative faculties, I will look to what Mill says about equality, dignity, and safety in *Utilitarianism* chapter V to see if he could make the claim that hate speech causes rights-infringing harm and falls within the domain of the legal harm principle. I will then attempt to gauge how Mill would apply the balancing principle.

## 6.2 What Constitutes Speech?

### 6.2.1 *Opinion and Verbal Utterances*

Liberty of opinion/thought is that which is most free. These are personal thoughts, ideas, views, and/or beliefs. These are *purely* within the self-regarding realm. Liberty of expressing that opinion falls within the other-regarding realm but, as Mill argues, expression of opinion is almost as important as merely having opinion that the same reasons in favor of freedom of opinion hold for expression. Some expressions of speech clearly fall within the (primarily) self-regarding realm which may not be violated, and others that fall within the other-regarding realm such as expressing the opinion that “caramel apples with nuts are the best desserts” or “School should be held year-round” do not really interfere with the significant and socially useful interests of others and thus, really ought to be considered as part of the self-regarding realm. In other words, those expressing opinions that do not have any negative impact on the significant interests of others and thus cause them no harm cannot be prevented or infringed by any means—legal or extra-legal.<sup>277</sup> Arguably, the majority of speech acts fit within this category. When we hear the term ‘freedom of speech’ we often only think of verbal utterances. But such freedom of expressing opinion in the form of private conversations and the consensual freedom to unite to express such opinions are not necessarily what is problematic and are generally protected under the same

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<sup>277</sup> This does not mean that people cannot express their disapproval or attempt to persuade. These types of interference are legitimate and may be characterized as “inducements.” See chapter 2.4.1.

argument Mill provides in chapter II of *On Liberty*.

Some categories of verbal utterances, though, clearly fall within the other-regarding realm, are harmful, and are *not* protected. For example, incitement, threat, and harassment increase the likelihood of danger to safety and security or other rights and thus constitute rights-infringing harm and are generally regarded as being acceptably prevented through the legal harm principle. When Mill is discussing fair competitions, such as two people competing for the same job, he claims these sorts of speech acts are illegitimate. He says that the only reason for interference in the case of legitimate competitions is when “means of success have been employed which it is contrary to the general interest to permit—namely, fraud or treachery, and force” (OL V: 3). So, Mill allows for interference in activities that employ fraud, treachery, and force. Force need not be physical. Threats are a way of forcing which Mill would find illegitimate.

In all of these cases, it seems that Mill would allow for interference because they all involve methods of interfering with deliberative capacities which are necessary for improvement as a progressive being. Merely saying something false (in good faith) or providing a bad argument is not generally meant to interfere with deliberative capacities but to commit fraud or treachery is to undermine our deliberation and decision-making which makes it more likely that we would act in manners that we do not truly choose.<sup>278</sup> It is directing it at specific agents or groups in a way that attempts to interfere with our rights to personal choice. Similarly, force is a way to prevent actors from doing what they legitimately want to do by forcing a choice that is

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<sup>278</sup> One of the considerations that Mill takes into account when using the balancing principle of maxim 2 is intention. In many cases someone’s intentions impact whether the act ought to be restricted or not. This is not the focus here but I will touch on intention in section 6.6 when discussing the balancing principle. However, there is a difference in considering the domain question and the balancing principle. The domain question only worries about the tendency or likelihood or risk of harm that an action may produce. It is only in the balancing principle that questions of intention come in.

not freely made. In cases where one's deliberative capacities are purposely undermined by another, Mill would allow for interference to prevent such illegitimate means of interference.

Remember *any* harm to a right<sup>279</sup> puts the action within the domain of the law and Mill claims that our right to safety and security is one of the most vital interests we have. The increased danger in these situations places them in the legal domain for discussion of legislation. Mill acknowledges this limitation when he claims that opinions can lose their protected status when without justifiable cause they are used to cause harm to others (OL III: 1).

### 6.2.2 Publishing Opinions

Speech encompasses much more than merely verbal utterances and “calling something speech is perfectly compatible with also calling it an action that may be harmful in itself or that may have harmful consequences.”<sup>280</sup> Waldron notes that this dual understanding of speech introduces complications in addressing speech regulations. He claims that “if we say we are interested in restrictions on ... *speech*, we convey the idea that the state is proposing to interfere with the spoken word, with conversation, and perhaps with vocabulary (interference that will result in our use of epithets being controlled by political correctness).”<sup>281</sup> But while restrictions on this sort of speech may be called for (and some is legitimately regulated, such as those that violate the clear and present danger test and those that incite violence<sup>282</sup>), there are other categories of speech acts that are frequently of concern.

There are acts, such as publication and display of language, that are also considered to be speech and fall within the other-regarding realm. Many of these sorts of speech, though, Mill

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<sup>279</sup> Reminder that I do not mean harm to the right itself but harm to the individual that implicates his/her rights.

<sup>280</sup> Waldron, *Hate Speech*, 38.

<sup>281</sup> *Ibid.*, 37.

<sup>282</sup> See Chapter 5.4.4.

thinks ought to be left as free as possible because of the benefits of them. But it is these other sorts of “speech” or expression that may interfere in the rights of others or cause rights-infringing harm in ways that verbal speech does not.

These are what Mill calls the “liberty of expressing and publishing opinions” that may encroach upon rights or harm others more so than the spoken word. Things such as publications, public speeches, billboards or placards, among others, represent this sort of speech and amount to “published” word and are thought to be a more “fixed” expression of speech and this fixity may increase the likelihood of harm in ways that verbal speech in the moment cannot. Waldron includes in this category those that are “printed, published, pasted up, or posted on the internet—expressions that become a permanent or semi-permanent part of the visible environment in which our lives ... have to be lived.”<sup>283</sup> But, of course, not *all* or even *most* of these kinds of speech are eligible for restriction. Though, as I will discuss below, Waldron believes these types of speech when directed as hate speech toward certain groups may constitute one of the more harmful sorts of speech (other than those that are generally accepted and protected through the law).

### *6.2.3 Non-Verbal Speech and Expression of Opinion*

In addition to expressing and publishing opinions, there are other things that have been categorized as “speech acts” that express opinion without any kind of actual speech or language use at all. Examples of this category are the use of certain symbols, flags, images, and other regalia that are known to represent an idea, view, or historical moment. This category represents “signs ... that have no meaning on their own, but that convey a powerful message to both user

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<sup>283</sup> Waldron, *Hate Speech*, 37.

and the recipient of the sign in context. Here we must look to the history of these signs to understand what they mean.”<sup>284</sup>

For instance, the swastika, Nazi flag, or Nazi uniform in many contexts represents support for, acceptance of, or endorsement of the views of Nazi Germany during its historical period.<sup>285</sup> Though, of course a Buddhist’s or a Hindu’s use of the swastika has a very different meaning and would not indicate support of Nazi Germany. Similarly, a flag in a museum would not necessarily be endorsing a position and may be attempting to educate about a historical event rather than take a position in favor of it. Other examples of not-necessarily-verbal or non-verbal speech acts would be cross-burning, marching, voting, or a variety of forms of protesting. Some of the acts or use of these non-verbal speech acts are often seen as harmful in the same way that other forms of speech are harmful and thus, eligible for legislation (as Matsuda and Waldron argue).

## 6.3 Defining Hate Speech

### 6.3.1 A General Understanding of Hate Speech

Hate speech is most commonly understood to be a form of “targeted vilification” and may amount to “extremely harsh personal insults and epithets directed against one’s race, religion, ethnic origin, gender, or sexual preference [orientation].”<sup>286</sup> In all of these cases (except religion<sup>287</sup>) these are things that individuals in the groups have no choice over<sup>288</sup> and

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<sup>284</sup> Matsuda, “Public Response,” 2365–6.

<sup>285</sup> *Ibid.*, 2365.

<sup>286</sup> Greenawalt, *Fighting Words*, 47.

<sup>287</sup> Which has its own, I think, separate reasons for being included here. It is included in part because of a historical development that brought about its necessity (i.e. people were being killed for believing and acting on those beliefs despite the fact that they do not cause harm to others).

<sup>288</sup> Some *may* argue that sexual preference *is* a choice, though it is not in my opinion. In which case, similar reasons for including religion in this group apply for sexual preference—acting on one’s sexual preferences or even just

targeting people as members of the group is not the same as attacking beliefs of people, which it seems, Mill would generally consider to be protected because of the deliberative value that we get from comparing a variety of opinions.<sup>289</sup> Greenawalt notes that hate speech also “aims to make the other feel degraded and hated, and [the speaker] chooses words to achieve that effect.”<sup>290</sup>

Waldron notes that the term ‘hate speech’ is problematic because it is ambiguous and unclear in part because of the term ‘hate’ and in part because of ‘speech.’ A focus on ‘hate,’ he argues, is distracting to the point that is being made about the legitimacy of legislation on this kind of speech. A general restriction of all speech that is hateful—expressive of hate—is *not* what is being called for. Hate speech, unlike hate crimes, need not focus on the motivations of the individual expressing them and indeed the term “makes it sound as though their primary function is expressive.”<sup>291</sup> Hate speech legislation is not necessarily concerned with the emotions, passions, attitudes, or thoughts of the individuals expressing such speech, but rather on the effects and the results of the speech. As Waldron notes, “in most hate speech legislation, hatred is relevant not as the motivation of certain acts, but as a possible *effect* of certain forms of speech. ... the element of ‘hatred’ [is] relevant as an aim or purpose, something that people are trying to bring about or incite.”<sup>292</sup> As such, hatred is still misleading because an emphasis on hate ignores what hate speech legislation is really aiming at, namely protecting groups from

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having sexual preferences do not harm others (unless it is without their consent, then it does and would not be protected).

<sup>289</sup> Attacking the *beliefs* of a religion is acceptable and does not constitute hate speech. Attacking or vilifying the people *because they belong* to the group is constitutive of hate speech. Similarly, attacking the *beliefs* of the members of the group is not hate speech but legitimately protected speech.

<sup>290</sup> Greenawalt, *Fighting Words*, 49.

<sup>291</sup> Waldron, *Harm in Hate Speech*, 2.

<sup>292</sup> *Ibid.*, 35.

harm. Matsuda calls for the same thing—“the focus on effects.”<sup>293</sup>

So, it seems that an essential feature of hate speech involves an aim or goal to target an ascriptive group of people in order to intentionally or recklessly incite hatred of that group.<sup>294</sup> And while one may be able to argue that the users of hate speech are expressing opinion, most of the speech is targeted and has an additional purpose—namely, bringing about a specific negative consequence as a result of the speech. The harmful consequences of these encounters are various and the effects, such as “emotional, attitudinal, and behavioral,” are similar to those experienced by victims of sexual abuse and violence.<sup>295</sup> The indirect effects are also significant and include the changes to the social and systemic environment such as heightened discrimination and inequality against target groups as well as an increase in violence against them. As their goal, people who use hate speech seek a “subtle and pervasive attitudinal change”<sup>296</sup> in the general public which contributes to the inequality experienced by the victims of such speech. Greenawalt notes that “in what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no serious physical pain.”<sup>297</sup> While I think Greenawalt’s analysis that the psychic assault is akin to physical assault is correct, I disagree that the psychic assault is always as minor as he suggests and there is a broad range of hate speech that may indeed enter a more serious realm of psychic assault that would amount to the equivalent of serious physical pain (for instance certain sorts of abuse of this nature may lead to a mental breakdown).

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<sup>293</sup> Matsuda, “Public Responses,” 2325. The focus on the effects or “what it does” is also the focus of Catherine McKinnon’s argument against pornography in *Only Words*, (Cambridge: Harvard University Press, 1996).

<sup>294</sup> Ascriptive groups are groups that are assigned based on something other than achievement. So race, gender, sexual orientation, religion, etc. are not achievement based categories and are thus ascriptive. See <https://www.collinsdictionary.com/us/dictionary/english/ascriptive> and <http://www.yourdictionary.com/ascriptive> as well as Waldron, *Hate Speech*, 5.

<sup>295</sup> Sumner, *The Hateful and the Obscene*, 160.

<sup>296</sup> *Ibid.*, 161.

<sup>297</sup> Greenawalt, *Fighting Words*, 49.

There are cases in which psychological trauma, post-traumatic stress, or verbal abuse lead to extreme mental harm. There are cases of bullying in which children who are constantly told that they are worthless or that they ought to kill themselves, do just that. There are also cases in which an individual may be constantly told that people in group X are worthless, animals, rapists, murderers, child molesters, etc. and the individual belongs to that group and internalizes the message. Some parents who are religious conservatives with gay children often inflict this sort of psychic harm when they tell the children that they are unworthy, that they are going to hell, that they are damaged in some way, or sending them to gay conversion therapy. There are cases in which posters and placards are posted that denigrate groups and individuals or that make claims that make their lives and safety feel threatened.

The Skokie case in 1977 is an example of such extreme psychic assault. In this case the American Nazi Party attempted to march through a predominantly Jewish neighborhood in Skokie, Illinois. It “was a rare pure case of symbolic conduct” being used to express race hatred.<sup>298</sup> The use of “speech” in this case was intended to terrorize, threaten, or intimidate—undermine deliberative capacities—and whether it was meant to express a legitimate political position would not undo the harm. As Feinberg notes in his assessment of the case,

their avowed purpose was to march in the Village parks without giving speeches and without distributing literature, but dressed in authentic stormtroopers’ uniforms, wearing swastikas, and carrying taunting signs. Free expression of opinion, a preemptive constitutional value, was not obviously involved. ... [the predominantly Jewish] village was to be a scene of a celebration of Hitler’s birthday by jackbooted youths in the same Nazi uniforms. The American Nazis had deliberately sought them out; their ‘message’ was not primarily for non-Jews.<sup>299</sup>

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<sup>298</sup> Feinberg, *Offense to Others*, 86. While it may not be as “rare” anymore, most instances of such speech acts are commonly referred to as “Skokie-type cases” indicating that the Skokie affair was the standard by which such cases are judged.

<sup>299</sup> *Ibid.*



In this case, they were relying on non-verbal speech to support a particular historical position, which was that of the Nazis who killed those of Jewish descent. While they may be expressing a political view, calling for the death of a group of people and attempting to represent the horrors of the Holocaust is a psychic assault. As one Skokie resident recalled

To traumatized survivors [of the Holocaust who lived] in Skokie, this was not the First Amendment debate that would be litigated all the way up to the U.S. Supreme Court. To them, the issue was much simpler than that: The Nazis were back and promising to continue their quest.

As then-village counsel Harvey Schwartz [said] ... ‘When someone wants to come marching into your town, with the announced intention to kill you, there was hardly anything left to discuss.’<sup>300</sup>

As Greenawalt notes, these sorts of speech “pose a serious problem for democratic theory and practice. Should such comments be forbidden because they lead to violence, because they hurt, or because they contribute to domination and hostility? Or should they be part of a person’s freedom to speak his or her mind? Any liberal democracy faces this dilemma.”<sup>301</sup>

### *6.3.2 Narrowing the Focus and Definition of Hate Speech: Publication*

In order to target the most serious kinds of hate speech that produce the most harm—and that may be thought to be protected by arguments that limit the infringement of free speech—Waldron proposes to limit his discussion (and discussions over the legislation) of “hate speech” to “publications which express profound disrespect, hatred, and vilification for the members of minority groups.”<sup>302</sup> This limitation does two things. First it focuses on publications and the printed word (and other non-verbal expressive symbols). He does this because these are a more permanent expression that tend to maximize exposure in order to reach a wider audience which

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<sup>300</sup> Howard Reich, “Reawakening the Ghosts of Skokie,” (*Chicago Tribune*, January 16, 2013) <http://www.chicagotribune.com/entertainment/movies/chi-perspec-skokie-movie-20130116-column.html>.

<sup>301</sup> Greenawalt, *Fighting Words*, 47.

<sup>302</sup> Jeremy Waldron, *Hate Speech*, 27.

may, in turn, produce more harm. He includes many things under publication, as noted above, such as those that are “printed, published, pasted up, or posted on the internet—expressions that become a permanent or semi-permanent part of the visible environment in which our lives ... have to be lived.”<sup>303</sup> These would also include non-verbal symbols such as flags that are connected to a specific meaning. Matsuda suggests that “formal criminal and administrative sanction—public as opposed to private prosecution—is also an appropriate response to racist [and other forms of hate] speech.”<sup>304</sup>

I think that a strong case can be made that Mill may accept limitations to hate speech *publication* that Matsuda and Waldron propose based on Mill’s objection to the public display of certain things that are in themselves harmless when done privately—though I am not arguing that hate speech is in itself harmless. He claims that

Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightfully be prohibited. Of this kind are offences against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, *the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so* (OL V: 7 Emphasis added).

So Waldron’s argument that narrows the sort of prohibitible hate speech to public displays seems to be in line with Mill’s assessment especially if we consider that Mill here is allowing things that are *entirely* within the self-regarding realm to be covered through the law and hate speech publication is not *entirely* within the self-regarding realm but rather is in the other-regarding realm. He uses the example of decency but one could argue that the harm that is caused by hate speech propaganda is much more harmful than issues of indecency and Mill also

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<sup>303</sup> Waldron, *Hate Speech*, 37.

<sup>304</sup> Matsuda, “Public Response,” 2321.

argues that this objection applies to many things that he does not explicitly mention.<sup>305</sup>

Furthermore, Mill's argument in favor of restricting incitement shows this same sentiment, that stating an opinion and stating an opinion publicly in certain contexts changes the permissibility or at least the domain in which it may fall.

### 6.3.3 *Narrowing the Focus and Definition of Hate Speech: Historically Oppressed Groups*

The second way this definition narrows the scope of hate speech is by singling out speech directed toward minority groups. This seems to be based on a distinction Matsuda (and others<sup>306</sup>) make between the harm that *dominant* groups experience when confronted with hate speech versus the harm that the *dominated* groups experience. Matsuda refers to these groups as “historically oppressed groups” who have been neglected members of the state.<sup>307</sup> This limitation in scope to focus on the harm that occurs to historically oppressed groups seems to be a common contemporary strategy when analyzing hate speech and fits with Mill's focus on the situational context to determine when speech crosses the threshold of limitation and may be prohibited. The historical situation contributes to the sort of harm that is perpetuated and done to the victims of hate speech.

Like Waldron's narrow definition, Matsuda's suggested definition of hate speech eligible for legislative interference focuses very narrowly on a subset of such speech. While Matsuda focuses on racist speech<sup>308</sup> and defines the sort of speech that she believes should (I would say

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<sup>305</sup> I am not entirely sure that Mill's argument here would stand in the case of indecency (see Feinberg's Bus examples in *Offense to Others*), but I do think it would hold for hate speech propaganda. In the case of indecency, it is not entirely clear what *harm* is being done. Though I suppose that Catherine McKinnon in *Only Words* may argue that in some cases of indecency women are harmed. Though I am not committed to this view.

<sup>306</sup> For instance, Catherine McKinnon, *Only Words*.

<sup>307</sup> Matsuda, “Public Response,” 2357–8.

<sup>308</sup> By racist speech Matsuda means “the ideology of racial supremacy and the mechanisms for keeping selected victim groups in subordinated positions. The implements of racism include:

1. Violence and genocide;

‘may’) legitimately be restricted in such a light, I believe that these restrictions would also stand for any member of a historically oppressed group or those toward whom domination or subjugation was common, such as those in the LGBT+ community, women, and members of religious groups. She claims that

In order to distinguish the worst, paradigm example of ... hate messages from other forms of ... speech, three identifying characteristics are suggested here:

1. The message is of ... inferiority;<sup>309</sup>
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.

Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship.<sup>310</sup>

These three requirements for limiting certain kinds of speech prevent some of the more insidious and harmful types of speech while still allowing for a robust commitment to free speech. What both Matsuda and Waldron are doing is focusing on the most extreme cases in order to highlight the limits of speech expression that Mill suggests. I will refer to this as “displays of extreme hate speech.”

#### 6.3.4 *The Effects of Hate Speech*

These focused definitions of hate speech are not without their critics. For instance, Greenawalt claims

Professor Matsuda actually includes as part of the definition of racist speech that it be directed against a historically oppressed group. *Whatever virtue that approach may have for legal categorization*, common usage, which I follow, assumes that blacks may make racist remarks about whites and that women may

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2. Racial hate messages, disparagement, and threats;
  3. Overt disparate treatment; and
  4. Covert disparate treatment and sanitized racist comments.

In addition to physical violence, there is the violence of the word. Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group” (Matsuda, 2332).

I think that hate speech for any oppressed group must fit these requirements as well.

<sup>309</sup> She uses racial here but I would argue that gender, religious affiliation, sexual preference, among others also fit within this context.

<sup>310</sup> Matsuda, “Public Response,” 2357–8.

make sexist remarks against men. Given the heavy condemnatory tones of the words ‘racist’ and ‘sexist’ in our culture, it strikes me as unfair to stipulate by definition that racism and sexism are a ‘one-way street.’ The argument over what the law should do should be carried on in terms different from a one-way definition of racism.<sup>311</sup>

However, I believe that Matsuda’s and Waldron’s definition of hate speech gets closer to the issue than the overly general categories Greenawalt and other legal scholars discuss precisely because it is an attempt to aid in “legal categorization.” Part of the limitations of some legal scholars, Greenawalt included, is first amendment jurisprudential considerations. However, these are not necessarily relevant to this discussion because we need not be bound by what the U. S. courts can and cannot allow. What I am concerned with is applying the legal harm principle to prevent acts of harm that infringe on rights that we have. If the actual criterion for speech to be regulated through the law is a rights-infringing harm, then it may be the case that the “common” understanding of racism is not what we are addressing.

That a black person can make a racist remark against a white person, for instance, does not fulfill the requirement for legislation because there is not the same kind of a threat to the safety and security of the white person. Matsuda acknowledges this common criticism to her view claiming

Expressions of hatred, revulsion, and anger directed against dominant-group members by subordinated-group members are not criminalized by the definition of racist hate messages used here. Malcolm X’s “white devil” statements—which he later retracted—are an example. Some would find this troublesome, arguing that any attack on any person’s ethnicity is harmful. The harm and hurt is there, but it is of a different degree. Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbor of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for historically non-subjugated-group members.<sup>312</sup>

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<sup>311</sup> Greenawalt, *Fighting Words*, 165 fn 39 emphasis added.

<sup>312</sup> Matsuda, “Public Response,” 2361.

Importantly, though, neither Waldron nor Matsuda actually claim that the oppressed groups cannot be racist or sexist or that their working definitions are the common definitions of racism or hate speech. What they claim is that any regulation that focuses on harm needs to recognize the disparity between the harm that occurs for the dominant groups versus the oppressed groups, the latter being the more serious and lasting sort of infringement because of the cultural context in which it exists. In part, what they are arguing is that hate speech regulation may fail so often to be implemented precisely because the general open definition includes too much, which, on balance would not be prohibitable—yes, there is harm, but it is relatively minor and on balance would not be serious enough to consider for regulations.

Certain dominant groups that fall within the general definition of such speech are not (usually) significantly harmed by the sorts of speech that “expresses profound disrespect, hatred and vilification” or that “attacks, threatens, or insults”<sup>313</sup> because they are members of a privileged group and the speech does not have the same psychological and tangible effects. They are better able to escape the consequences or effects of the speech precisely because they have a safe place to return to that oppressed groups do not. Interestingly, Greenawalt makes note of this very point when he claims “Differences in harm may concern kind as well as amount. Epithets used against minority members of oppressed groups may reinforce feelings of inferiority and fear of violence in a way not characteristic of epithets used against groups that have been dominant historically.”<sup>314</sup> Additionally, he states that “those who are in a secure and favored status can accept denigrating terms that apply to their privileged position with less distress than those who know the terms reflect a wide dislike of their group.”<sup>315</sup>

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<sup>313</sup> Greenawalt, *Fighting Words*, 47.

<sup>314</sup> *Ibid.*, 55.

<sup>315</sup> *Ibid.*

An overly general account of hate speech legislation fails to take into account the real differences that exist between groups and that disadvantaged groups are affected and harmed by speech that advantaged groups are not. There is real and tangible harm that occurs to victims of racist (and other similar forms of) speech that the law has a tendency to ignore or underestimate.

Matsuda claims that

The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live. This absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives. A legal response to racist [and hate speech] speech is a statement that victims of [hate speech] are valued members of our polity.<sup>316</sup>

The fact that such groups have not historically had a place at the legal table suggests that the harms they experience—that those who generally craft the law do not—have not been adequately taken into account. Matsuda notes that

racist speech is so common that it is seen as part of the ordinary jostling and conflict people are expected to tolerate, rather than as fighting words. Another problem is that the effect of dehumanizing racist language is often flight rather than fight. Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Lack of a fight and admirable self-restraint then defines the words as nonactionable.<sup>317</sup>

Because of the lack of violent response—which those in vulnerable positions do not tend to rely upon—and the saturation of such speech in everyday life, the resultant harm is generally underestimated. Historically oppressed groups are thus more affected because hate speech helps to perpetuate and institutionalize behaviors, ideas<sup>318</sup>, and prejudices that impact their physical well-being, things like mental health, job security, securing things such as loans, and protection under the law, etc.

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<sup>316</sup> Matsuda, “Public Response,” 2321–2.

<sup>317</sup> *Ibid.*, 2355–6.

<sup>318</sup> Greenawalt, *Fighting Words*, 165 fn 39.

To make a distinction is not “unfair,” as Greenawalt claims, and does not encroach on justice, but actually helps to secure fairness and justice—it is redressing an imbalance. These groups are in positions where they lack power and such speech impacts them directly and the likelihood of consequential rights-infringing harm occurring rises as a result. Matsuda argues “If the harm of racist [or other] hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility.”<sup>319</sup> Lynne Tirrell describes such speech as “toxic” and argues that “toxic speech, like any toxin, is a threat to the well-being and even the very lives of those against whom it is deployed”<sup>320</sup> and “toxic effects vary depending on one’s epistemic position, access, and authority.”<sup>321</sup> These are category differences and important distinctions. The restrictions that Matsuda outlines prevent the sorts of speech that have a tendency to become entrenched in society and institutions and “the definitive elements are discrimination, connection to violence, and messages of inferiority, hatred, or persecution. Thus the entire spectrum of what could be called racist speech is not prohibited.”<sup>322</sup> Matsuda and Waldron are thus attempting to respect the balance between the benefits of free speech and the harm that vulnerable members of society may experience as a result of free speech.

If, as Mill states (U V: 25) and I concur, the harm to significant interests in safety are what matter, a more specific definition may be needed to actually get at the crux of the issue. It is not those in a position of power or dominance that need protection because this sort of speech does not significantly harm their interests in safety and security. Previously oppressed groups, minorities, and those with precarious positions in society have a higher risk of harm to their

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<sup>319</sup> Matsuda, “Public Responses,” 2341.

<sup>320</sup> Lynne Tirrell, “Toxic Speech: Toward an Epidemiology of Discursive Speech,” in *Philosophical Topics* 45.2 (2017): 140.

<sup>321</sup> *Ibid.*, 141.

<sup>322</sup> Matsuda, “Public Responses,” 2348.



rights by such speech than those whose position is unlikely to be affected by such speech.

Matsuda claims that the “presence and the active dissemination of racist propaganda [and other sorts of harmful speech] means that citizens are denied personal security and liberty as they go about their daily lives”<sup>323</sup> because “victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.”<sup>324</sup> These effects are persistent and inescapable in a society that protects such hate speech.

The distinctions between the sorts of harm to the victimized groups and other more privileged groups that Matsuda and Waldron propose are not always recognized and Matsuda notes that in part this is because in analyzing the harm of hate speech

The identity of the person doing the analysis often seems to make the difference ... in responding to racist speech. In advocating legal restriction of hate speech, I have found my most sympathetic audience in people who identify with target groups, while I have encountered incredulity, skepticism, and even hostility from others.<sup>325</sup>

And while we could interpret Mill as being sympathetic to the position, he also expresses skepticism that it is the law’s business to prevent what he calls “vituperative language” (OL II: 44). I think this is in part because he is not considering hate speech as such. In assessing “hateful” language he is not addressing it as an attempt to stir up hatred of groups but rather as a distasteful or unfortunate instance of emotions getting the better of people—as a way of speaking not a message with an effect which incites hatred. The instances he notes are those of expressing frustration or anger and are not targeted vilification. This is not the same as the sort of speech

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<sup>323</sup> Matsuda, “Public Response,” 2321.

<sup>324</sup> *Ibid.*, 2337.

<sup>325</sup> *Ibid.*, 2326.

that I, following Matsuda and Waldron, am addressing.

### 6.3.5 Mill on Vituperative Language

It may be useful to discuss Mill's analysis of vituperative language at more length since he seems to recognize the need to protect historically oppressed groups from harmful speech but then seems to reject it as being justifiably prohibited or within the domain of the law. I think this is because of a key difference in the cases that I wish to bring out. Mill begins his discussion of "intemperate" or "vituperative" speech by stating that

Undoubtedly the *manner* of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure. ... The gravest of them is, to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion. But all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is *rarely* possible on adequate grounds conscientiously to stamp the misrepresentation as morally culpable; *and still less could law presume to interfere with this kind of controversial misconduct* (OL II: 44 Emphasis added).

The sort of speech Mill is discussing in this passage is more like a misrepresentation of the facts or utilizing bad methods of argumentation than engaging in anything like hate speech (though this may be a feature of some sorts of hate speech). This is sometimes done on purpose, but frequently such methods are the result of honest mistakes which can be corrected or pointed out in discussion and one could argue on Millian lines that the harm of censoring such speech would be worse than allowing it. And while Mill is discussing true opinion, even expressing false information, while harmful, is less harmful than allowing the suppression of it for Mill.

However, one thing that is important to note about the selection above is that Mill says that there are "rarely" grounds good enough to prohibit it and that if the grounds are found, that the law has even less reason to interfere—but he does not discount it altogether. He seems to allow that there

may be some instances of such speech that may be either prevented through the law or else that may be considered for prevention.

The next set of considerations Mill discusses has to do not with misstatements or misrepresentations but with ways of speaking—what he calls “intemperate discussion.” Mill states that

With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion: against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation (OL II: 44).

The use of these methods in discussion has many purposes and some of them may be inappropriate in some instances and some of them may be offensive and hurtful (to feelings, etc.) but sometimes it is a matter of emotions, anger, or frustration getting the better of people and while it would be better if everyone spoke civilly and calmly, this is not always possible and some methods of “intemperate discussion” may encourage discussion. But, he notes that there is an instance where the use of such vituperative language is most problematic—when it is used against those vulnerable members of society in order to silence them.

Interestingly, here Mill is again alluding to the tendency of the majority to assert power over the minority (or really the powerful over the oppressed). He claims that part of the problem with preventing intemperate discussion is that it is not applied equally to all interlocutors and it will actually lead to those we wish to help (vulnerable members of society) being silenced more often than the dominant speakers. He claims that

whatever mischief arises from their use [vituperative language], is greatest when they are employed against the comparatively defenceless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions. The worst offence of this kind which can

be committed by a polemic, is to stigmatize those who hold the contrary opinion as bad and immoral men. To calumny of this sort, those who hold any unpopular opinion are peculiarly exposed, because they are in general few and uninfluential, and nobody but themselves feels much interested in seeing justice done them; but this weapon is, from the nature of the case, denied to those who attack a prevailing opinion: they can neither use it with safety to themselves, nor, if they could, would it do anything but recoil on their own cause (OL II:44).

The benefit of using this sort of language and method of communication is almost exclusively on the side of those in a privileged position.

If those who are expressing contrary or unpopular views use this language, it tends to only further delegitimize their position because the majority will choose not to listen when it is spoken in a way that is aggressive. Mill defends this point by claiming that

In general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in a slight degree without losing ground: *while unmeasured vituperation employed on the side of the prevailing opinion, really does deter people from professing contrary opinions, and from listening to those who profess them. For the interest, therefore, of truth and justice, it is far more important to restrain this employment of vituperative language than the other*; and, for example, if it were necessary to choose, there would be much more need to discourage offensive attacks on infidelity, than on religion (OL II: 44).

Mill recognizes the effects of such intemperate language on those who are in positions of relative powerlessness and distinguishes between an opinion of vulnerable groups of people who must be careful in their statements not to cause listeners to react negatively and those of the majority or “received” opinion who can mostly say what they wish (no matter who they offend, harm, etc.).

In the first case, there are groups of people who are not really at liberty to discuss their opinions or views because of the backlash that may occur. They are, in a sense, silenced. In the other case, because such language is spoken by the majority (or more powerful groups), it “really does deter people from professing contrary opinions and from listening to those who profess them. For the interest, therefore, of truth and justice it is far more important to restrain this

employment of vituperative language than the other ... . (OL II: 44).” This seems to concur with the analysis of hate speech above pretty clearly. In the case where the powerful may say what it wishes without impunity, the negative language that is spoken is much more harmful than similar language spoken by those who do not have the power or authority of the dominant group.

The opinions of one group, then, are actually given more weight and are believed more readily and thus contribute to the infringement of the liberty right to speech of the oppressed groups. As Catherine McKinnon says it “understanding that there is a relationship between these two issues—the less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from—is virtually nonexistent.”<sup>326</sup> The point that Mill seems to be making is that the minority or historically oppressed and subjugated groups are more vulnerable and their opinions are often silenced whereas the majority can, in large part, say what it wants without fear of the negative repercussions that the minorities face when voicing their opinions. As Brink says, “Mill recognizes the disparate impact of intemperate speech when employed by a majority and by a minority. If intemperate speech by the majority excludes and marginalizes minority opinions on issues that affect their interests, this looks like a harm that might justify intervention.”<sup>327</sup> It is, at the very minimum, a clash of speech rights between the two groups.

However, despite this apparent agreement with Matsuda and Waldron’s position restricting certain forms of hate speech, Mill goes on to claim that

It is, however, *obvious* that law and authority have no business with restraining either, while opinion ought, in every instance, to determine its verdict by the circumstances of the individual case; condemning every one, on whichever side of the argument he places himself, in whose mode of advocacy either want of

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<sup>326</sup> McKinnon, *Only Words*, 72–3.

<sup>327</sup> Brink, *Mill’s Progressive Principles*, 168.

candour, or malignity, bigotry or intolerance of feeling manifest themselves; but not inferring these vices from the side which a person takes, though it be the contrary side of the question to our own: and giving merited honour to every one, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favour. This is the real morality of public discussion: and if often violated, I am happy to think that there are many controversialists who to a great extent observe it, and a still greater number who conscientiously strive towards it (OL II: 44).

This assessment seems to state outright that Mill would say the law has no business legislating against hate speech. I am not so sure this is the case. Because again, Mill is considering here not hate speech but intemperate language that is used to express an opinion that may be bigoted or angry but that is expressing an opinion. In the sorts of hate speech that Matsuda and Waldron are appealing to, displays of extreme hate speech, it is not the case that the goal is the statement of opinion but rather the incitement of hatred of *a group of people* not an *idea or belief* that the group holds, but rather they are attempting to do something much closer to incitement of violence.

In addition to this, it is not merely the mode of advocacy, the “intemperance” of the speech that is problematic, but the consequences of the speech on the groups—the harm. Mill himself admits that the consequences of such methods often result in the vulnerable groups being unable to participate on an equal footing in the discussion. The vulnerable groups must not only forward their opinions in ways that are least likely to evoke a negative and excessive response in their opponents, but they are also subjected to more rigorous standards than their opponents. This results in an imbalance and inequality in the ability to exercise their rights to free speech. And while it seems that we have a rights-infringing harm occurring, Mill seems to suggest that, when the balancing principle is applied, the infringement is not enough to allow for prohibition.

However, again, Mill does concede that this rights-infringing harm happens more

frequently to those who are already vulnerable and thus the harm to the rights of the vulnerable groups is much steeper than that of the dominant group. If a member of the dominant group expresses hate speech, it has a tendency to silence or impair the oppressed individual's right to speech. It limits how the oppressed groups are able to express their rights to speech. They need to temper their emotions, speak in moderate tones, be sure not to offend the sensibilities of those who are in the position of power, and modify their behavior generally. This is interfering with the right to free expression. Yet, if it is the case that Mill believes that we have claims on society to protect us regarding certain liberties, then it seems that we ought to have our right to liberty protected against others who are utilizing their liberty of free speech in order to disrupt ours. In other words, if someone else's speech rights are in competition with my rights and the consequences of the speech are harmful, it does not make sense to privilege the aggressor's rights over the victim's. We ought to protect the victim in the case where two individuals' rights are in competition.

In addition to this, it is important to remember that in the cases I am discussing, displays of extreme hate speech, the groups being attacked are not merely defending their opinions and it is not a mere difference of *opinion* that is at issue, but rather the vulnerable members of society are either defending their very position in society or, in cases where there is *not* dialogue, their position in society is being threatened or undermined. As Matsuda notes, "what the emerging global standard [against hate speech] prohibits is the kind of expression that most interferes with the rights of subordinated-group members to participate equally in society, maintaining their basic sense of security and worth as human beings."<sup>328</sup> So it seems that hate speech, at minimum, causes harm that infringes on the free expression of speech which would place it within the

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<sup>328</sup> Matsuda, "Public Responses," 2348.

domain of the law. However, while the rights to speech are in conflict in this manner, it seems that much more than the competing rights to free speech are at issue which would place it on an even firmer footing in the legal domain.

## **6.4 Does Hate Speech Implicate Other Millian Rights?**

### *6.4.1 Dignity, Equality, Personal Choice, and Diversity*

Both Waldron and Matsuda rely on the idea of human dignity as a protected area for individuals because of the impact it has on an individual's well-being. Indeed, Mill even notes in *Utilitarianism* that "a sense of dignity, which all human beings possess in one form or another, and in some ... proportion to their higher faculties, and which is so essential a part of the happiness of those in whom it is strong, that nothing which conflicts with it could be, otherwise than momentarily, an object of desire to them" (U II: 6). Waldron defines dignity as "basic social standing" which recognizes that all people "are members of society in good standing ... [and are] proper objects of society's protection and concern."<sup>329</sup> Furthermore, he claims it is not just a "Kantian aura. It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society" and as such fosters the value of inclusiveness<sup>330</sup> and diversity which Mill frequently cited as important to individuality or autonomy and the liberty of personal choice.

Waldron believes that this harm to a person's personal dignity is a harm to the liberty of personal choice and the importance of diversity as well.<sup>331</sup> He claims that

there is something socially and legally significant at stake. ... there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And

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<sup>329</sup> Waldron, *Hate Speech*, 5.

<sup>330</sup> *Ibid.*

<sup>331</sup> Again, the harm is to the person, not to personal dignity.



we embarked on a grand experiment of living and working together despite these sorts of differences. ... Hate speech undermines this public good.<sup>332</sup>

These considerations mimic the language of Mill in *On Liberty* who calls for diversity, individuality, and experiments in living. Waldron argues that hate speech

aims to compromise the dignity of those at whom it is targeted, both in their eyes and in the eyes of other members of the society. ... it aims to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.<sup>333</sup>

Thus, when members are attacked in such a way it contributes not only to the harm to one's liberty of personal choice, but also to one's claim right to safety and security because there is, among other things, a perpetuation of inequality which results in a higher likelihood of rights-infringing harm. This tendency of hate speech to risk rights-infringing harm would seem to take the speech out of the protected realm and place it into the domain of the law. When an agent exhibits this sort of behavior, Mill claims

he has infringed the rules necessary for the protection of his fellow-creatures, individually or collectively. The evil consequences of his acts do not then fall on himself, but on others; and society, as the protector of all its members, must retaliate on him; must inflict pain on him for the express purpose of punishment, and must take care that it be sufficiently severe. In the one case, he is an offender at our bar, and we are called on not only to sit in judgment on him, but, in one shape or another, to execute our own sentence: in the other case, it is not our part to inflict any suffering on him, except what may incidentally follow from our using the same liberty in the regulation of our own affairs, which we allow to him in his (OL IV: 7).

However, while I argued above that Mill would recognize some kinds of hate speech as a competition between both party's rights to free speech, I have not shown that Mill could appeal to other sorts of rights that such displays of extreme hate speech would infringe. I believe there are two other sorts of rights that such speech would infringe: the right to equality and the right to

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<sup>332</sup> Waldron, *Hate Speech*, 4.

<sup>333</sup> *Ibid.*

personal choice.

#### 6.4.2 Mill on the Right to Equality

In *Utilitarianism* when Mill is looking to legislation specifically, he claims that the courts (law) have elaborated maxims in an attempt to “fulfil their double function, of inflicting punishment when due, and of awarding to each person his right” (U V: 35). In doing so they have enacted specifically legal maxims to determine when a rights violation ought to be prevented through the penal law. Two duties that he believes we ought to rely on when considering legislation are impartiality and equality. He claims

That first of judicial virtues, impartiality, is an obligation of justice, partly ... as being a necessary condition of the fulfilment of the other obligations of justice. But this is not the only source of the exalted rank, among human obligations, of those maxims of equality and impartiality, which, both in popular estimation and in that of the most enlightened, are included among the precepts of justice. In one point of view, they may be considered as corollaries from the principles already laid down. If it is a duty to do to each according to his deserts, returning good for good as well as repressing evil by evil, it necessarily follows that we should treat all equally well (when no higher duty forbids) who have deserved equally well of us, and that society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost possible degree to converge (U V: 36).

So, not only does Mill believe that impartiality and equality are obligations that the state has toward citizens but he says that they are the highest standards of justice to which we ought to strive. This suggests not only that we have a right to such treatment but that this right is to be considered one of the most socially useful. In part he believes impartiality and equal treatment are important because they are a logical extension of the principle of utility itself (upon which all of his talk of rights depend). He states that

But this great moral duty [to treat all equally well] rests upon a still deeper

foundation, being a direct emanation from the first principle of morals, and not a mere logical corollary from secondary or derivative doctrines. It is involved in the very meaning of Utility, or the Greatest Happiness Principle. That principle is a mere form of words without rational signification, unless one person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another's. Those conditions being supplied, Bentham's dictum, 'everybody to count for one, nobody for more than one,' might be written under the principle of utility as an explanatory commentary. The equal claim of everybody to happiness in the estimation of the moralist and the legislator, involves an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest, in which that of every individual is included, set limits to the maxim; and those limits ought to be strictly construed. As every other maxim of justice, so this is by no means applied or held applicable universally; on the contrary, as I have already remarked, it bends to every person's ideas of social expediency. But in whatever case it is deemed applicable at all, it is held to be the dictate of justice. All persons are deemed to have a *right* to equality of treatment, except when some recognised social expediency requires the reverse (U V: 36).

But again, even equality of treatment is limited if social utility calls for inequality. This may happen in the case of a conflict of rights, such as that of speech and equality of treatment. So while we have a right to equal treatment, it may be the case that another right we have comes into conflict with it and forces a weighing or balancing of the rights against one another to determine which is most socially useful. But this shows us that it is at least plausible that Mill would allow for considerations of our liberty to free speech to be balanced against our right to equal treatment.

Interestingly and in line with his argument in chapter II of *On Liberty*, Mill continues his line of thought by claiming that allowing inequalities based on an idea of social utility or expediency is what has led to marked injustices. And perhaps allowing for this is problematic.

He claims that

all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they ever could have been tolerated; forgetful that they themselves perhaps tolerate other inequalities under an equally mistaken notion of expediency, the correction of which would make that which they

approve seem quite as monstrous as what they have at last learnt to condemn. The entire history of social improvement has been a series of transitions, by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of a universally stigmatised injustice and tyranny. So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; *and so it will be, and in part already is, with the aristocracies of colour, race, and sex* (U V: 36 emphasis added).

So here he adopts the idea that the interests of each person should count equally (making allowances for the importance of each interest) and protecting everyone's interest is essential to their well-being. So the speaker's right to speech is only more important than the victim's right to safety, security, speech, autonomy, dignity, etc. if the benefit of the speech outweighs the harm to the victim. Considering Waldron and Matsuda's arguments on the real and significant harm to those exposed to hate speech, I do not believe it does.

It seems that Mill would support fostering equality or pluralism and a corresponding right in individuals in its protection. In *Utilitarianism* he outlines the commonly held ideas of justice and in doing so briefly discusses impartiality and equality. While he admits these are vague and such values/interests are not always so obvious, in applying rights he claims that impartiality is commonly understood as useful and indeed is instrumental in fulfilling our duties. He claims that "impartiality where rights are concerned is of course obligatory; but this is involved in the more general obligation of giving to everyone his right" (U V: 9). And while Mill admits that the concepts of equality and impartiality may be understood in different ways, he admits that for many, being impartial and being just amount to "giving equal protection to the rights of all" (U V: 10).

He also claims in *On Liberty* that citizens have duties to "observe a certain line of conduct toward the rest" which not only involves not violating others' rights but also amounts to "each person's bearing his share (*to be fixed on some equitable principle*) of the labours and

*sacrifices* incurred for defending the society or its members from injury and molestation” (OL IV: 3). And if it is the case that minorities and socially vulnerable groups are not having their rights protected by some equitable principle and are bearing more than their share of the sacrifices of defending themselves and others, the situation that contributes to this would be violating their rights. So hate speech would be infringing on their right to have their rights protected equally and “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” (OL IV: 3).

#### *6.4.3 Mill on the Value and Interests of Individuality and Diversity for Well-being*

While I think that there is an argument that can be made that hate speech against vulnerable groups may be considered for legislation on the basis of Mill’s right to equality, I think a better argument can be made that Mill would consider displays of extreme hate speech to risk or cause rights-infringing harm regarding our liberty of personal choice. In discussing autonomy and the liberties of choice and action, in chapter III of *On Liberty*, Mill spends a good deal of time both defending individuality, diversity, and choosing one’s own path in life as necessary features of progressing humanity and well-being and lamenting the yoke of custom, the tendency toward mediocrity, and the attempt to foist assimilation on those who express individuality. Being able to choose for oneself how to live and what sort of life one will have without undue interference by others is something that Mill argues is of the utmost importance.

Mill generally understood this interference to involve government overreach and was particularly worried about the government’s use of censorship but I do not think he adequately considers the role the government can play in censoring in order to foster an atmosphere that is

conducive not only to a broader sense of free speech but individuality and autonomy. Just like we restrict actions that harm others, speech (as an action) also causes harm to others especially their individuality and autonomy, their abilities to go about their lives and choose how they shall live, so restricting some speech has the same effect as restricting some liberty (as he is calling for in *On Liberty*), namely: more liberty overall.

In chapter II he claims that there is

so great a mass of influences hostile to Individuality, that it is not easy to see how it can stand its ground. It will do so with increasing difficulty, unless the intelligent part of the public can be made to feel its value—to see that it is good there should be differences, even though not for the better, even though, as it may appear to them, some should be for the worse. If the claims of Individuality are ever to be asserted, the time is now, while much is still wanting to complete the enforced assimilation. It is only in the earlier stages that any stand can be successfully made against the encroachment. The demand that all other people shall resemble ourselves, grows by what it feeds on. If resistance waits till life is reduced nearly to one uniform type, all deviations from that type will come to be considered impious, immoral, even monstrous and contrary to nature. Mankind speedily become unable to conceive diversity, when they have been for some time unaccustomed to see it (OL III: 19).

It seems then that while Mill calls for tolerance, he has in mind those vulnerable members of society who express diversity, individuality, and progress. He seems to recognize that custom has a tendency to erase ideas that are contrary to received opinion and that free speech protects this. However, what happens when “resistance waits” and is silenced? It seems that in protecting diversity, he would want to protect the speech rights of those most vulnerable groups and if it is by restraining the speech rights of the oppressors that we can protect the vulnerable, it seems Mill would be favorable to it. He claims that

Persons of genius, it is true, are, and are always likely to be, a small minority; but in order to have them, it is necessary to preserve the soil in which they grow. Genius can only breathe freely in an *atmosphere* of freedom. Persons of genius are, *ex vi termini*, more individual than any other people—less capable, consequently, of fitting themselves, without hurtful compression, into any of the small number of moulds which society provides in order to save its members the

trouble of forming their own character. If from timidity they consent to be forced into one of these moulds, and to let all that part of themselves which cannot expand under the pressure remain unexpanded, society will be little the better for their genius (OL III: 11).

If our goal is to foster the use of deliberative faculties, then it seems fostering an atmosphere of freedom would be key. It seems unlikely that allowing speech that interferes with both the deliberative faculties and those who best express individuality fosters individuality and if these aspects of well-being are prevented, then restricting this speech seems consistent with enacting legislation that protects such rights-infringing harm.

Mill claims that “but indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes” (OL II: 17). He further states that

if either of the two opinions [for or against a particular position] has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority. That is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share (OL II: 36).

The final clause seems problematic. It is not the case that preventing certain harmful speech will reduce the significant and socially useful interests or well-being of the speaker but it very well may be the case that those in danger of getting less than their fair share are those toward whom such “vitriol” is spewed. In these two places Mill is speaking against legislating free speech but the problem is, in some cases it is not the purveyors of these harmful views that are being persecuted but their victims. Our goal should not be free speech at whatever cost, it should be free speech until such speech is a rights-infringing harm and interferes with the right to safety and security. And such speech must fit Mill’s criteria for rights-infringing harm which would be “acts of wrongful aggression, or wrongful exercise of power over some one; [or] ... those which

consist in wrongfully withholding from him something which is his due” (U V: 33). And it is indeed preventing persecution of innocent groups/individuals from these wrongful acts that is the goal of certain speech laws. Mill sees the freedom of speech as the bulwark against persecution and the views and examples he discusses tend to be the intolerant preventing the freedom and liberty of others to go about their life and he sees free speech as the protector of those groups who lack power and are persecuted (see God, Socrates, and Marcus Aurelius examples OL II: 11–17 and English court cases II: 18–19). However, I think that in some cases extending the freedom of speech to encompass and allow for these intolerant views—those that are harmful-to-others which he is arguing ought not be allowed to enact legislation and which he refers to as bigoted views (OL II: 19)—is actually opening the floodgates for persecution and harm. It seems that it would be consistent and plausible to prevent *these* harms through the general harm principle, which is consistent with Mill, and that it is also plausible that these types of harm may be rights-infringing harm and fall within the domain of the law.

Mill discusses the usefulness of a variety of characters and types of people and “experiments of living” but he qualifies that this has a limit: “short of injury to others” (OL III: 1). And further that these opinions, acts, and ideas are those that “do not primarily concern others” (OL III: 1) is a requirement that some speech does not seem to fulfill. Mill believes that free speech enhances and tends toward the well-being, flourishing, and individuality of people but he seems to ignore questions that ask whether certain kinds of speech, such as false or racist or sexist speech, even if valuable in the ways that Mill claims they are, are really *more valuable* than the interest we have in things like dignity and security. Brink claims that

It must certainly be an empirical claim that it is harder to draw principled and salient lines here than elsewhere. Absent empirical support for this claim, it seems irresponsible to give up regulating hate speech without seriously trying. If it should turn out that our best efforts at a principled and salient conception of hate



speech and its regulation not only have an unavoidably chilling effect on high-value speech but actually harm the legitimate speech interests of the very groups hate speech regulations are designed to protect, then that would be a good pragmatic objection to hate speech regulation. Hate speech regulation would then be a failed experiment. But the experiment has not even begun yet; claims that it fails are, therefore, premature.<sup>334</sup>

Part of Mill's motivation is to protect individuality or autonomy, and aiming for our own well-being in a way that we see fit and historically, legislation on speech had lots of negative repercussions because the speech was overly restrictive and impacted those most likely to express diversity and individuality. It was disproportionately shouldered by those who were most likely to contribute to the well-being and progressive nature of humans. The minority positions tended to be overregulated and regulated into silence.

But if what Mill wants is to protect such opinions, then it seems *not* regulating the speech of others may actually increase instances of this occurring. Protecting the opinions that highlight alternate ways of life and opinion which enhance our deliberative faculties would actually require censorship of others who impinge on this valuable social utility/interest. The display of extreme hate speech is minimally valuable and does not contribute to enhancing our deliberative faculties and if considering regulation over these speech acts does enhance our well-being and deliberative faculties, then Mill is ignoring the overall enhancement of well-being and deliberation that would occur if such speech is restricted. Speech absolutely contributes to our overall well-being and our deliberative faculties but it is not the only thing that contributes and other values may weigh more on the scales. This is where Matsuda and Waldron come in when they bring in other considerations that add value to the deliberative faculties. There is an overstatement of the value of speech and I think that Mill could say that preventing displays of extreme hate speech would be beneficial for those who are censored as well because

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<sup>334</sup> Brink, "Millian Principles," 148–9.

for this there is ample compensation even in the point of view of human development. The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people. And even to himself there is a full equivalent in the better development of the social part of his nature, rendered possible by the restraint put upon the selfish part. To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object (OL III: 9).

So, perhaps in restricting the liberties of speech, the overall benefit to liberties as a whole is increased.

## **6.5 Hate Speech and the Legal Harm Principle**

### *6.5.1 The Extra Legal-Domain*

What then, would Mill, using the method I propose, say about displays of extreme hate speech? If we recall that Mill's general harm principle is a multi-step process that first considers whether there is harm—any harm—occurring, then we should begin with the general harm principle which distinguishes between primarily self-regarding acts and other-regarding acts. The general harm principle places actions within its domain—extra-legal—if there is harm to others.<sup>335</sup> This is what Mill's first maxim discusses.<sup>336</sup> In the case of displays of extreme hate speech it seems that the general harm principle would place such speech acts within its domain because of the clearly harmful effects of such speech that were outlined in 6.3.4. These effects harm individuals. Once we determine that there is harm, we need to apply maxim 2 in order to figure out the domain question, i.e. apply the jurisdiction principle (which is separate from the balancing principle).<sup>337</sup>

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<sup>335</sup> See chapters 2-3.

<sup>336</sup> See chapter 2.2-2.3.

<sup>337</sup> See Chapter 2-3 and 6.6.

### 6.5.2 *Causing or Contributing to Rights-Infringing Harm?*

So, the next question is whether such harms would fit within the legal domain.<sup>338</sup> Harm that would be placed within the legal domain would be rights-infringing harms. Rights-infringing harm is harm in the other-regarding domain that we have a claim against society to protect us in, that impacts our significant interests, and that is thought to be wrong and subject to punishment.<sup>339</sup> In many cases of extreme displays of hate speech we can see that they are no longer within the self-regarding domain and fall within the other-regarding domain. There is also harm, so it is harmful other-regarding behavior. This harm is also caused by the others and there is, in many cases, a tangible link from the hate speech to the rights implicated in such speech. This is in keeping with what Mill claims about an agent calling for tyrannicide (OL II: 1 FN1). If it is the case that a probable causal link can be established between the expression of the idea and the harm, it is firmly within the domain of the law because it is a rights-infringement. We do not yet know if it is a rights violation—rights violations are not a determination of the jurisdiction principle. We can only determine rights violations once the balancing principle is applied.

In the previous chapter I claim that if an individual fails to prevent harm or contributes to harm (but does not cause it),<sup>340</sup> then it is not rights-infringing harm but is still harm and can still be covered by the general harm principle, though not the legal harm principle.<sup>341</sup> The question is,

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<sup>338</sup> See chapters 2.2-3.2 for this discussion.

<sup>339</sup> See Chapters 3.3.4 and 4.2.3.

<sup>340</sup> For instance in “bad Samaritan” cases where individuals fail to prevent already occurring harm but do not cause it, they could be censured by social/moral pressures but not by the law.

<sup>341</sup> We may have a “right to life” which means we have a right not to be (unjustly) killed by another but this does not mean that others must give us things that were not ours in order to keep us alive, i.e. no one owes us things that would save us such as food or water—they only owe us not to harm us. We may have a “right to food” but this is just a right to that which we already have but we do not have a right that anyone give this to us, only that they not take it from us. Others have moral obligations to help others but others do not have this as their due. We do not owe specific individuals food or assistance (unless there is a special relationship such as parental or familial obligations, etc.) but if we give it to them, we are doing a morally good thing. We have this extra-legal moral obligation but it is not a legislatable moral right that can be demanded of us through the law.

when an agent uses free speech in the form of displays of extreme hate speech and this speech is then used—by the agent or another—as an impetus for a rights violation or rights-infringing harm, are they causing or contributing to the rights-infringing/violating harm? On the one hand, we may argue that it is the sum total of the displays of extreme hate speech that adds up to contribute to the rights-infringing harm and that it is not any one piece of literature that causes the rights-infringing harm. On the other hand we may claim that it does not make sense to think of it in these terms because the literature increases the likelihood of the rights-infringing harm occurring. To draw an analogy, in the case of pollution while it may be the case that a particular tailpipe does not cause any more pollution than anyone else's, it does not then make sense to say that that tailpipe is not causing pollution. Reducing that tailpipe's emissions will reduce pollution. Similarly, preventing an individual's expression of hate speech reduces the likelihood of rights-infringing harm. Yes, the expression of hate speech *contributes* to the harm but can also be said to *cause* the rights-infringing harm.

There is a difference between actively engaging in hate speech which increases the likelihood of rights-infringing harm (causing harm) and for instance, failing to assist someone who is drowning (contributing but not causing harm). While the drowning individual is in a harmful situation—drowning—and there is a risk to safety and security, the bystander did not cause the individual to be in that situation. This is not the case with someone engaged in hate speech. They were a causal factor in the harmful situation, they did not merely refuse to interfere. So it is the difference between someone engaging in hate speech (causing/increasing the likelihood of rights-infringing harm) and a bystander not interfering when someone is engaging in hate speech (contributing to the rights-infringing harm but not causing the rights-infringing harm). As a bystander witnessing the hate speech, he/she *should* intervene but if that

person does not, the bystander is not violating or infringing a right, the bystander is contributing to the harmful situation but not causing it. The bystander's failure to act would be contributing to the harm and thus could be morally or extra-legally censured but not censured through the law.

### *6.5.3 Competing Rights: Infringing the Right to Free Speech*

As I claimed above using Mill's section on vituperative language, it seems that, at the very least, this hate speech is at odds with the oppressed person's right to speech.<sup>342</sup> So we have an instance of rights-infringing harm occurring when both the speaker and the victim's right to speech come into conflict. This would place hate speech in the domain of the law because the speaker is silencing or making it much more difficult for the victim of the hate speech to utilize his/her own right to speech—thus, infringing this right. However, it seems that if the rights-infringing harm is just a matter of the two rights coming into conflict, then Mill would almost never allow for such speech to be prevented because the harm of legislating such speech would far outweigh the balancing harm of allowing it to continue unfettered by legal means—though he would call for it to be prevented or at least discouraged through the extra-legal domain. However, because such displays of extreme hate speech are much worse than other sorts of vituperative language or bigoted ideas, a further question arises, namely, are there other rights that are implicated in displays of extreme hate speech that would aid in the balancing test that may tip the scales in favor of legislation? In other words, while displays of extreme hate speech are in the legal domain and eligible for consideration for legislation, is it the case that there are additional rights that are infringed that would provide a better defense for legislation when the balancing principle is applied?

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<sup>342</sup> See chapter 6.3.5.

#### 6.5.4 Other Millian Rights Implicated in Displays of Extreme Hate Speech

It seems that there are several other rights and interests that are implicated in displays of extreme hate speech. First, Mill claims that most people, including those whose deliberative faculties are excellent, have shown that a right to equality under the law is in everyone's interests and is socially useful. In many cases displays of extreme hate speech cause rights-infringing harm and implicate our right to such equality. Matsuda and Waldron base this right on the concept of dignity.<sup>343</sup> Our dignity is our social standing and if we are all supposed to have an equal social standing then actions that infringe on this right are within the domain of the law. There are many instances in which displays of extreme hate speech cause or significantly risk unequal protection under the law, unequal circumstances in fair competitions, as well as undermining the victim's legitimate position in society. Our dignity and equal social standing are significant interests that we have and if displays of extreme hate speech cause harm to this right, it seems that there is an additional factor that places it in the legal domain and another sort of harm to consider when applying the balancing principle.

In addition to the right to equality, it seems that our liberty right to personal choice and our interests in individuality, diversity, and autonomy are implicated through displays of extreme hate speech. Mill claims that the strength of his argument for free speech applies equally to our liberty rights to personal choice and the freedom to unite (OL I: 16). These three areas of liberty, he believes, are necessary for our well-being and the use of our deliberative faculties. If a person's right to speech interferes with our abilities to choose how we want to live or makes it more difficult for us to make those choices that are within our rights, then it seems that there is an additional rights-infringing harm to consider. The right to personal choice aids in the

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<sup>343</sup> See Chapter 5.4. Waldron, *Hate Speech*, 5; Matsuda, "Public Responses," 2377, 2381.

development of individuality and diversity by making it more likely that individuals can choose their own experiments in living, and even being exposed to others acting on this right makes it more likely that individuals engage and utilize their deliberative capacities because in seeing how others live and chose their lives, one can see the consequences and benefits/drawbacks of choosing such a life which contributes to our well-being.

So, while it may be the case that Mill would not allow for displays of extreme hate speech to be prevented through the law if only the equivalent right to free speech was at stake, he at least would have to recognize that it falls into the domain of the law even if it would not weigh enough to justify legislation. However, when one considers that other rights and interests besides the right to free speech, such as the right to equal social standing, right to personal choice, and our significant interests in individuality and diversity, are implicated when someone utilizes their right to free speech to display extreme hate speech, it seems that there are much more rights-infringing harms to consider when applying the balancing principle of maxim 2. Many other rights are implicated with hate speech than a mere competition between each person's right to speech and these other rights-infringing harms help to place displays of extreme hate speech more firmly into the domain of the law and in contention for legislation. All of these rights-infringing harms must be weighed and balanced against the harm to the speaker of hate speech and the infringements to the speaker's liberty that would necessarily occur if such speech was to be regulated.<sup>344</sup> However, my project only applies the jurisdiction principle and helps to place it within the domain of the law. It does not say whether such legislation on displays of extreme hate speech is a good idea, all things considered. If we decide that, all things considered, it ought

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<sup>344</sup> I want to be clear that I am not attempting to say that merely the number of rights infringements are to be weighed against each other—i.e. one rights infringement versus three—but rather that all these rights-infringing harms as well as the costs, the seriousness of the harms, and other relevant normative considerations must be made. This goes beyond merely placing it in the domain for contention. It requires the balancing principle.

to be prevented, we are saying that it is a rights violation. To determine that it is a rights violation, one needs to weigh the relative harm that results from regulation versus toleration. I am not going to give such maxims that ought to be considered in applying the balancing principle and my project is not meant to provide guidance as to which regulations ought to be a law.

## 6.6 Mill's Balancing Principles

However, I would like to close with a few thoughts on Mill's use of the balancing principle which is thought to justify legislating against those acts that are in the legal domain. Part of the problem that arises with *applying* the legal harm principle based on Mill's very general description of rights is that we must utilize other decision-making principles in order to interpret the harm principle. In discussing whether something like speech fits within the law we need to discuss specifics of the cases at hand, practical considerations. Feinberg calls these "mediating maxims"<sup>345</sup> and many of the maxims or considerations he relies upon are consistent with Mill's discussion in *On Liberty* and *Utilitarianism*. Feinberg claims in relation to his own formulation of the harm principle that

whatever ... the harm principle gains in plausibility, ... it loses in practical utility as a guide to legislative decisions. Legislators must decide not only *whether* to use the harm principle in this somewhat dilute formulation, but also *how* to use it in cases of merely minor harms, moderately probable harms, harms to some interests preventable only at the cost of harms to other interests irreconcilable with them, structured competitive harms, accumulative harms, and so on. Solutions to these problems cannot be provided by the harm principle in its simply stated form, but absolutely require the help of supplementary principles.<sup>346</sup>

The same mediating maxims are necessary to determine whether legislation is warranted or not.

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<sup>345</sup> Feinberg, *Harm to Others*, 187.

<sup>346</sup> Feinberg, *Harm to Others*, 187.



Two considerations that are relevant to determining if there is a rights-infringing harm or not is the magnitude of the harm and the probability of the harm occurring.

One way in which we may weigh the relative importance of interests against each other is in its level of importance in other interests that we have. Sumner summarizes the issue nicely when he claims that

when two important social values (such as liberty and equality) conflict, the optimal tradeoff or balance between them is that point at which further gains in one of the values would be outweighed by greater losses in the other. Freedom of expression would be better protected were there no legal constraints whatever on hate propaganda, while the equal status of minority groups would (arguably) be better safeguarded by legislation more restrictive than the hate propaganda law ... Somewhere between these extremes lies a balance point at which the greater protection for these groups afforded by more restrictive legislation would be outweighed by the greater impairment of expression, while the greater protection for expression afforded by more permissive legislation would be outweighed by the greater risk of discrimination.<sup>347</sup>

Many of our interests are interconnected and in some cases harming one of the interests we have may cause harm to other interests of ours which contributes to a greater degree of harm to our overall well-being. To use Feinberg's analogy, "harm to one's heart or brain will do more damage to one's bodily health than an equal degree of harm to less vital organs."<sup>348</sup> So determining how central the interest is to the entire web of interests may aid in weighing the interest against the interests of others.

Another consideration that Mill seems to allow in weighing the relative strength in liberties is the intention of the speaker. If the speaker utilizes his/her right to speech in order to incite or bring about harm or encourage others to bring about harm, then they are an important causal factor in the harm occurring and the individual's speech may be restricted or punished

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<sup>347</sup> Sumner, *The Hateful and the Obscene*, 62–3.

<sup>348</sup> Feinberg, *Harm to Others*, 204–5.

after the fact for the effect of the speech by third parties. This is advocating or encouraging violence or harm. It is an unjustified increase in the risk of rights-infringing harm and as Feinberg notes “one party *can* be a cause of the voluntary actions of another party, and thus be coresponsible with him for the harmful consequences to a third party.”<sup>349</sup> The right that is violated is the interest in safety and security of bodily integrity or property that Mill and most legal scholars agree is a significant and important interest. Indeed Mill goes so far as to say it is perhaps the most important of our interests.

In *Utilitarianism* Mill claims that many of the common maxims of justice are instrumentally valuable in applying his balancing principle. Several of the maxims he endorses as useful in considering legislation are

That a person is only responsible for what he has done voluntarily, or could voluntarily have avoided; that it is unjust to condemn any person unheard; that the punishment ought to be proportioned to the offence, and [these] ... are maxims intended to prevent the just principle of evil for evil from being perverted to the infliction of evil without that justification (U V: 35).

It seems he counts these among acceptable mediating maxims that will help in the application of justice which is the foundation of the harm principle generally.

When Mill develops the harm principle he talks in terms of harm and risk of harm. So, for the law it may be proper to talk in terms of rights violations or risk of rights infringement. Those things which undermine rights or contribute to a higher risk of rights violations may be included in the domain of the law. And if more harm results from such restrictions, such as increased cost to the public in terms of policing, decreased freedoms, monetary losses, etc., then it may not be prudent to have a legal restriction but a social or extra-legal restriction on it. The risk or likelihood of harm or infringement of a right is what matters for the legal harm principle

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<sup>349</sup> Feinberg, *Harm to Others*, 243.

and the risk of harm is different for different groups. Those groups who are or were previously oppressed may have a higher risk of harm from certain speech acts than those who are either in a privileged position or a position of power. While freedom of thought and expression promotes autonomy, in a similar manner it can also restrict the freedom and autonomy of others. If certain kinds of expression lead to illegitimate oppression or defamation and/or to risk of safety and security of others, then it seems the speech acts in question ought to be prevented.

One of the benefits of Mill's view is that rights are fluid and adaptable. We create new laws based on protecting those interests that are most socially useful and that contribute to our improvement as progressive beings. This is what Mill means by moral rights. So, rights that previously were not necessary become necessary and rights that are no longer needed can be removed. Issues with speech that contradict the safety and security of individuals and groups may be needed in societies in which there are unjust social institutions that prevent safety and security. However, once the previously oppressed groups actually do become the dominant group, such protections would no longer be afforded to them. This idea is reflected in Matsuda when she acknowledges that "should history change course, placing former victim groups in a dominant or equalized position, the newly equalized group will lose the special protection suggested here for expression of nationalist anger."<sup>350</sup> Now there are difficulties with applying this and I acknowledge that application requires interpretation but that is not a criticism against this view alone. All views have difficulty in application. The question for my approach is over the domain of the law. This categorization and understanding of the sort of speech that could be prevented asks whether rights are infringed. I believe that they are in the case of hate speech because of the very real risks of safety and security and rights-infringing harm that accompany

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<sup>350</sup> Matsuda, "Public Responses," 2362.

them. Interpreting application of the law is a separate and important question.<sup>351</sup>

It seems that while certain forms of speech are indeed harmful and studies concur that such things are harmful, Mill still has an important point about the importance of free speech. In arguing for free speech, Mill discusses many instances where those in power suppress the opinion of others because the contrary opinion is so strongly thought and believed to be true. The most notable example is a belief in a god (OL II: 11-12). If this is true and “everyone” (most people, the majority, all but the crazies, etc.) knows it to be true, then surely there is no harm in suppressing the opposite opinion, namely that a god does not exist. What harm can be done? Mill argues that a great harm can be done, especially when one considers that no matter how certain one feels about a proposition, it still may very well be true (OL II). Mill provides an additional apt example (though at the time he did not realize how apt) of Newtonian mechanics (OL II: 8). Even if people are so sure that they are right, they may still be wrong. Now, what does that have to do with the suppression of the speech, materials, and information that we know to be harmful (and obviously-to-us false)? For instance, a Ku Klux Klan member wishes to publish a racist book, billboard, etc. We know not only that the material is false but that it is harmful to individual African Americans and African Americans as a group (through the perpetuation of systemic racism, etc.). Why should we allow it? Mill’s point to this example is two-fold.

First, it may be the case that in order to prevent our views from being dismissed, silenced, and suppressed we must allow others with crazy racist, sexist, whatever-other-views-opposed-to-those-that-we-know-to-be-the-truth, etc. to be expressed in various ways because it then allows us to express our views which may turn out to be true though not the dominant opinion. In other words, if we should not be silenced when we dissent, we ought not silence others. Mill argues

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<sup>351</sup> Matsuda, “Public Responses,” 2363.

that “unless we are willing to adopt the logic of persecutors, and to say that we may persecute others because we are right, and that they must not persecute us because they are wrong, we must beware of admitting a principle of which we should resent as a gross injustice the application to ourselves” (OL IV: 15). In a way, if we want to be able to exercise our free speech, press, etc. in order to further the goal of truth seeking and develop our deliberative faculties, we must allow (at least not have laws that prevent) the views that we consider to not only be wrong but harmful in order to prevent a greater wrong.

Now, this argument is not without its valid criticisms. For instance, it is all well and good for me to make these claims since I likely have never experienced the racism, sexism, abuse, etc. that these harmful views engender and perpetuate which makes me underestimate the degree of harm that is actually occurring in these instances. This may be (and I think is likely) the case. However, it seems that those views that we are fighting to suppress (i.e. those we know to be false) could only be fought by allowing the free and open use of reason and discussion. We know these things to be false because we were able to argue against these harmful views.

Second, Mill’s argument about free speech highlights the progressive abilities of open dialogue. When we come across a particularly heinous view, we can and ought to refute it or show why it is mistaken (just because the law may create more harm than good does not mean it is not interfered with at all, but rather it is the extra-legal social pressures that must prevent it). This allows us to educate and change the dialogue. The worry is, with the suppression of speech, we may inadvertently suppress the very speech we ought to allow to occur. It seems that instead of using the criminal law to punish those who express harmful views, we ought to redirect our efforts to educating, engaging, and utilizing legitimate social pressures. However, this view is also making several assumptions. It is assuming that the harm of suppressing such speech is

worse than allowing it. This is a big assumption and I am not convinced that this is the correct assumption to make.

Regarding application of such speech regulation, Mill is concerned that such legislation would be difficult to control and maintain because those in power would likely do one of several things: misinterpret the scope of such laws, apply them prejudicially, or over reach its legitimate bounds. All of these are fair considerations in applying the balancing principle. These concerns do not really impact whether or not the sorts of speech regulation I claim are within the domain of the law, they apply to the question of creating actual legislation and the practical concerns that arise. Most of Mill's arguments are *not* an application of the jurisdiction principle and in fact he admits that expression and publication of opinion is, by its very nature, other-regarding but he notes that *more harm* would likely result if such restrictions were enacted, not that they do not fit in the domain. This makes sense considering Mill was concerned with liberty and coercion much more generally than I am and in crafting his principle recognized a multi-step process for determining the domain and the practical application of the domain in legislation but did not discuss these as separate goals but rather intertwined both the jurisdiction principle and the balancing principle throughout his discussion. This explains his emphasis on the need to limit legislation for free speech while at the same time acknowledging that by its nature, publication and certain speech acts *are* other-regarding and that they also may cause harm that infringes rights. He notes that these acts are "almost" as important as the liberty of thought and that it is "practically inseparable from it" (OL I: 12) but practical matters aside, they *are* separate and part of the separateness rests on the fact that some of these publications and forms of expression (not all) may actually violate others' rights. I have an inclination to accept most of what Mill says about free speech and recognize the practical problems that arise with what is commonly called

“censorship” and how likely it is to be abused. However, this argument against free speech does not actually impact my argument that the legal domain has jurisdiction in these cases and that a review of such speech acts and legislation is due.

## 6.6 Conclusion

In writing *On Liberty* Mill is, in part, attempting to define the limits of liberty. In doing so he highlights the value of speech and for the most part, I believe that he is accurate in his assessment. Speech and expressing our opinions is essential to our autonomy and freedom. But part of the problem with Mill’s account is that it seems to prioritize speech in such a way that actually undermines part of his project. If his desire is to prevent violations of those socially useful actions that promote a robust and progressive well-being, then he is ignoring or at least downplaying part of the harm to other important values and rights such as dignity, equal social standing, safety and security, and liberties of personal choice (among others). All of these rights and interests aid in the development of our deliberative faculties and if displays of extreme hate speech undermine this project, then it seems that on balance, it may be better to prevent it. As Stanley Fish argues, in placing speech as a value above others that may have just as much if not more social utility, we are dismissing competing values without providing a proper argument. He claims that unless we compare these values, we are giving undue priority to speech and “mystifying—presenting as an arbitrary and untheorized fiat—a policy that will seem whimsical or worse to those whose interests it harms or dismisses.”<sup>352</sup> And while Fish is not arguing from a harm principle, the point is that Mill seems to ignore other values that he recognizes as being in our significant interest in discussing free speech. Some speech is specifically designed to silence

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<sup>352</sup> Stanley Fish, *There’s No Such Thing as Free Speech...and It’s a Good Thing Too*, (New York: Oxford University Press, 1994) 123.

groups of people and to intimidate or threaten. This seems to interfere in the liberty of others and cause harm. But Mill seems to resist that it is rights-infringing harm that *should* be prevented by legal means.

Mill's argument seems to be parsed in the following way: unless we can convince the other side that they are wrong and unless opinions to the contrary can be heard and defeated or defended, we are appealing to mere dogma. What matters is getting the truth of the opinion to be understood by the others. While this may be the ideal case, what happens in the meantime is people are harmed, for example by displays of extreme hate speech. If it is the case, as Mill claims, that the reason why free speech is so valuable is because of the opportunity to gain insight into the truth, then certain sorts of speech that do not attempt to reflect an argument, position, or belief but are merely defamatory or meant to provoke, ought not to be protected through the law. Hate speech does not enhance, but rather undermines, our deliberative faculties. It is not just that we think such speech is false or offensive, though it may be, it is that such speech is not actually doing the work that Mill claims it is meant to do. And if it fails to do the work that contributes to our well-being, there seems to be little reason to protect it.



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