

The Harm Principle

With a better understanding of the rationale and limits of Mill's liberal principles, we can take a closer look at the details of his categorical approach, including its centerpiece—the harm principle.

First, recall that Mill distinguishes between *harm* and *mere offense*. Not every unwelcome consequence for others counts as a harm. Offenses tend to be comparatively minor and ephemeral. To constitute a harm, an action must be injurious or set back important interests of particular people, interests in which they have rights (I 12; III 1; IV 3, 10, 12; V 5). Whereas Mill appears to reject the regulation of mere offense, the harm principle appears to be the one justification he recognizes for restricting liberty.

Second, Mill envisions that the harm principle is something that we can apply prospectively to prevent someone from acting in certain ways and causing harm. In many cases all we could reasonably know is that a given action *risks* harm. Fortunately, this seems to be all that Mill requires (IV 10). There are interesting and important questions about what threshold of risk must be met for purposes of the harm principle, which Mill does not address. Presumably, the threshold should vary inversely with the magnitude of the harm risked, so that the probability of harm required to justify regulation is lower the greater the harm risked.

Third, Mill wants the harm principle to have *wide scope*. He insists that the harm principle regulates more than relations between government and individuals. Its application should include the family, in particular, relationships between husbands and wives and parents and children (V 12). Here, he prefigures some claims he will develop in *The Subjection of Women* (discussed below).

Fourth, though Mill often focuses simply on harm, it appears that his real focus is on *non-consensual* harm (I 2). He endorses the maxim *volenti non fit injuria*, which he glosses in *Utilitarianism* as the doctrine that “that is not unjust which is done with the consent of the person who is supposed to be hurt by it” (U V 28). It is not that one cannot be hurt by something one has consented to or freely risked. Rather, when one has knowingly and willingly risked something harmful, one cannot legitimately complain when that harm comes home to roost. Having my nose broken surely counts as a harm, but if you broke my nose in a boxing match, I cannot fairly complain about the harm, because I consented to the risk.

Does Mill really treat the harm principle as the sole legitimate basis for restricting the liberties of individuals? As we have seen, Mill cannot think that harm prevention is sufficient to justify restricting liberty.

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)

Later, Mill makes clear that harm prevention is necessary but not sufficient to justify restrictions on liberty.

[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. (V 3)

These claims demonstrate that Mill is not committed to a simple version of the sufficiency of harm for restrictions on liberty. However, these claims are compatible with Mill endorsing a weaker version of sufficiency.

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

This suggests that Mill's position is that causing harm is always *pro tanto* reason—a non-negligible reason—to regulate the action, but nonetheless a reason that might be outweighed by countervailing reasons not to regulate. 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. This suggests that we should distinguish stronger and weaker versions of the idea that harm is sufficient to justify regulation.

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

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

Once we distinguish these options, there is a pretty compelling case for thinking that Mill rejects strong sufficiency but embraces weak sufficiency.

But notice that if Mill rejects strong sufficiency then this compromises his one very simple principle. For only strong sufficiency shows that the harm principle is a complete guide to the regulation of liberty, telling us both when regulation is impermissible and when it is required. Even weak sufficiency implies that the harm principle must be supplemented with some other principle, such as the utilitarian principle, in order to determine if regulation is permissible, much less required. Mill's doubts about strong sufficiency imply that his own conception of liberal rights requires more than the harm principle.

In rejecting strong sufficiency, Mill claims that actions that cause losses in a fair competition should not be regulated (V 3–4). This case would fall within his “free-trade” exception, which limits the scope of the liberty principle (V 4). Unfortunately, Mill is not entirely clear about the basis for the free-trade exception. After all, losses, even in a fair competition, can be harmful. If I have a successful business selling widgets and then you move into the area selling widgets at a big discount and drive me out of business, forcing me into bankruptcy, I suffer a significant loss, making me worse off than I would otherwise have been.

If Mill accepts weak, rather than strong, sufficiency, then he might claim that though there is a reason to regulate harmful economic competition the costs of interfering with free markets are too great. However, this seems not be Mill's preferred response. His official position seems to be that the harm principle should not be applied to such economic harms (IV 4). It is hard to see why Mill embraces this sort of free-trade exception. A different and better reply would not suspend the operation of the harm principle in such cases but rather claim that such losses should not be understood as harms, in the relevant sense. Mill might make either of two related arguments for not treating such losses as harms. First, he might invoke the *volenti* principle and insist that the harm principle targets only non-consensual harms. He could then argue that in a market economy that ensures fair terms of cooperation economic losses of the sort described are freely risked and so consensual, in the relevant sense.

Second, Mill can and does claim that competitive losses are not harms, because they do not deprive economic actors of something to which they have a right (OL V 3). Recall that Mill says that a harm involves damage to an interest to which a person has a right (I 12; III 1; IV 3, 10, 12; V 5). You may beat me out in a fair competition for a job. But I don't seem to have a right to the job. Instead, what I have is a right of fair opportunity to compete for the job.

Is harm necessary to justify regulation? Though some of Mill's pronouncements suggest that causing harm is a necessary condition of restricting liberty, closer inspection suggests that Mill countenances various restrictions on individual liberty that appear designed to benefit others, rather than prevent harm. Let's focus on two main kinds of apparent exceptions to the necessity thesis: (1) enforceable duties to others that benefit them, such as the duty to give evidence in court and Good Samaritan duties (I 11) and (2)

enforceable duties to contribute one's fair share to the provision of various kinds of public goods (IV 3), including the common defense (*OL* I 11; *PPE* V.viii.1), community infrastructure (*PPE* V.viii.1; *CRG* 538, 541), mandatory education (*OL* V 12–14; *PPE* II.xiii.3, V.xi.8; *CRG* 467–70), and state support for the arts (*PPE* V.xi.15). These two sorts of exception present somewhat different issues.

In discussing enforceable duties to give evidence or Samaritan aid, Mill claims that the failure to confer benefits constitutes harm. But it is not in general true that the failure to provide benefits always counts as a harm. In many cases it seems not to. You would benefit me by transferring all your savings to my bank account (let us assume); it doesn't follow that your failure to do so harms me.

Why not? Presumably, because we assess harms counterfactually: if *x* harms me, it makes me significantly worse off than I would have been otherwise. This makes clear that harms are assessed relative to some baseline. It is an interesting question how to set the baseline. But the baseline cannot be set by the restriction on liberty itself; that would convert all failures to benefit into harms. The baseline must have some independent rationale. Consider Mill's example of Good Samaritan laws. A classic example of the sort of Samaritan duty that Mill favors would be the requirement to save a drowning child when I could do so at little cost or risk to myself. It is not clear that my failure to rescue harms the child. Have I made the child worse-off than he would otherwise have been? Well, relative to what baseline? Of course, I have made him worse-off relative to the baseline situation in which Good Samaritanism is compulsory. But why select that baseline? I haven't made him worse-off relative to the situation he would have been in had I not been there. By hypothesis, he would have drowned in my absence. If so, it is not clear that I harm the person whom I fail to rescue. This is not to deny that my failure to rescue is wrong and perhaps that the law ought to compel aid in such cases. But it does raise questions about whether we can justify Good Samaritan laws by appeal to the harm principle.

Notice that even if my failure to rescue the child does not harm him, he is nonetheless harmed by drowning. After all, he would have been better off had he not fallen into the pond and drowned. This suggests a possible way for Mill to square Good Samaritan laws with the harm principle. Even if restrictions on *A*'s freedom, requiring him to benefit *B*, cannot be justified on grounds of preventing *A* from harming *B*, they may nonetheless be justified on the grounds of preventing harm to *B*. This draws our attention to a significant ambiguity in the harm principle (see Lyons 1979). Mill talks both about preventing one from harming others and about harm prevention. Indeed, his statement of the one very simple principle mentions both (*OL* I 9). But as the Samaritan example brings out, these two claims are not equivalent. Every time I prevent one person from harming another, I also engage in harm prevention. But some cases of preventing harm may not be cases of preventing one person from harming another. So we really should distinguish two different versions of the harm principle.

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

Because every case of preventing one person from harming another is a case of harm prevention, but not vice versa, HP1 is narrower than HP2. Indeed, HP1 is a proper part of HP2. Whereas HP1 justifies intervention only when the target herself would be the cause of harm to others, HP2 would justify intervention to prevent harm to others, whether that harm would be caused by the target or in some other way. Clearly, HP2 will justify more intervention than HP1. As we have seen, it is hard to justify Good Samaritan laws if HP is the sole basis for restricting liberty as long as we understand HP as HP1. The fact that Mill thinks Samaritan laws can be squared with the harm principle (I 11) is evidence that he understands the harm principle in terms of harm prevention.

A different worry about the necessity of harm concerns those cases involving restrictions on liberty in the

compulsory provision of public goods. For it is part of the structure of public goods that the effect of individual contributions on provision of the public good is negligible. The negative impact of an individual's failure to contribute is both small and is spread widely over the population. But that means that even if failure to provide public goods would otherwise count as a serious loss for all and a harm, the cost of individual failures to provide for such goods does not seem to meet Mill's criteria for harmful conduct—the impact of individual failures to contribute to public goods is too small and spread too widely to constitute the breach of “a distinct and assignable obligation to any other person or persons” (IV 10). Insofar as this is a worry for the harm principle, it seems to be equally a worry for HP1 and for HP2.

One Millian response is to deny that the harm principle is intended to serve as a necessary condition on any and all restrictions on liberty. As we saw, Mill is interested in defending *fundamental* or *basic liberties*, rather than liberty *per se*. In particular, he is interested in liberties of conscience and expressive liberties, liberties of tastes and pursuits, and liberties of association (I 12). He can defend these liberties as playing a more central role in our practical deliberations and our formation and pursuit of personal ideals than other liberties. But then Mill might try to justify the modest restrictions on liberty necessary to provide the benefits of significant public goods by claiming that, even if these restrictions on liberty don't prevent harms, they do not restrict fundamental liberties and they do help secure other goods, such as education, security, and sanitation, that serve as necessary conditions of our happiness.

This issue requires us to distinguish two more readings of the harm principle: one in terms of liberty *per se* and one in terms of basic liberties. This distinction cuts across the distinction between anti-harming and harm prevention, giving us four possible interpretations of the necessity claim.

- HP1A: A can restrict B's liberty only in order to prevent B from harming others.
- HP1B: A can restrict B's basic liberties only in order to prevent B from harming others.
- HP2A: A can restrict B's liberty only in order to prevent harm to others.
- HP2B: A can restrict B's basic liberties only in order to prevent harm to others.

Earlier, we suggested that the harm principle would be more robust and better fit with Mill's views about justified restrictions of liberty if we understood it is a harm prevention principle, essentially, as HP2A, rather than HP1A. Now we have seen how the harm principle would be more robust and better fit Mill's views about justified restrictions of liberty if we understood it to regulate restrictions on basic liberties, rather than liberty *per se*. This requires us to interpret the harm principle as HP2B. We might call this the *basic liberties harm prevention principle*. But if we interpret the harm principle this way, then Mill is even further from a libertarian view, at least if libertarianism is understood as the idea that the only legitimate limit on individual liberty is to prevent that individual from acting in ways that harm others.

The necessity claim that the harm principle makes is more robust if we interpret it as the basic liberties harm prevention principle. But, even so interpreted, the necessity claim is still false. For all versions of the harm principle insist that paternalism is an impermissible rationale for restriction. But Mill does not in fact accept a blanket prohibition on paternalism. He allows paternalistic restrictions on selling oneself into slavery (V 11). In a moment, we will discuss the justification and scope of this exception to the normal prohibition on paternalism. But the exception itself shows that Mill does not think that the only acceptable restrictions on liberty are those that prevent harm to others. For this is a case in which it is permissible to restrict liberty, not to prevent harm to others, but to prevent a special kind of harm to self.

If harm prevention is neither necessary nor sufficient for justifying restrictions on liberty, then Mill's “one very simple principle” is over-simple.

Brink, David, "Mill's Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.). Web. October 2014.