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Harm and Offence in Mill's Conception of Liberty

This paper discusses John Stuart Mill's approach to offensive behaviour, and its relation with harmful conduct and the liberty principle, abstracting as much as possible from the difficulties of his general utilitarian morality and its controversial relation with the liberty principle.

The Liberty or Harm Principle

Mill proclaims in the first sentence of his 1859 book 'On Liberty' that '[t]he subject of this Essay is… Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual'. As revealed by the main titles of its chapters, Mill draws together and correlates 'liberty of thought and discussion', 'individuality, as one of the elements of well-being', and 'the limits to the authority of society over the individual'. Mill describes it in his Autobiography as

> a kind of philosophic textbook of a single truth…: the importance, to man and society, of a large variety in types of character, and of giving full freedom to human nature to expand itself in innumerable and conflicting directions. (p 215)

The essay is particularly renowned by asserting 'one very simple principle', according to which 'harm to others' is the sole justification for coercive intervention. In his own words,

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised

> over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. (LI10)

Later in the book he puts forward the two maxims of his essay:

> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people, if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that 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 punishments, if society is of opinion that the one or the other is requisite for its protection. (LV2)

The first maxim is the *liberty principle*, the second has been termed the *social authority principle*. He tells us that these two maxims 'together form the entire doctrine of this Essay' (LV1).

Mill aims to establish a principle that isolates an area of liberty within which people are uninterfered with in developing their individuality through free choice and experiments in living. It seeks to bar intrusive action justified on *paternalistic* or merely *moralistic* grounds ['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'.] A main feature of Mill's defence of liberty is its *force*, its unbending character. Where the liberty principle applies, the liberty of individuals should be *absolute* and indefeasible, a principle 'entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control'. He says repeatedly that their liberty is by right absolute with respect to matters said to be harmless to other people, that individuals enjoy absolute liberty to choose

as they please among certain 'purely self-regarding' acts.

The reasonableness of attributing categorical *force* to a principle of liberty is very much dependent on its *scope*, which is of a 'very limited range'.[1] It does *not* state the necessary and sufficient conditions for justified coercion. Mill does certainly not pretend that the principle is a *sufficient* condition for legitimate use of coercion against individuals, it specifies only a *necessary* condition: liberty of action may be restrained inasmuch as it is harmful to others. It tells us when we may restrict liberty, not when we ought to do so. He is willing to give absolute shelter to the self-regarding realm—the range of actions not harmful to others—not to provide a complete picture of the liberties that individuals ought to enjoy. Individual liberty is not in practice confined to the principle of liberty, that is, to the self-regarding domain. Freedom should be protected (i) whenever action is *harmless* to others, as well as (ii) whenever it is *inexpedient* to control it, although interference could be legitimately considered from the viewpoint of the liberty principle. Therefore, the full conditions of justified coercion are two-fold: the act must be harmful to others, and it must be expedient to constrain its practice. The liberty principle per se does not cover the expedient scope of liberty, it is not about determining the full range of individual liberty. It is not about the right of property, to set up a business, to sell goods, to vote, to a fair trial, to a fair distribution of resources, or even a defence of a range of basic liberties as the ones advanced by Rawls. It is about a distinctive class of equal liberties of thought, expression and action in every single fashion not harmful to other people, a defence of a walled domain sealed off against coercive or oppressive interference within which individuals have an indefeasible right to a definite and unqualified control over the way they think,

[1] Dworkin, 1974, p 2.

express their thoughts and feelings, and act, in order to promote the cultivation of their individuality through experiments in living. The principle states a sufficient condition for legitimate protection of liberty: the individual ought to be free from societal interference if her action does not harm others. Of course, Mill was obviously aware of the fact that no democratically developed society could be satisfied with such a confined scope of liberty.

Immoral and Other-Regarding Conduct

The notions of *morality*, *harm prevention*, and *other-regarding conduct* are fundamentally intertwined in Mill's doctrine. *Immoral* or *wrong* conduct is that which affects or *interferes* (in a certain manner) with certain *interests* of others, that which is *harmful* to them.[2] Therefore, the phrase 'harmless wrongdoing' finds no place in Mill's doctrine as it is a contradiction in terms: purely self-regarding acts, harmless to other people, are beyond morality. Saying that an action is *wrong* is committing oneself to the view that it is socially *harmful*, and calling the aid of public opinion or legal *coercion* in stopping that action.[3]

To Mill the scope and subject matter of morality is that of *enforceable obligations* about *harm prevention*. Only morality generates obligations—excellence and prudence do not. Moral obligation is about those things that people are 'bound to do', and whose infringement makes them 'proper objects of punishment' and blame. Mill states clearly that it is a part of the notion of duty '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,' and 'the real

[2] The harm principle states not so much that coercion is legitimate if conduct is harmful, but the broader notion that the liberty of an action may be interfered with (coerced) if the interference *prevents* harm to others (Lyons, p 127).
[3] Ryan, 1991, p 166.

turning point of the distinction between morality and simple expediency' is its binding nature, its enforceability, and deserving social interference and punishment (UV14). He says in this regard that

> 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 law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience… How we come by these ideas of deserving and not deserving punishment, will appear, perhaps, in the sequel; but I think there is no doubt that this distinction lies at the bottom of the notions of right and wrong (UV14)

Although it is not wrong to say that this is a distinctive feature of morality, that its *subject matter* is that of enforceable obligations whose infringement ought to be punished, I do not think that one should believe that the Millian *criterion* of right (or permissible) and wrong action lies on whether an action deserves to be stopped and punished, on whether it relates to 'things in which we think we have a right to control him' (LIV7). The idea of deserving punishment is but a formal criterion of wrongness. Conduct ought to be punished because it is wrong, it is not so much the case that it is wrong because it ought to be punished. What makes an action wrong in the first place is that it is harmful. The critical and ultimate question to determine the limits of morality and of social and legal coercion, or the domain of liberty, is primarily the question of which actions are *harmful* to others.[4]

[4] Harm, however, is not a non-moral concept, and it presupposes a substantive theory of justice understood in a broad sense, similar to the one conveyed by Rawls: 'a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation' (A Theory of Justice, p 5). For instance, to have a right against unauthorised interference with material goods that one possesses depends on, say, a just allocation of resources or a certain conception of private property. Moreover, one can have a vital interest to which one does not have a right, for instance a medicine stolen can be a vital interest to me, but the fact that it was stolen does not in normal circumstances allow one to say that I have a right to it.
Its dependence on a substantive theory of justice is detectable in the following sentence: '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

The relation between wrongful or immoral conduct and that which ought to be punished is not straightforward. The underlying logical structure of typical legal or moral rules is based on a two-element model consisting of the premises (or descriptive 'fact-situation') and the conclusion (or prescriptive statement), corresponding closely to the structure of a conditional or if/then logical proposition. It is of the nature of a conditional proposition, or the relation between the premise and the conclusion that the antecedent implies or triggers the consequent, which is therefore a logical implication of the former. However, in evaluative assessments the consequent can partly reverse this 'natural' dynamics and play an elucidatory and interpretative role in ascertaining and determining the content and scope of the antecedent. This should be applied to Mill's notion of immoral or harmful behaviour. If the conclusion of a harmful action is that it shall be forbidden and punished, one should make use of the normative strength of the prescriptive statement, and not only of the elements of the 'descriptive fact-situation' of harm (the idea of prejudicing certain interests of others), to construe the meaning of harmfulness. This gives room to contend that, in some sense, conduct is harmful inasmuch as it is blamable, inasmuch as it ought to be stopped and punished. It could be seen as a sort of teleological interpretation of a specific kind, in which the end taken into account to understand the rule is not the one for the sake of which it was established (say, to protect the interests of others where it would be bad, inefficient or unfair to affect adversely), but the result brought about when the requirements of the premise are met. The fact that, say, 'deplorable exhibitionism' is sanctioned with social ostracism, plays a relevant interpretative role in determining which

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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*' (UV33, emphases added).

acts of exhibitionism ought to be seen as deplorable. Mill seems to follow a similar line of thought when he says that:

> How we come by these ideas of deserving and not deserving punishment, will appear, perhaps, in the sequel; but I think there is no doubt that this distinction lies at the bottom of the notions of right and wrong; that we call any conduct wrong, or employ, instead, some other term of dislike or disparagement, according as we think that the person ought, or ought not, to be punished for it (UV14)

This quotation does not allow us to believe though that in Mill's view 'to say that an action is morally wrong *is* just to say that the system of practices should in one way or another penalise it'.[5] Although it is not wrong to say that this is a distinctive feature of morality, that its subject matter is that of enforceable obligations whose infringement ought to be punished, one cannot accept that *the* Millian criterion of right (or permissible) and wrong action lies on whether an action deserves to be stopped and punished, on whether it relates to 'things in which we think we have a right to control him' (LIV7). This would prompt the circularity inherent in that Mill was precisely searching a criterion to guide us in establishing when a 'person ought, or ought not, to be punished for' an action—purpose for which he advanced, as we know, the notion of harmfulness (which elicits the implicit question of what is it for conduct to be harmful). The proper epistemological course is that conduct ought to be punished because it is wrong, not that conduct is wrong because it ought to be punished. What makes an action immoral in the first place is that it is harmful, not that it deserves punishment or that we think that we have a right to control it. Therefore, Mill's argument that the question of punishment (or control), although appearing in the *sequel*, lies rather at the *bottom* of the notions of right and wrong, should be read in the said epistemological context and seen as an additional condition of its

[5] Skorupski, 1989, p 319.

course, rather than as a rejection of it. The same should be said regarding his notion of right, which is, as we will see, the counterpart of duties of justice: 'To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of' (UV25). That which makes a thing to be considered a right is a quality of that thing. It is not a right because society ought to defend me in the possession of it, but society ought to protect me in the possession of it precisely due to the quality of that thing.

Aware as he was of the normative character of the reasoning, I believe that Mill meant to call the attention of the reader to the adjunct (but not subordinate) role played by the conclusion (conduct that ought to be controlled and punished, or things which society ought to defend me in the possession of) upon the premise (morally wrong conduct, or things regarding which we have a right to). It is perhaps a moral intuitive import to delimitate and give content to the notion of wrongful or harmful behaviour: conduct considered to affect adversely, 'directly and in the first instance', certain interests of others under the moral intuitive idea of it as deserving punishment. To conclude: immoral conduct is that which harms others. Harmful conduct is that which affects 'directly and in the first instance' interests of others that ought be considered as rights. At this point Mill adds that harmful conduct is *also* to be established by the fact that immoral conduct is that which ought to be punished or controlled.

In any case, because only morality generates obligations, there are no duties of nobility towards others, or duties to promote general welfare, and no duties at all to oneself,[6]

[6] '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' (LIV6).

and this is of fundamental relevance to his project of settling the 'struggle between Liberty and Authority' (LI2). The role of morality is directed towards protecting and permitting each one's good to flourish in each one's way, where the principle of liberty shapes the limits of morality as harm prevention, excluding moralist and paternalist invasion of liberty.

Morality, Justice, and Rights

To be bound by duties, whose violation deserves blame and punishment, is the 'characteristic difference which marks off morality in general', from the remaining provinces of practice. But Mill singles out 'justice' as a certain class of moral duties within 'morality'. The duties of *justice* are those in virtue of which there is a correlative right in some person, a *claim* on the part of one or more individuals, duties we are bound to practise towards a definite person, an assignable individual, assimilating to a *debt* that which is due towards others as a matter of justice. The other duties of morality are still obligatory, but they 'do not give birth to any right'; we are not bound to practise it towards any assignable individual, nor at any prescribed time: the particular occasions of performing it, Mill tells us, are left to our choice. It implies a *wrong* done but not some assignable person who is *wronged*, as required by justice (UV3, UV15, UII24).

A rule of justice is one 'which concern the essentials of human well-being more nearly', about 'certain social utilities which are vastly more important… than any others are as a class', and which, 'regarded collectively, stand higher in the scale of social utility… than any others', becoming 'a real difference in kind'. As to the strength or binding force of the directions of justice, he makes it clear that policy ought only to be

listened to *after* justice 'has been satisfied', justice being therefore endowed with lexical priority over the other branches of practice. The social utilities that give rise to rights are 'more absolute and imperative' than any others are as a class, and so the rules of justice are far more imperative in their demands and of more absolute or paramount obligation than any other rules for the guidance of life, except in extreme situations (UV33, UV40, UV38, UV25, UV2). [7]

Rules of justice concern those primary goods or values that give rise to rights: 'a right residing in an individual [is] the essence of the idea of justice' (UV33). The duties of justice are 'of more paramount obligation' (UV38) precisely because their infringement amounts to a violation of someone else's rights.

> 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... If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it. [8] (UV24)
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> To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. [9] (UV25)

In fact, a thing could only be guaranteed to us by society if the protection of that possession has priority over the direct pursuit of the general good, which make rights work as 'trumps' or 'side-constraints' (in Dworkin and Nozick's language) to considerations of

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[7] He tells us that the maxims of justice are 'by no means applied or held applicable universally', they bend to certain cases of social expediency (UV37). In such cases, Mill says, 'as we do not call anything justice which is not a virtue', it is not that justice must give way to other moral principle, but that 'what is just in ordinary cases is, by reason of that other principle, not just in the particular case', way in which the character of indefeasibility attributed to justice is kept up (UV38).

[8] 'If we desire to prove that anything does not belong to him by right, we think this done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave him to chance, or to his own exertions.'

[9] 'If the objector goes on to ask, why it ought? I can give him no other reason than general utility.'

policy or expediency: expediency 'ought only to be listened to' when justice 'has been satisfied' (UV33). It is the very notion of a right that implies its character of indefeasibility or absoluteness.

The reason why society ought to protect me in the possession of that thing cannot be other than the nature of that thing. The notion of a right (as well as the notion of harm) is grounded on that of an *interest*. The interest in question, he says in Utilitarianism, is the most vital of all interests, that of security and preserving peace, which is 'the very groundwork of our existence'. Another interest involved is that of liberty, the 'wrongful interference with each others freedom'. To be precise, it is that of autonomy (although Mill does not use this concept). In fact, Mill talks of the rules of justice as being primarily constituted by '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'. These interests are a so 'extraordinarily important and impressive kind of utility' that they should be valued by society above any other good, and therefore society ought to take measures to secure them for the possessor and not 'leave him to chance, or to his own exertions' (UV25, UV33, UV24).[10]

We are then getting closer to the notion of harm, since the obligations of justice are 'primarily' composed by 'the moralities which protect every individual from being harmed by others'; they are so crucial to human life in society that their observance is said to constitute the test which decides whether a person is fit to exist 'as one of the fellowship of

[10] Although Mill refers to security and not to liberty in UV25, a few paragraphs below he says that 'wrongful interference with each others freedom' is included in the notion hurting one another, and that the moral rules which forbid mankind to hurt one another 'are more vital to human well-being than any maxims, however important', of expediency (UV33).

human beings'. In fact, coercive interference is justified not only to overcome (illegitimate) coercion, but to prevent harm to others. Acts of wrongful aggression or wrongful exercise of power over someone, including the 'wrongful interference with each other's freedom', and wrongfully withholding from someone something which is that person's due constitute the most marked cases of injustice. This is because they inflict a *positive hurt* in the victim, hurt that exists 'in the most elementary cases of just and unjust' (UV33, UV34).

Harm

The notions of harm, and of rights and duties of justice are therefore intimately related, and all together are intimately related with that of interests, of a certain sort of interests: those goods that 'society ought to defend me in the possession of'. These are interest in security and autonomy. *Security*—in person and property—is an interest to which he refers mainly in Utilitarianism, *autonomy* one that is at stake particularly in On Liberty, which is based on the emphasis on liberty, individuality, choice, self-development through activity, experiments in living and other related concepts that one finds in the essay, together with his assertion in Utilitarianism that an individual can be harmed 'by being hindered in his freedom of pursuing his own good'. The protection of autonomy, which is about everyone having 'a just claim to carry on their own lives in their own way',[11] concerns some basic and necessary conditions 'to human nature to expand itself in innumerable and conflicting directions' (Autobiography, p 215). Of course, the principle of liberty is not supposed to positively promote autonomy[12]—otherwise it would be of an extremely wide scope—it

[11] In XVIII 270: quoted by Skorupski, 1989, p 359.
[12] Gray, A Defence, p 94.

removes but an important class of obstacles to autonomy, that of coercive hindrances (either legal or popular). [13]

Mill refers to conduct harmful as well as 'hurtful to others', that 'produce' or 'cause evil' to others, that result in 'definite damage, or a definite risk of damage' to them, as action which 'affects prejudicially the interests of others', 'directly, and in the first instance', that is injurious to 'certain interests, which… ought to be considered as rights', and so on (LI10, LI12, LI13, LIV3, LIV10). In Utilitarianism, as seen, he talks of acts that are harmful to others 'either directly or by being hindered in his freedom of pursuing his own good'. Harm is other-regarding in that it is about behaviour that affects others. But it must affect others in the relevant manner: it must not only affect others, it must prejudice their interests; and not any sort of interests, but certain interests, those that ought to be considered as rights. [14] Rights, as we saw, are about vital interests in security and autonomy regarding which every single citizen is individually entitled to absolute protection (by the state and society) against any sort of interests of others or of society in general (except in extreme cases). In general, one can conclude form Mill's examples, that harm is a relevant injury or damage to one's body, material possessions, reputation, or freedom of action.

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[13] As Gray puts it, 'what matters in autonomy are the powers exercised in framing and implementing successive plans of life' (A Defence, p 55).

[14] When talking about 'acts injurious to others' Mill says: 'Encroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury—these are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment. And not only these acts, but the dispositions which lead to them, are properly immoral, and fit subjects of disapprobation which may rise to abhorrence' (LIV6).

These are 'the most vital of all interests' because they are needed by everyone, while other interests 'are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else'. This, I believe, is not only a useful tool in understanding harm and the scope of the harm principle, it is also a constituent element of the idea of harm itself as worked out by the liberty principle. The interests that are protected by rights and the harm principle, Mill says, 'no human being can possibly do without', and we depend on those interests 'for the whole value of all and every good, beyond the passing moment' (UV25). [15] This is the sense in which he famously refers to the 'permanent interests of man as a progressive being' (LI12), the only interests that, he contends, 'authorize the subjection of individual spontaneity to external control'. This is very similar to Rawls' thin theory of the good, not only in the sense of the basic goods being basic, but in the more technical sense that these are things that every rational agent wants whatever else she wants. [16]

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[15] Mill makes this remarks regarding the interest in security, but it can coherently be extended to the vital interest of autonomy.

[16] Riley attributes to Mill's notion of harm a much lesser technical meaning: 'The idea of harm, around which the argument of the Liberty seems to cohere, is this simple idea of perceptible damage experienced against one's wishes, with the caveat that the perceptible damage must exist independently of any rights and correlative duties recognized by the majority or its representatives' (J Riley, 1998, p 99).

A similar approach is that of Skorupski, who says that there is 'no such thing as *Mill's* 'concept of harm'': 'Terms such as 'harm', 'cause evil', 'injure', 'damage' or 'hurt' are not used by Mill in a technical way. On the contrary, he relies on their ordinary range of meaning, adding such further explanations or qualifications as become necessary along the way, and closing the essay with a chapter of specimen applications'. This can be explained, according to this author, because Mill's object was not to minimise misunderstanding among specialists, but to maximising understanding among an intelligent general public (Skorupski, 1989, p 341-42).

Public Oppression and Social Penalties

Crucial to understand Mill's project is the idea, argued famously by Allan Ryan, that the distinction that runs throughout Mill's work is not between law and morality, but 'between the sort of conduct subject to *law-or-morality* on the one hand and that which is subject to neither of these but to prudential or aesthetic appraisal on the other.'[17] He was not aiming at differentiating the subjects matter of morality and the law. In fact, he assimilated law and morality by specifying *enforceability* as their common feature. [18]

Linked with this is Mill's concern with social oppression generally, together with the authority of the State. Political coercion was not his sole worry. Mill's purpose was to set a limit on the means allowed in pursuit of moral ideals. Criticism or avoidance, education, persuasion, and advice towards a better life are welcome. Coercion, either popular or legal, is not. He was not then writing specifically against legal coercion and the limits of the authority of the State. He was writing about the limits of moral duties and the external sanctions meant to exact those duties. The principle of liberty is about conduct that ought to be free from both legal and social forms of coercion. In fact, the latter (public opinion and costume) was a special cause of alarm, to which he referred as the penalties of public opinion or social penalties, to contrast it with civil or legal penalties. He seemed to fear social pressure particularly: '[f]or a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma', claiming that in England, due to the peculiar circumstances of her political history, 'though the yoke of opinion is perhaps heavier, that

[17] Ryan, 1991, p 162.
[18] Gray, Introduction, 1991, p xv.

of law is lighter, than in most other countries of Europe'. In fact, he acknowledged that in many occasions 'society is itself the tyrant':

> 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, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. 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 (LI5, emphases added) [19]

To be precise, Mill' alarm with popular feeling seems to be two-fold: as a source of rules, and as a sanction against those who dissent from those rules. Society does not only issue 'its own mandates', it does also 'execute' them through public oppression against those who do not follow it. With regard to popular opinion as a *source of rules*, Mill is alarmed for he believes that society has a propensity to issue (i) wrong mandates, as well as (ii) mandates about parts of behaviour 'with which it ought not to meddle' as they are beyond the limits of that regarding which society is morally entitled to have a say, 'penetrating much more deeply into the details of life'. The propensity to issue wrong and too intrusive mandates relies on two reasons. First, on that popular opinion is normally grounded on its own liking, that is on self-interest and mere prejudice rather than on (good or right) reasons. He calls attention to the fact that a person's 'standard of judgment is his own liking', problem which is aggravated because that person does not acknowledge it. The point he seems to be making is that, in not being conscious that they are acting out of

[19] The heading of Chapter IV of On Liberty, the phrase 'of the limits to authority of society over the individual'—context within which he discusses '[h]ow much of human life should be assigned to individuality, and how much to society' (LIV1)—is informative in that it reflects his concerns with the authority of the State as well as with the 'government of public opinion', of society generally.

their self-interest and prejudice, people tend to feel their judgments reinforced by the conviction that they are impartially motivated and morally right, which supports the conversion of their likings into rules binding on others and to be imposed on them. Mill's criticism goes to the point of saying that the effect of costume is that 'it is not generally considered necessary that reasons should be given, either by one person to others, or by each to himself' (LI6). Since one is uncritically bound to costume, and since costume goes into the details of life, it is likely to enslave 'the soul itself'. The second reason on which the propensity to issue wrong and intrusive mandates is grounded is the popular demand that everybody should act as they would like them to act. That is, on people's tendency to turn their own ideas and practices into rules of conduct: either as consuetudinary rules in their own right; or as legal rules, since the law is liable to end up being modelled in the image of the feelings or opinions of the majority.

Functionally related with the danger of popular feeling as a source of rules—although logically distinct from it—is the threat stemming from popular feeling as a *sanction*. This is the tendency to 'impose' their own ideas and practices on those who dissent from them, that is to say, to 'execute' the rules of conduct based on the likings and dislikings of society. The means used is popular oppression, which is understood by Mill as penalties of opinion or social penalties 'purposely inflicted on [people] for the sake of punishment'. This is dreadfully feared by Mill because it is executed almost everywhere by almost everyone, making it very effective and difficult to escape from (together with the social exclusion and humiliation it brings about). To him the strength of the social stigma 'is really effective' (LII20).

Mill's critical alarm with popular oppression is intimately connected with his concern with the formation of individuality through free choice and experiments in living.

He thinks that 'the tyranny of the prevailing opinion and feeling' will tend to 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 its own" (LI5), thwarting his view of a society with 'a large variety in types of character, and of giving full freedom to human nature to expand itself in innumerable and conflicting directions' (Autobiography, p 215). It is therefore coupled with the Principle of Liberty and his general idea of morality as a body of imperative directives aiming at opening a space within which aesthetic and personal ideals are guaranteed and may flourish, and people may pursue their own goods, pursue that morality does not demand, but protects and permits.

Legal Coercion

However, for the purposes of a political and legal philosophy it is quite relevant to understand when is one justified in using the weapons of law. Where Mill's harm principle is critical in determining the point from which coercion is permissible, it is not helpful to provide a *full* justification of legal coercion, as it provides but a necessary condition of legal coercive intervention. Something further is required. He acknowledges though that it is 'true that mankind consider the idea of justice and its obligations as applicable to many things which neither are, nor is it desired that they should be, regulated by law' (LI12).

He asserts that legal coercion must still pass through a test of expediency, since there are 'many things which are not fit subjects for the operation of law', where legal penalties are 'not safely applicable'. Legal coercion needs to be allowed by the liberty principle but still has to be 'consistent with practicability and social convenience', having particularly in

mind the impracticability of executing certain laws (LI6, LI12, LIV9, LIV20). There are two lines that limit legal punishment, the first is drawn by the harm or liberty principle, and establishes an absolute boundary above which legal punishment is not allowed no matter what; the second is drawn by the expediency principle. The final decision on when can the law be called upon is to be settled on expedient grounds. Here competing considerations need be weighted: the harms prevented together with other social benefits of interfering with the practice should outweigh the harms provoked together with the resources consumed by the institutional enforcement of duties of justice and other social costs generated by the coercive interference.

But apart from expediency, there is something about the nature of law and the nature of justice that gives moral grounds (and not only expedient ones) to believe that they have different scopes of application. This conclusion—that will not be pursued here—is based on several passages of his work, where it seems that at times it is justice itself that tells us that certain actions, although unjust, ought not to be punished by law (which is very much related with the issue of proportionate punishment and the nature of legal institutions). Whether legal punishment should or not be levied is to Mill, I think, not only a matter of expediency, but also and primarily a matter of morality. However, Mill gives us no clues about where to draw the line between harms that can also be punished by law and those that can only be punished by public opinion, nor does he provide the criteria that we should follow for this purpose.

Natural Penalties

The fact that Mill confined the realm of morality to the other-regarding sphere of conduct, to which he limited the legitimacy of social coercion or public pressure, does by no means suggest that infringements of the directions of other branches of practice ought to be accepted or even respected by us all. Self-regarding conduct may, and in many cases should, be disliked and criticised by others (although not oppressed or controlled). Although morality is the only branch of practice that generates duties to others, prudence and aesthetics are still bodies of directions for people's conduct aiming at a certain end, implying the possibility of judgments of admiration or of dislike. The right to judge, to express criticism, and to act in accordance with one's judgments is also intimately linked with his defence of freedom of thought, discussion and action, and of a diversity of pursuits and plurality of values. Mill defends throughout the Essay a 'liberty of tastes and pursuits' (LI13), and links it with the fundamental point that conduct does not harm others simply because they dislike it and are thereby troubled or even tormented by it. This does not mean, of course, that he is advocating encouragement, commitment, *respect* or even acceptance of self-regarding vices that we dislike. It does not even mean that he advocates *indifference* towards rightly disliked self-regarding actions. [20]

In this respect Mill introduces the notion of *natural penalties*, to be contrasted with legal and popular penalties (which I will call *purposeful penalties*). Natural penalties apply to action that, though doing no wrong to anyone, we think of as foolish or perverse, as a

[20] 'It would be a great misunderstanding of this doctrine, to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved' (LIV4).

lowness or depravation of taste that may be proof of any amount of folly, or want of personal dignity and self-respect. It is about actions that constitute faults and displease us, but faults of a kind that directly concern only the actor: they are not properly immoralities, they are self-regarding vices, not moral vices, and so, "to whatever pitch they may be carried, do not constitute wickedness". He calls it merely contingent or constructive injury that 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'. Although her behaviour is only a subject of moral reprobation when it involves a breach of duty to others, that person still acts as to compel us to judge her, and feel to her, as a fool, or as a being of an inferior order, and she will have no right to complain for having a less share of our favourable sentiments (LV5, LV6, LV11).

So, natural penalties differ from purposeful penalties (either social or legal penalties) in that to a great extent they flow directly from one's dislike or distaste towards others' behaviour, and in that they are not in many cases easily detachable from that feeling of dislike. It is the natural and spontaneous corollary of our feelings towards the disliked conduct. Purposeful penalties are deliberately inflicted 'for the express purpose of punishment' on grounds other than the dislike or distaste. Their underlying reason is harm prevention, which is therefore detachable from our feelings towards properly immoral behaviour. This is the reason why the natural penalties are as much the result of using our liberty in the regulation of our own affairs as it is the liberty of the actor in the regulation of hers, while in the purposeful penalties we still make use of our liberties but towards a totally different aim. To be precise, in the former we use our liberty in our own domain of life regarding others' legitimate use of their liberty to act in their own domain. Both parties make a legitimate use of their liberty and act within the self-regarding sphere, although they will inevitably have an effect on the life of each other. In the purposeful penalties one

does not use one's liberty to regulate one's own affairs, but to control the life of others. Mill's use of the word *retaliate*—in reference to our right to 'retaliate on him'—regarding immoral conduct helps to understand the nature of the two categories to which these penalties apply, as it expresses the idea that we are acting in return or in response to a wrong or harm that has been done to us, which can therefore come to justify our treating him like an enemy of society (LIV7). In fact, if it does not harm me, and is not potentially harmful to society, there is no reason to 'parade' my feelings, that is, to intentionally display it in public, inviting others to disapprove it and joining me in making her life more uncomfortable or painful. It is also significant that in Mill's view the distaste and unfavourable judgment tend to go together with the sentiment of pity, where 'we shall rather endeavour to alleviate his punishment'. One feels pity for that which someone does to herself, and resentment for that which she does to others. (LIV7, LIV10).

Offensive Conduct

Mill offers the readers little more than these laconic and somehow hermetic lines on this topic:

> 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. (LV7)

The primary concern is here with the moral 'objection to publicity' (not specifically with decency). The violation of social rules on good manners isolates behaviour whose

wrongness is dependent on its publicity. The harmfulness of killing, raping, stealing or wounding is by no means dependent on the venue where these actions take place. There are actions, however, that gain moral significance by being paraded in public. Mill says that there are acts which, if done publicly, are a violation of good manners, and that offences against decency are but a sub-class of the former. In fact, though, the phrase 'violation of good manners' is neutral regarding the public/private divide, where 'offences against decency' is not. The violation in private of social conventions on good manners (say, rules on dinning etiquette) is still conceptually a violation of good manners. However, as it does not affect others, it ought not to be interfered with by legal coercion or social oppression. This is not the case of indecency, however, which is conceptually dependent of its exposure to others. One cannot be indecent in private. In this sense, indecency is a value-laden concept. So, to be precise, 'offences against decency' are a species of the category of 'violation of good manners' done publicly.

A more relevant divide is that between acts that are 'directly injurious only to the agents themselves' [say, sex with animals], and acts 'not in themselves condemnable, nor supposed to be so' [say, marital sex]. Acts not in themselves condemnable are not criticisable from a moral perspective, as well as from the viewpoint of any of the other directions or rules of practice. Acts that are injurious only to the agent (self-regarding acts) might bring about *natural penalties*, but no more than natural penalties since 'the inconveniences which are strictly inseparable from the unfavourable judgment of others, are the only ones to which a person should ever be subjected for that portion of his conduct and character which concerns his own good' (LIV6). *Purposeful penalties* could not be levied upon the agent as these self-regarding actions are 'not properly immoralities' and therefore do not fall within the scope of the harm principle, if at all because there are no duties to oneself: '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' (LIV6).

It is not clear from Mill's wording whether he sees offences against decency as a category of one or the other, or possibly of both of them. The latter option is the one that makes sense. What makes an action indecent is (i) it being is practiced in public, and (ii) some other features of the action not necessarily linked with its inherent worth. In fact, the strength of this divide is to this purpose dismissed by Mill as he says that the objection to publicity is 'equally strong' in both cases (acts that are, and that are not in themselves condemnable). It is the action being performed in public that makes it wrong. Publicity transforms into other-regarding behaviour that would otherwise be self-regarding. As Mill says in another chapter of the book, 'What are called duties to ourselves are not socially obligatory, unless circumstances render them at the same time duties to others' (LIV6). As seen, the *circumstances* at stake in the case of violations of good manners are their public undertaking.

Of course, the mere fact of being done in public is not per se sufficient to make it wrong: saving someone's life or reading poetry in public are not wrong. Something else is required, and that thing seems to be the existence of a branch of rules on good manners, more precisely, the existence of a certain range of actions that might affect others *in a certain way*, whose regulation is provided for by a category of directions aiming to control the potential prejudicial effects of those actions. The way in which it might affect others gravitates roughly around the idea of hurting others' feelings or senses. A first problem is whether to Mill these prejudicial effects are harmful to others or not: whether there is a subcategory of other-regarding conduct that is not harmful, or whether these are but instances of harmful behaviour. Another problem is whether Mill is opening the door to all

that regarding which the liberty principle raised itself to protect us from: having our actions and our life subject to the 'likings and dislikings of society' (LI7) and therefore partly constraining the 'liberty of tastes and pursuits' (LI13) that is one of the requirements and core aims of the principle.

Before looking at these two questions in turn, it is worth telling that the violation of good manner is either a too loose use of these words, or an insufficient representation of the sorts of actions that, together with indecent behaviour, might cause offence. For conduct to be offensive it must be likely to have an unpleasant impact on others, and it must be wrong. Its wrongfulness is to some degree a function of its detrimental effects on others. The same with the typical cases of harm: the wrong of torturing is very much a result of the pain, humiliation, subjugation and confinement it tends to imply or provoke. One could then see offence as 'wrongful because offensive' or as 'offensive because wrongful'. This duality is meant to stress (i) whether the wrongfulness of behaviour is very much a function of its detrimental effects on others (*wrongful because offensive*) or whether it is more significantly justified on independent moral grounds (*offensive because wrongful*). It also underlies that the detrimental effects of *offensive because wrongful* offences are in great part caused by its wrongness.

Noisy behaviour in public is wrong because it has a detrimental effect on others and was made to happen with no good reason (if this is the case). Its wrongness is very much dependent on the directly displeasing consequences of conduct (consisting essentially in disturbing others with no justification or excuse). The line of argument would go like 'its noise disturbs me and you have no good reasons to disturb me'. This argument is somehow in line with the objection that is made against inflicting pain on others. It is the detrimental effect is has on the sufferer imposed for no good reason that makes it wrong. However, if

we refer to a white man wearing a T-shirt combining Nazi's or KKK's motifs with explicit racist insults to Jewish or black people, we would not simply concentrate on the 'it annoys me' bit, we would rather say that 'it is morally wrong and it interferes adversely with me'. In cases of these sorts, the wrongness is justified on morally independent grounds (that is, on grounds other than its detrimental effects) by reasons such as, say, the equal dignity of all human beings independently of their race. Where offence is wrong on moral independent grounds, its detrimental effects tend to be a consequence of its wrongness (thus the phrase *offensive because wrongful*), and so, reasons that justify one tend to justify the other as well. Mill's concentration on good manners cannot in justice encompass many actions of the two categories introduced in the previous paragraph.

I will now discuss the two main questions referred above (Is Mill allowing what the liberty principle aimed to protect us from? Are violations of good manners harmful to Mill?). Before, it is worth noting that the paragraph in reference is such a tiny sample of material that it could not be taken as being a good representative of Mill's thought in the subject, whatever his thoughts might be. It is therefore unfair to over-analyse it and try to draw too many conclusions from it. I will try to look at it in the broader context of his work, party portrayed in this paper.

Offence and Costumary Morality

Mill admits that self-regarding acts affect the feelings of other people, and that they can (and in many cases should) cause intense dislike. Mere dislike, though, is neither a sufficient, nor a necessary reason for coercive intervention, it is not even a good reason for this purpose. In fact, this is the very thing against which Mill was fighting throughout his

writings on liberty and individuality. As seen, he was providing a moral and political defence 'against the tyranny of the prevailing opinion and feeling'—which he thought to be more formidable than many kinds of political oppression—a defence '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' (LI5). But the evil of the violations of good manners is precisely (at least in the relevant part) the dislike it provokes on others and its affecting their feelings. Many critics have defended that by allowing social or legal interference against violations of good manner or other sorts of offensive behaviour, Mill watered-down his liberalism or contradicted himself inescapably. [21]

As said above, Mill is worried with society's propensity to issue wrong and too intrusive mandates because popular opinion is normally grounded on its own liking (self-interest and mere prejudice), rather than on (good or right) reasons, which is reinforced by the belief that they are impartially motivated and morally right. When people's likings become consuetudinary rules, 'it is not generally considered necessary that reasons should be given, either by one person to others, or by each to himself'. In fact, their *lacking rational justification* does not only help to explain why it enslaves 'the soul itself', it also feeds the 'practical principle which guides them to their opinions on the regulation of human conduct': the feeling that 'everybody should be required to act as he… would like them to act' (LI5, LI6).

Mill is therefore quite clear in asserting that what makes behaviour immoral in the first place is not the 'likings and dislikings of society' (LI7), whatever their number or the

[21] 'Mill, without being explicit, seems to allow customary morality to override his adherence to the Liberty Principle' (J Wolff, 1996, p 140).

strength of the dislike, but objective reasons; to be precise, the fact that there are reasons to believe that conduct affect certain relevant interests of others, reasons other than the fact that it adversely affects their unfounded feelings or opinions: [22]

> 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. (LI6)

In saying that an opinion not supported by reasons can *only* count as one person's preference, Mill is conveying that it does *not* count as a reason (as a good reason), and since only reasons count 'for the purposes of repression or punishment', mere likings as such are irrelevant. In truth, he is writing very much against the relevance of preferences of others not founded on reasons—i.e., their mere likings or dislikings—to justify social interference with liberty and self-development. This quotation advances the general idea that the application of the Liberty Principle is to be grounded on the objective merits of reasons, and backs his argument that liberty is absolute (within the self-regarding domain) in that unreasonable preferences do not count either to determine the scope of the Principle or to overturn the strength of the principle as against other kinds of considerations. In fact, the feelings of dislike or disapproval caused by self-regarding actions of others can never be founded on (good) reasons, and are irrelevant for the purposes of the liberty principle,[23] threshold that gives grounds to its indefeasibility: otherwise the mere dislike might outweigh the value of individual liberty. As a consequence, preferences and dislike not

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[22] In this context, a hard case would be one acting against unfounded feelings of others, with the knowledge and the sole purpose of hurting, upsetting or offending them, case to which Mill does not seem to refer.

[23] Dworkin follows a somehow similar path when, after distinguishing between personal and external preferences, argues for the exclusion of the latter whatever their content, which he sees as the way to meet the utilitarian meritorious aim of treating people as equals.

grounded on reason do not contribute to establish whether behaviour is self or other-regarding.

This view is reinforced in a letter he wrote to Elizabeth Cleghorn Gaskell in 1859 (the year in which On Liberty was published):

> The case being simply that in the exercise of the discretion of an Editor you neglected the usual and indispensable duties which *custom (founded on reason)* has imposed of omitting all that might be offensive to the feelings of individuals [Quoted in J Riley, p 182, emphasis added]

Mill opens a distinction between 'custom based on reason' and 'custom not based on reason', which is a line he did not explicitly press in On Liberty. This is important, first because it stresses that the opinion of the majority is not the sole, or a good, criterion to decide which customs should be seen as valuable, and which should not. That is, the value and moral force of costume is not merely based on social facts, it depends also on its independent moral worth. Only customs founded on reason give rise do duties: we are not bound by custom if it is not rationally grounded. It seems that to Mill the moral validity of custom depends on the existence of a social convention regarding polite or decent behaviour, and on the rationality and rightness of the convention. [24]

To Mill, therefore, reasonableness is a requirement of any measure, moral or legal, encroaching on anyone's freedom to choose or act. He would certainly not agree with Feinberg who, after distinguishing harm from offence as two good prima facie bases for

[24] Mill complains, for instance, of existing customs of politeness, in that they do inhibit the individual from expressing their dislike about others' self-regarding actions. People ought to be more free in this regard than is customary: 'It would be well, indeed, if this good office were much more freely rendered than the common notions of politeness at present permit, and if one person could honestly point out to another that he thinks him in fault, without being considered unmannerly or presuming' (LIV5).

legal punishment, rejects the requirement of 'reasonableness of the offense' as a necessary condition for legal coercion, where *reasonableness* means to be 'subject to rational appraisal and criticism', to judge offensiveness according—and not contrary or indifferent—to reason. Feinberg presents three arguments for his claim against reasonableness: it would be redundant and unnecessary (for empirical reasons);[25] it would be dangerous to democracy and contrary to liberal principles;[26] and there are 'types of offense that in their very nature have nothing to do with reasonableness', which are 'neither reasonable nor unreasonable but simply "nonreasonable"'. This third claim maintains that one *cannot* give reasons as to why some types of behaviour are offensive and that they *cannot* be subject to rational criticism. These are the reasons why Feinberg relies on 'the extent of offense standard rather than [on] a reasonableness standard'.

Mill's reliance on reasons would certainly make him line with Finnis' argument that 'morality is a matter of what reasons require, and reasons are inherently intelligible, shared, common' (Finnis, p 3), rather than with Feinberg's partial moral scepticism of an indeed substantial group of offences. Also, Mill would never sign upon the argument that requiring rational arguments to support coercion (instead of relying on society's prevailing feelings) would be dangerous to democracy and contrary to liberal principles. This is not only due to the role he attributes to reason and to his defence of democracy, but also

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[25] Feinberg says in this regard: 'It is possible, I suppose, but extremely unlikely, that *virtually everyone* would have an unreasonable disposition to be offended by a certain kind of experience … As for the *most* forms of *unreasonable* offense, the very unreasonableness of the reaction will tend to keep it from being sufficiently widespread to warrant preventive coercion.' (Offense 35-36)

[26] Feinberg says that 'it would require agencies of the state to make official judgments of the reasonableness and unreasonableness of emotional states and sensibilities, in effect closing these questions to dissent and putting the stamp of state approval on answers to questions which, like issues of ideology and belief, should be left open to unimpeded discussion and practice … To make *those* questions subject to administrative or judicial determination, I should think, would be dangerous and distinctly contrary to liberal principles.' (Offense 35-37)

because he was writing against legal coercion as well as against public oppression; and the prevailing feelings, the likings and dislikings of society, are the voice of prejudice and self-interest. Mill would certainly argue that society would then make ungrounded judgments and interfere with the expression and development of individual's emotional states and sensibilities, putting pressure against free choice, expressing one's opinion, and acting in accordance with one's free choices. It would be an encroachment on human self-development and the formation of one's own individuality.

Mill would have not accepted a positive morality's kind of test as the sole criterion to evaluate behaviour. This would mean his siding with the view that what makes behaviour right is its conformity to the *actual* prevalent practices, opinions or customs in a society, where his view is that what really matters is conformity to those that *ought to* obtain. Mill stressed this line quite carefully, by directing his criticisms not only against conservative writers, who would tend to go against Mill's specific arguments of applied ethics, but also against 'those who have been in advance of society in thought and feeling', thinkers that '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' (LI7). The indefeasible character of the Liberty Principle relies very much on Mill trumping the likings and dislikings of others as a relevant factor in settling the 'struggle between Liberty and Authority'.

Social conventions play an intermediate role between deeper values and social practices and actions. The value of wearing dark cloths at a funeral service (in some countries) is not in the choice of the colour, but in the fact that a certain code is acknowledged as expressing respect to the deceased and to his family. The same value is compatible with different codes. The code itself is somehow arbitrary, but not the

convention, as it expresses deeper values that are based on reasons. This is in any case too simple an explanation since the relation between the deeper values and conventional rule is to a great extent arbitrary and often too loose. For instance, if wearing cloths expresses, say, a value of privacy and intimacy, of setting boundaries between an individual person and the others, one would tend to consider unreasonable to require covering the all body, but reasonable not to allow nudity in every public place. This is very much dependent on the predominant values of a certain time and a certain place. Although deeper values set limits on the legitimacy of social rules, disallowing immoral conventions such as racist or sexist ones, conventions are part a matter of *value* and part a matter of *fact*, and it is difficult (or not possible) to separate the latter from the likings and dislikings of society.

Mill does not work out these notions and it is therefore impossible to reconstruct his thoughts on the topic. However, considering the central role he attributed to individuality and free expression of one's choices, it is not difficult to believe that he would tend to defend tolerance as against social coercion in drawing the line between the self-regarding and the other-regarding realms of action performed in public. In relation to those actions that are fit objects of social interference, Mill would certainly tend to rule out legal coercion in many cases (having in mind that legal coercion is to be applied, for reasons of justice and expediency, to an inner circle of cases within the wider circle of those to which social sanctions apply).

To this purpose it might be useful to bring in his discussion of the particular case of freedom of opinion. Mill says 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.' (LII45) However, law should not interfere with its principal forms. But why, if it may justly incur severe censure? He apparently gives three reasons: (i) because it is almost

impossible to bring home to conviction; (ii) because it is rarely possible on adequate grounds conscientiously to stamp cases of misrepresentation of opinion as morally culpable as it is so continually done in perfect good faith; and (iii) because it is a misconduct of a controversial nature: 'still less could law presume to interfere with this kind of controversial misconduct'. These arguments seem to appeal to expedient reasons, as well as to a deeper self-limiting feature of law itself: regarding controversial misconduct (that is rarely morally wrong or whose wrongness is of difficult assessment) law should not interfere. Legal interference seems to require that a certain range of moral 'agreement' be achieved before it steps on people's lives, and this is obviously not about a social agreement (based on a majoritarian criterion), but a moral one.

Offence and the Liberty Principle

Mill says that 'it is unnecessary to dwell' on offences against decency, 'as they are only connected indirectly with our subject' (LV7). Many critics tend to interpret this assertion as meaning that those violations do not follow within the harm principle, and either suggested that Mill thought of an autonomous offence principle, [27] or that he was simply aware of the limitations of his liberty principle. [28] Others defend that these are still instances of the harm principle. [29]

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[27] Hart argued that a distinction can and should be drawn between 'shock or offence to feelings caused by some public display', and distress caused by 'the bare knowledge that others are acting in ways you think wrong' or by 'the belief that others are doing what you do not want them to do' (1963, p 46-7). Feinberg thought the same and wrote a book on the topic: 'Offense to Others' (Vol. II of his four volumes on 'The Moral Limits of the Criminal Law'). None of them, as far as I know, attributed this view to Mill.

[28] According to Skorupski, Mill was not claiming that such acts, when done publicly, are harmful to others: 'He is engaged in spelling out some of the 'obvious limitations' (LV6) of his maxim when it is

The obvious question is try to determine to which subject he is referring—when he says that offences against decency 'are only connected indirectly with our subject'—in order to understand how he saw the relation of offences against decency with the Liberty Principle. In the very first sentence of the book Mill says that 'The subject of this Essay is … the nature and limits of the power which can be legitimately exercised by society over the individual'. This is definitely not the subject he is referring to in the crucial paragraph, since it is written in the latter that these violations 'coming thus within the category of offences against others, may rightfully be prohibited' (LV7). In saying that it may be prohibited he is discussing 'the power which can be legitimately exercised by society over the individual'. This is confirmed by the fact that only several paragraphs after he says that: 'I have reserved for the last place a large class of questions respecting the limits of government interference, which, though closely connected with the subject of this Essay, do not, in strictness, belong to it' (LV16).

In the paragraph that precedes the one in question Mill writes:

> 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. Drunkennesses, for example, in ordinary cases, is not a fit subject for legislative interference; but… [t]he making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others. (LV6)

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applied in practice, and adding specimen qualifications in a selective but intelligible way. Acts of discourtesy, or public nuisance, do not, in normal cases, *harm* others or *injure* their interests, nor does Mill have a technical sense of 'harm' in which they can be said to do so' (Skorupski, 1989, p 342).

[29] 'These cases fall outside the ambit of the principle of self-regarding liberty, he seems to be saying, because harm really is suffered by the victims of others' bad manners or shocking behaviour in public' (Riley, 1998, p 178). In the sense that they fall within the harm principle, see Ten, 1980, p 106-7.

The paragraph I am analysing follows the immediately above quotation, and starts by saying: 'Again, there are many acts which…' (UV7). This is a strong textual reason to conclude that the subject that Mill is referring to—when he says that offences against decency 'are only connected indirectly with our subject'—is 'purely self-regarding misconduct', which means that these violations belong to other-regarding and not to the self-regarding sphere of action. As he identified the sphere of absolute liberty with self-regarding behaviour, it seems that Mill saw offensiveness (whatever its limits are) as falling directly within the Liberty Principle. The example of drunkenness shares with the violation of good manners the fact that, when it occurs together with a (related but external) relevant factor conduct steps from the self-regarding to the other-regarding domain: in the case of drunkenness this factor is the fact that he 'had once been convicted of any act of violence to others under the influence of drink' (LV6), in the case of the violation of good manners the relevant factor is publicity.

In the beginning of this last chapter of On Liberty ('Applications'), Mill tells us:

> The few observations I propose to make on questions of detail, are designed to illustrate the principles, rather than to follow them out to their consequences. I offer, not so much applications, as specimens of application; which may serve to bring into greater clearness the meaning and limits of the two maxims which together form the entire doctrine of this Essay and to assist the judgment in holding the balance between them, in the cases where it appears doubtful which of them is applicable to the case. (LV1)

This quotation points towards the conclusion that offences against decency are an example of 'specimens of application' of the two maxims [quoted on page 2 of this paper] 'designed to illustrate' them and to help determining their limits. They are not instances of cases regarding which none of these maxims apply, ie cases that fall outside the harm principle. In fact, these two symmetrical maxims 'together form the entire doctrine of this

Essay', which seems to leave no room to a third autonomous principle within the boundaries of these two. In fact, his observations on these cases (of which offences against decency is one among others) are meant 'to assist the judgment in holding the balance between' these two maxims, 'in the cases where it appears doubtful which of them is applicable'. It is still, then, a matter of deciding which of the two maxims apply: that of absolute liberty, or that of social authority in face of harm to others.

This led me to conclude that Mill did *not mean* to put forward an autonomous offence principle, but to justify coercion against certain kinds of offensive behaviour in the light of the harm principle. I do not have room here, though, to face the substantive and much more interesting and important question of whether the coercive interference against offensiveness coheres with Mill's notion of harm as conduct affecting significantly, 'directly and in the first instance', certain essential interests (in security and autonomy) that ought to be considered as rights. In order to address this issue, one would have perhaps to start asking what are the interests threatened or injured by the violation, done in public, of good manners or other sorts of offensive conduct. One thing is unquestionable, it could not be a mere general interest in preserving the actual positive morality.