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Mill on Liberty, Speech, and the Free Society

Mill's argument in *On Liberty* is conventionally held to rest on what is known as the Harm Principle (HP), according to which the only good reason to interfere with an individual's liberty of action is to prevent harm to others.[1] Moreover, HP is commonly taken to imply that the harmfulness of an action (to nonconsenting others) *does* provide good reason, albeit not always sufficient reason, for society to interfere with it. But it is also widely acknowledged that the primary aim of Mill's essay is to argue for what I will call the Doctrine of Liberty (DL): the quintessentially liberal claim that there should exist a substantial sphere within which the individual is free from social coercion. After roughly circumscribing this sphere of liberty, Mill declares: "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" (I, 13).[2] Among the liberty rights granted by Mill's ideal of a

I would like to thank Kathleen Cook, Justin D'Arms, Samuel Scheffler, and colloquium audiences at Franklin & Marshall and Stanford for their helpful remarks on earlier drafts, and Steve Darwall for many rewarding and enjoyable conversations on these and related topics. I am also indebted to an anonymous referee for this journal, whose comments helped improve the paper greatly.

1. The term 'harm principle' was coined by Joel Feinberg in *Harm to Others* (New York: Oxford University Press, 1984). While Feinberg has developed a powerful and detailed liberal approach to the law, the effects of this term have been less felicitous, as Feinberg's notion of harm is idiosyncratic and potentially misleading. In particular, subsequent writers have commonly attributed a harm principle to Mill without adopting Feinberg's conception of "harming as wronging" (see esp. p. 34); hence, they typically take any harm to provide reason for interference with liberty.

2. Mill, *On Liberty* (London: J. W. Parker, 1859). References to this work will be given in the text simply as (chapter, paragraph).

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free society, he gives pride of place to what he calls "the liberty of conscience, in the most comprehensive sense" (I, 9).[3] He understood this sense as including not just thought but also the expression of any opinion or sentiment, however unpopular, offensive, *or even harmful* it may be. Hence, Mill's defense of a sphere of liberty broad enough to include unqualified speech rights is in tension with the Harm Principle from which it is supposedly derived.

I will argue that the traditional interpretation of Mill's argument is mistaken, especially with regard to the role and content of HP, and that this misreading distorts the fundamental purpose of *On Liberty* by undermining the essay's liberal ambitions.[4] In particular, it has led many commentators to conclude that Mill's defense of speech rights is either quite limited or else rests on the absurd claim that speech is somehow guaranteed to be harmless. There are three central tenets of this traditional interpretation, which are as follows. (1) Mill accepts a Harm Principle on which the harmfulness of an act is a good reason to subject it to social control by legal or moral means. Whether coercion is ultimately justified is a further question, to be settled by calculation of its costs and benefits in the particular case. (2) *Self-regarding* action, Mill's term of art for acts that fall within the sphere of liberty posited by DL, refers to actions that are harmless (to nonconsenting others—a qualification I will drop hereafter, for the sake of brevity, but which should be assumed throughout).[5] (3) DL follows from HP by way of this class of self-regarding action; thus, the sphere of liberty it posits is limited to acts that cannot harm.

But all three tenets of the traditional interpretation are false. Rather, Mill advocates a form of liberalism on which individuals have certain basic rights, including the right to free speech. These rights are constitutive of Mill's free society—an ideal founded on his conception of the pre-

3. Individuals also have certain positive or claim rights in the free society (e.g., to an education—see V, 12), in addition to the negative or liberty rights manifest in DL, which will be my focus here.

4. The essentials of the view I am calling the traditional interpretation is identified in similar terms by John Gray in *Mill on Liberty: A Defence*, 2nd ed. (London: Routledge, 1996). The phrase 'Doctrine of Liberty' is also borrowed from Gray, although he uses DL to refer quite broadly to "the various principles stated and defended in *On Liberty*" and yet thinks that it "is silent about the proper limits of state activity" (p. 17), whereas my usage differs on both points. While Gray's interpretation is in some respects quite similar to mine, there are substantial differences between our readings.

5. Any adequate treatment of Mill's conception of harm would also have to include danger that does not actually issue in injury.

requisites for human flourishing. Although Mill recognizes that speech is not always harmless, his defense of speech rights is not limited to harmless speech, and his Doctrine of Liberty is not limited to harmless action. Hence, Mill's commitment to HP has been fundamentally misunderstood. In the first place, Mill puts a rights constraint on HP, which protects actions that are within the sphere of liberty from prohibition even on grounds of harm prevention. While certain individual acts of expression can be interfered with, for instance, it is not for their harmfulness per se. And such limited interference with speech as is justifiable is not in tension with DL, because it does not constitute any qualification of speech rights or infringement of liberty.

Even when rights are not at issue, the justifiable exercise of social power, although strictly limited, is not limited to harm prevention. A crucial and neglected point, which will be central to my interpretation, is that Mill expressly allows that some interference with an individual does not constitute an infringement of her liberty. These more modest exercises of power can be justified by appeal to their benefit to others as well as the prevention of harm to them. Hence, Mill not only forbids interference with some harmful acts on the grounds that they are within our rights to perform; also, in specific circumstances where liberty is not compromised, he permits interference with acts that are harmless even when their remote consequences are taken into account. Rather than speak of a harm principle at all, it might cause less confusion to say that Mill endorses an antimoralism, antipaternalism principle (in addition to DL). Whatever one's terminology, the crucial point is that HP is not meant to support the Doctrine of Liberty, as is commonly supposed; therefore, its inability to do so is not problematic.

The rights-based interpretation I will defend can answer two related and long-standing objections to Millian liberalism that have seemed, even to some of his most sensitive and sympathetic commentators, to threaten the coherence of Mill's view. On the traditional, harm-based interpretation, Mill's argument is vulnerable to an incisive twofold challenge: HP seems both too weak and too strong. One of the first criticisms of Mill, launched by contemporary utilitarians and still popular among opponents of liberalism, is that HP is too permissive of interference to support DL because almost every action can affect others and, hence, is a legitimate concern of theirs. If there are very few self-regarding acts

then, contrary to DL, there can be no substantial sphere of liberty.[6] Yet it has also been claimed that HP is too restrictive of interference to provide a foundation for public policy, because it seems to render illegitimate many of the powers Mill grants to be necessary for any functional government, such as taxation, subpoena, and conscription. Moreover, the most prominent and influential attempts to rescue Mill from this problem, offered by D. G. Brown and David Lyons, secure the legitimacy of these necessary powers at the expense of Millian liberalism.[7] This is too steep a price, if there is a less costly and revisionist solution. I propose to treat Mill's account of speech rights as exemplary of his liberal commitments, in order to show that there is an alternative interpretation of the defense of liberty which is preferable to the traditional interpretation on both exegetical and philosophical grounds.

I. The Defense of Unqualified Speech Rights

My first goal in challenging the traditional interpretation is to explicate Mill's claim that it is never legitimate to prohibit the expression of an opinion or sentiment. His commitment to this claim is implicit in his peremptory refusal to weigh the utility of tolerating any particular opinion against that of censoring it. And it is explicit in his statement that, "however positive any one's persuasion may be, not only of the falsity but of the pernicious consequences—not only of the pernicious consequences, but (to adopt expressions which I altogether condemn) the immorality and impiety of an opinion," it is wrong to prohibit its expression (II, 9).[8] This point is crucial, because those who would censor speech in-

6. DL is stated as claiming that there is a "substantial" sphere of liberty in order to avoid its trivialization. In particular, Millian liberalism requires a sphere of liberty substantial enough to include free speech.

7. See David Lyons, *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994); and D. G. Brown, "Mill on Liberty and Morality," *The Philosophical Review* 81 (1972): 133–58.

8. Mill does not, of course, condemn the concept of immorality itself; indeed, he is here claiming that censorship is wrong. Rather, he condemns its application to speech and other self-regarding action. Indeed, the fact that Mill refuses to apply moral sanction to opinion is strong evidence that he takes such speech to be self-regarding, which will be the central claim of this section. Consider that Mill claims, analogously, that moral vices are "unlike the self-regarding faults previously mentioned, which are not properly immoralities . . . [unless] they involve a breach of duty to others" (IV, 6).

evitably claim that the opinion they target is extremely harmful. Rather than engage such arguments directly, Mill offers highly general considerations in favor of the toleration of all sentiments and opinions, extending even to their public expression.[9]

Yet, despite claiming that "human beings should be free to form opinions, and to express their opinions without reserve" (III, 1), Mill acknowledges certain exceptional cases: particular acts of expression with which society can legitimately interfere. I will argue that these are exceptions that prove the rule, in the truest sense of that phrase: they are specious exceptions which, when properly understood, support rather than subvert the rule of absolute and unqualified speech rights. 'Absolutism' tends to be wielded as a term of abuse, and the issue of speech rights is sometimes obscured by a misguided philosophical rigorism on which the doctrine of free speech is held to be necessarily limitless.[10] But the important point for our discussion is not whether Mill's use of the word 'absolute' was prudent or perspicuous. It is that Mill gives substance to his distinction between qualified and unqualified liberties. While he defends both doctrines of free speech and free trade, for example, only the former freedom is unqualified. He marks this distinction in two ways: by saying that the doctrine of free trade (unlike free speech) is *not* a matter of individual liberty, and by classifying speech (but not trade) as self-regarding action. Mill's distinction between self- and other-regarding action is notoriously problematic; it has confused many of his interpreters and led others to ignore the distinction entirely, despite its textual prominence.[11] While it is

9. In his treatment of this argument, David Lewis wavers between an exegetical error (that Mill aspires to convince all disputants, even Lewis's imagined Inquisitor) and a tendentious exaggeration (that, since the Inquisitor cannot be convinced, only the likes of a Milquetoast can be). See Lewis, "Mill and Milquetoast," reprinted in Gerald Dworkin, ed., *Mill's On Liberty: Critical Essays* (Lantham: Rowan & Littlefield, 1997).

10. If there is no such thing as free speech, as Stanley Fish declares, because speech rights must have some limits, then there is no such thing as flat, straight, or empty either, since nothing (actual) is *absolutely* flat. Nor is there freedom of anything, since no freedom is without limits. A dose of semantic contextualism is the cure for this philosophical malaise. See Fish, *There's No Such Thing as Free Speech* (New York: Oxford University Press, 1984).

11. Lyons thus praises Brown for "not allow[ing] his interpretation of Mill's principle of liberty to get bogged down in discussion of Mill's distinction between 'self-regarding' conduct (a term used by Mill) and 'other-regarding' conduct (a term not used by Mill)" (Lyons, *Rights*, p. 91). Lyons's point about Mill's usage is not telling, however, as Mill simply has another term for other-regarding acts. He calls these 'social' acts—a potentially misleading term which we are better off avoiding, since Mill clearly thinks that some acts that are social in the sense of involving many people are nevertheless self-regarding.

uncontroversial that by identifying an action or trait as self-regarding, Mill means to place it within the sphere of liberty, it is considerably less clear on what grounds he does so.

In fact, my claim that Mill considered speech to be a type of self-regarding action is commonly denied.[12] The contrary view is often motivated by the implicit or explicit adoption of what I will call the simple gloss of the self-regarding as the harmless.[13] In support of the simple gloss, it is easy to cite isolated passages where Mill characterizes self-regarding action as that which affects no one but the agent himself and, hence, can harm no one else. But the simple gloss presents Mill with an incisive dilemma: either speech must always be harmless, which seems absurd; or else it is other-regarding, and its regulation is subject to calculations of utility. This is a false dilemma, because close reading of Mill's argument will show that he does not adopt the simple gloss. Indeed, some glaring exegetical problems with the simple gloss have already been exposed, but the alternatives that have been suggested are more complex and do not clearly solve the central problem. My strategy will be to argue, first, that Mill takes speech to be a paradigm of the self-regarding; and then that Mill grants there to be other cases, besides speech, of self-regarding action that is not harmless. In Section III, I will advance a gloss of the self-regarding that is both straightforward and compatible with Millian liberalism.

Several sympathetic interpreters have responded to this dilemma by refining Mill's notion of harm, so as to make more plausible the claim that speech is harmless.[14] Although I am sympathetic to some aspects of this response, I doubt that it can solve the problem of speech rights. While it is true that words cannot draw blood or otherwise directly cause physical injury, they can nevertheless wound in less palpable or direct, but no less

12. See, e. g., Lewis, "Mill and Milquetoast"; Jonathan Riley, *Mill on Liberty* (New York: Routledge, 1998); and Frederick Schauer, *Free Expression: A Philosophical Enquiry* (Oxford: Oxford University Press, 1982). Even Gray seems to hold this view (see *Mill on Liberty,* p. 106), despite his acknowledgement that, for Mill, "expressive acts enjoy a privileged immunity from liberty-limiting restrictions on harm-preventing grounds" (p. 104).

13. Lewis thus writes, "if an opinion is not held secretly, but is expressed in a way that might persuade others, that *is* other-regarding: both because of the effect that the opinion may have on the life of the convert and because of what the convert might do, premised on that opinion, which might affect third parties" ("Mill and Milquetoast," p. 5).

14. See esp. J. C. Rees, "A Re-reading of Mill on Liberty," reprinted in John Gray and G. W. Smith, eds., *J. S. Mill—On Liberty* in *Focus* (New York: Routledge, 1996). See also C. L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980); and Gray, *Mill on Liberty,* p. 57.

significant, ways. If harm is limited to physical injury, then what is so important about it? Given that we would all prefer to suffer slight physical harm than severe emotional trauma, shouldn't Mill's focus be on something like well-being rather than such narrowly construed "harm"? This question is especially problematic for Mill because of his inclination to hold some kind of (idealized) preference satisfaction account of the good.[15] If instead the suggestion is that the harmful but indirect effects of speech are not to be admitted into deliberation, then we are in need of a compelling reason for society to refrain from punishing expressive acts that cause harm indirectly. This objection is particularly difficult for Mill because of his consequentialist tendencies. As Sidgwick remarked, "I do not see how it is from a utilitarian point of view justifiable to say broadly with J. S. Mill that such secondary injury to others . . . is to be disregarded."[16] It would be best if our interpretation can allow that offense and the indirect harms of speech are genuinely bad consequences, while explaining how Mill justifies not counting such harms as providing good reason for restricting self-regarding action. Therefore, I will not pursue the question of what Mill counts as harm but will accept that, on any gloss of harm that does not traduce its significance, speech can harm.

In addition to the fact that speech clearly affects others and can harm them, a further reason to think it is other-regarding comes from those exceptional cases which fall beyond the pale of free speech protection.[17] Nevertheless, the carefully drawn limits to the general immunity Mill grants to speech parallel the limits he places on other forms of self-regarding conduct; in neither case are they drawn simply on the basis of the possibility of harm or the utility of interference. A central burden of my argument is to square these exceptional cases of speech with Mill's claim that basic liberties should be absolute and unqualified, but I think this reconciliation can be neatly made. In fact, it would be closer to the truth to say that speech—that is, the form of speech relevant to speech rights—is not action, for Mill, than to say that it is other-regarding action.

That Mill takes speech to be within the sphere of liberty is most evident

15. See Mill's discussion of the parts of happiness doctrine and the decided preference test in *Utilitarianism*, reprinted in *Collected Works of John Stuart Mill*, vol. 10, J. M. Robson, ed. (Toronto: University of Toronto Press, 1977), esp. p. 211.

16. Henry Sidgwick, *The Methods of Ethics*, 7th ed. (Indianapolis: Hackett, 1981), p. 478.

17. This seems to motivate Riley's claim that public acts of speech in general fall into the other-regarding class, although it seldom happens to be expedient to restrain them (see *Mill on Liberty*, p. 71).

in the passage where he explicates that sphere by dividing it into three branches. The first branch is the freedom of conscience, the second is self-regarding action proper, and the third is the freedom to unite with others to engage consensually in such action. Here is Mill's characterization of the first branch of the sphere of liberty:

> 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)

Despite the fact that Mill here explicitly places expressing and publishing opinion into the "appropriate region of human liberty," the italicized clause has misled many readers into concluding that speech is other-regarding.[18] However, it is crucial to notice not only that the express purpose of (I, 12) is to explicate the sphere of liberty, but also that Mill deliberately places speech in the first branch, with *thought*, rather than in the second or third, with *action*—even action of the self-regarding variety. Note too that when the problematic clause is read in the context of the whole sentence, it is equivocal: this, Mill says, is the reason that freedom of expression "may *seem* to fall under a different principle." While this part of the sentence is ambiguous, the ambiguity is congenial to my view on both readings. Mill is either saying that speech is wrongly thought (primarily) to concern others, or that speech, despite concerning others, nevertheless falls under the same principle as thought.[19]

18. Thus, Schauer claims that: "A close reading of *On Liberty* reveals that, as between self-regarding and other-regarding acts, Mill treats speech as a member of the latter category. His chapter 2 is an attempt to demonstrate why speech is a special class of other-regarding acts immune, *for other reasons*, from state control" (*Free Expression*, p. 11, his emphasis). But he neither offers nor cites any such close reading. And, although the italicized clause is the best evidence for Schauer's case, in the very same sentence Mill states that the liberty of expression rests in great part *on the same reasons* that justify the liberty of thought.

19. Riley's gloss of (I, 12) is: "Strictly speaking, expression is legitimately subject to social control, [Mill] seems to be saying, since it is conduct which can harm others. Even so, soci-

Moreover, Mill could mean two quite different things by his claim that the liberty of speech is "practically inseparable" from the liberty of thought: either that they are *almost* inseparable, or that they are *in practice* inseparable. But on the first, weaker reading the claim is a non sequitur. What does it matter if thought and speech are almost impossible to separate, or if the arguments for their freedom are similar in importance and substance?[20] Mill's position is actually far more radical than has been realized. There is conclusive evidence that Mill is making the stronger claim that discussion is a mode of thinking, and that expression is more like thought than like action. This is not, of course, to deny that speech is conceptually distinct from thought. We can make sense of the idea of "holding opinions in secret, without ever disclosing them" (IV, 19); sometimes we are even capable of it. But Mill makes this remark while disparaging so restrictive a conception of the liberty of conscience. This, he says, would be no real freedom at all, because the benefits of free thought require that discussion, especially normative discussion, be uninhibited by the threat of punishment. Mill's view is that the process of thinking includes justification, and justification is necessarily social. This view is evident in the epistemological character of the arguments of Chapter 2, where Mill attributes a crucial justificatory role to discussion. "The steady habit of correcting and completing his own opinion by collecting it with those of others," he writes, "is the only stable foundation for a just reliance on it" (II, 7). Speech isn't just a handy way to express our thinking, but the medium in which we think.[21]

This idea may strike some readers as recondite, and my exegesis of (I, 12) as recherché. Perhaps it is. We should therefore look to the text as a

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ety should 'almost' never bother to exercise its control because laissez-faire is virtually always generally expedient here" (*Mill on Liberty,* p. 49). But this 'almost' is gratuitously repositioned, distorting Mill's meaning. Mill says that the liberty of speech is *almost as important*, not *almost as exceptionless*, as the liberty of thought. In fact, Mill's view is that laissez faire is (merely) typically expedient with regard to trade, not speech; and that the doctrine of free trade does not rest, as free speech does, on the principle of liberty.

20. As Lewis asks, rhetorically, "What kind of argument is this? Other-regarding conduct is not in general protected by reason of inseparability from private thought, as will be plain if someone's religion demands human sacrifice" ("Mill and Milquetoast," p. 5). But the analogy here—between acting on a belief by expressing it publicly and acting on it by performing a human sacrifice—is precisely what Mill rejects in classifying the expression of opinion with thought rather than with action.

21. I am indebted to David Hills for this way of putting the point and for drawing my attention to the Utilitarian origins of this idea in the work of William Godwin.

whole, to see what Mill takes himself to be doing. When we do so, it becomes clear that Mill's aim is precisely what he announces it to be: the defense of unqualified speech rights. In the first place, he expressly conceives Chapter 2 (the title of which is "On the Liberty of Thought and Discussion") as being confined to a *single* branch of the sphere of liberty. "[T]his one branch is the Liberty of Thought: from which it is impossible to separate the cognate liberty of speaking and writing" (I, 16). Mill thus explicitly contradicts the contention that speech is outside the sphere of liberty. And, if the spirit of (I, 12) and the letter of (I, 16) aren't decisive enough, Mill gives further evidence in just the passage that should be taken as most conclusive. In (III, 1), where he considers an exceptional case of speech, Mill again places the assertion of opinion with thought rather than with action. This is not as strange a way of speaking as it first appears. Consider that when we say someone acts on his opinions, we do not mean simply that he advocates them publicly but that he somehow attempts to carry them out.

Although speech is surely a kind of action, there is also a clear sense in which to advocate an act is not to perform it. Rather, it is to perform an act of an altogether different kind: an act of assertion or expression.[22] In introducing the crucial case, Mill writes,

> 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. (III, 1)

When Mill contrasts opinion with action in this passage, speech is again expressly placed with opinion; indeed, it loses its immunity precisely when it becomes more profoundly active. It is then taken out of the first branch of the sphere of liberty. Hence, those performative speech acts that are nevertheless self-regarding (such as a vow to quit smoking, which does not issue in an obligation to one's spouse) are so because they fall into the second or third branch. It invites confusion to assimilate these

22. Schauer makes a great deal of the fact that many kinds of action can be said to be expressive: e.g., Booth's assassination of Lincoln expressed his contempt for the Union. Though true, this is a red herring. Just as not all acts of assertion are simply assertions of opinion, not all acts of expression are simply expressions of sentiment. To give even absolute and unqualified freedom to opinion and sentiment, type-identified by its content, is not to grant immunity to all token acts that assert opinion or express emotion.

disparate illocutionary acts with acts of assertion or expression, simply because they are also things we do with words.[23]

One might fear that by grouping assertion with opinion rather than action, Mill is taking a naïve position which ignores the fact that assertions too can be more deeply performative. But his famous corn-dealer example is designed specifically to illustrate that in some contexts the expression of an opinion counts as action in a more substantive sense—for instance, it can constitute a "positive instigation." As he writes,

> 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. (III, 1)

It is not the danger or disutility of the assertion that makes it lose its immunity, nor is it the intention of the speaker to harm the interests of corn dealers. This is a crucial point which Mill's explanation makes clear. To publish the same opinion in the press, even with the reasonable hope of bringing about political change that would be disastrous to the interests of corn dealers, is no such instigation. Therefore it is irrelevant how harmful promulgation of this opinion may be to the interests of corn dealers and capitalists, or how inherently immoral it may be to equate property with theft.

It is important to note what Mill means by an opinion. Different people have the same opinion when they both believe some proposition, but different expressions of the same opinion can constitute different actions, depending on their context.[24] Mill's conception of speech rights thus implicitly type-identifies acts of expression by the opinion or sentiment expressed, which in turn determines what kinds of interference with speech count as infringements of liberty. The freedom of expression Mill advocates is the freedom to express any factual or normative opin-

23. See Daniel Jacobson, "Speech and Action: Replies to Hornsby and Langton," forthcoming in *Legal Theory*, for arguments against a view of speech rights that deliberately traduces this distinction.

24. Of course, the content of an opinion is partly determined by the context of its expression in a variety of ways, most obviously concerning indexicals. But this is immaterial. The point is that the same proposition can be avowed in a variety of contexts, and that what speech act is performed varies over those contexts.

ion, where opinions are understood to be individuated by their content.[25] It is not the freedom to express that opinion in any context whatsoever, because in certain contexts such expression constitutes incitement, conspiracy, or fraud. This conception is motivated by the rationale for defending free speech, which necessitates giving immunity to expressive acts but does not extend to other types of illocutionary act. Indeed, this is precisely the point of drawing the distinction between opinion and action as Mill does. He can therefore claim to defend free speech as an unqualified liberty, despite the exceptional cases, precisely because there is no opinion whose expression can be prohibited.

Mill does not even consider the suggestion that some opinion is harmful or immoral *whatever* the context of its expression, because he is arguing for a general immunity for all opinions. Hence, rather than consider whether the advocacy of Tyrannicide can be prohibited as immoral, he declares: "If the arguments of [Chapter 2] are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. It would, therefore, be irrelevant and out of place to examine here, whether the doctrine of Tyrannicide [is immoral]" (II, 1fn.). It seems, then, that there are only two possibilities consistent with Mill's defense of free speech. He must either hold the absurd view that there are no harmful opinions, or else he must hold that an opinion's harmfulness, like its putative immorality, is no good reason to interfere with its expression. But the latter option, its obvious advantages notwithstanding, seems to run afoul of what Mill calls the "principle of liberty" and subsequent commentators have termed the Harm Principle. Doesn't HP commit Mill to holding that any harmful act is punishable and any harmless act is within the sphere of liberty posited by DL? Contrary to the traditional interpretation, it does not. I will argue that DL is wholly distinct from HP, not merely a corollary of it, and that it is DL, not HP, which Mill ultimately refers to as the principle of liberty. Furthermore, DL guarantees that the harmfulness of an opinion is not even a good reason to restrict it, to be weighed against the costs of censorship. This is not to deny that free speech, like the Doctrine of Liberty as a whole, is ultimately supported by reference to utility; but it is to claim that Mill does not endorse HP, as that principle is conventionally construed.

25. ↦ Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Affair*s 1, no. 2 (Winter 1972): 204–26, for discussion of a similar approach to free speech.

II. What Is the Principle of Liberty?

Mill's official statement of HP comes immediately after he announces, with characteristic overstatement, the object of his essay: to advance "one very simple principle" about the compulsion and control of individuals by society. While Mill calls this a principle of liberty, not a harm principle, it must be allowed that both this statement and the subsequent discussion prominently invoke harm.

> 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. (I, 9)

The careful reader will have noticed that these two consecutive statements of the principle are not obviously synonymous. For them to be univocal, an exercise of power over an individual must be the same thing as an interference with his liberty of action, and the aim of preventing harm to others must be equivalent to that of self-protection.

Any interpreter of Mill must address his unfortunate but undeniable tendency to be so casual in the statement of crucial doctrines that they are often given in substantially different terms within the same work—or even within the same paragraph.[26] In attempting to reconcile Mill's two official statements of HP, then, we must focus on the role that principle plays in his overall argument. For instance, while the 'self-protection' of mankind can be understood as the same aim as harm prevention, it can also be read broadly enough to permit a significant degree of paternalism: legislation designed to protect people from themselves, whether by keeping them from harm or by coercing them for their own good. Were enough people attracted to a deadly form of pleasure, society would be imperiled and could claim self-protection as justification for admittedly paternalist legislation. But this would be anathema to Mill. Immediately after these statements of HP, he flatly renounces paternalism (as well as moralism: reasons based on claims of the inherent wrongness of an action, with-

26. Mill's lack of rigorous verbal consistency is practically a matter of stylistic policy, which partly reflects his popular ambitious and partly his impatience with the ponderous style of Bentham who, Mill thought, "perpetually [aimed] at impracticable precision" ("Bentham," in Robson, ed., *Collected Works*, vol. 10, p. 114). Even more telling is the specific complaint Mill registers against Bentham's prose (see fn. 46).

out regard to its consequences). A person's "own good, either physical or moral, is not a sufficient warrant" for compelling him to act or to forebear from acting (I, 9). While Mill's strict antipaternalism is a controversial doctrine, there can be little doubt as to his commitment to it. HP is therefore better stated in terms of harm rather than self-protection. Also, Mill writes indiscriminately of what would constitute a "rightful purpose," a "warranted end," or a "good reason" for social coercion, whether legal or moral.[27] For the sake of precision and consistency, I will limit myself to talk of reasons. A good reason is a consideration that can properly be brought to bear on deliberation, whether of individual action or public policy.

But there is another, more important difference between Mill's two consecutive statements of HP. The notion of an exercise of power is far more capacious than that of an interference with someone's liberty of action. Taxation, for instance, is certainly an exercise of state power, but it can be construed as an interference with my liberty only in an attenuated sense. There is no type of action it prevents me from performing, other than the parasitic and negative action-type constituted by the law itself: tax evasion.[28] Indeed, there is reason to resist the suggestion that tax evasion is any kind of action at all, since that would be to conflate action and inaction.[29] However that may be, Mill cannot be read as holding that every exercise of power constitutes an infringement of liberty, since he explicitly refers to "government interference [that] is not such as to involve infringement of liberty" (V, 16). Moreover, Mill includes tax paying among the "many positive acts *for the benefit of others*, which [an indi-

27. One of Alan Ryan's greatest contributions to the literature on Mill is his demonstration that Mill, rather idiosyncratically among liberals, takes the proper realm of the legal and the moral to be identical. When sanctions are appropriate, the question of which to use is to be settled by weighing their respective costs and benefits. See Ryan, "John Stuart Mill's Art of Living," reprinted in Gray and Smith, eds., *J. S. Mill*.

28. Of course, my tax burden might happen to prevent me from vacationing in St. Bart's, as I would have liked, but taxation does not prohibit one from doing so. On Mill's view, taxation only violates liberty when its purpose is to create a material impediment to engaging in certain kinds of action.

29. Someone might object that this is a distinction without a difference, since it is as great a compromise of my liberty of action to compel me to do one thing as it is to prevent me from doing another. But the force of this objection depends crucially on the nature of the compelled act and how much it compromises what Mill calls our individuality: the process of developing our values, influenced but not coerced by others. In any case, Mill draws a substantive distinction between action and inaction, claiming that "the latter case . . . requires a much more cautious exercise of compulsion than the former" (I, 14).

vidual] may rightfully be compelled to perform" (I, 11; emphasis added). The question of whether these legitimate *positive compulsions* are consistent with HP is the subject of an unresolved dispute between Lyons and Brown, which we will consider in more detail presently. If taxation can be justified by its benefits—not only by the prevention of harm—then either HP's limitations must be loosened or we must differentiate between those exercises of social power that are and are not infringements of liberty. I propose to state HP initially in terms of interference, a term that seems intermediate in scope between 'exercise of power' and 'infringement of liberty', so as to leave open for now the proper range of the principle. Hence, a minimally tendentious formulation is as follows: (HP) The only good reason for social interference is to prevent harm to others.

As stated, HP gives a necessary but not sufficient condition, which is in keeping with both statements in (I, 9) and is explicitly confirmed in (V, 3).[30] Everyone agrees that Mill cannot mean that the harmfulness of an action to nonconsenting others is sufficient to justify its restraint, because he repeatedly emphasizes that the costs of restraint might outweigh its benefits (see V, 16–19).Nevertheless, most commentators accept that harmful action is in principle *punishable:* there is good reason to punish (or blame) someone for performing such an act, whether or not there are stronger countermanding reasons based on the inexpedience of legal punishment (or moral disapprobation). This claim is equivalent to the first tenet of the traditional interpretation, on which HP is implicitly biconditional: it makes harm a necessary and sufficient condition for there being good reason for any exercise of social power. Notwithstanding their dispute over how to account for positive compulsions, Brown and Lyons both unequivocally accept this biconditional gloss of HP, which makes every harmful act punishable and immunizes every harmless act.[31] However, I will argue that the biconditional gloss of HP cannot

30. Yet Mill immediately continues, "To justify [compulsion], the conduct from which it is desired to deter [the individual] must be calculated to produce evil to someone else" (I, 9). This seems to specify what would be good, if not sufficient, reason for coercion. But 'calculated' is ambiguous here, and Mill doesn't use the term in this context again. I think that the most natural reading of this claim jibes much better with my interpretation than with the traditional interpretation, but, for these reasons, I will not put much weight on this claim.

31. Thus, Lyons claims that "the principle of liberty says flatly . . . that the prevention of harm to others justifies interfering with [an individual's] liberty" (Lyons, *Rights,* p. 92). By 'justifies' Lyons does not mean justifies sufficiently, since that depends on whether the benefits of interference outweigh its costs. Brown claims, even more straightforwardly, that Mill

be correct—not even with the standing qualifications about danger and consent inferred. A further qualification has to be met before we even have good (much less sufficient) reason to interfere or punish: the harmful act must not be within our rights to perform.

The first objection to this claim that defenders of the traditional interpretation are likely to raise concerns its reliance on a theory of rights. There is of course a long-standing debate over whether utilitarianism can respect rights, and a related controversy over the consistency of Mill's commitment to principles of liberty and utility. Mill famously declares in *On Liberty* that he will "forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility" (I, 14). Yet, despite this renunciation of natural rights and his commitment to some form of utilitarianism, Mill frequently appeals to both legal and moral rights. Even in *Utilitarianism*, Mill expressly adopts the strong conception of rights on which "to have a right [is] to have something which society ought to defend me in the possession of," without regard to whether it is optimific in any given case to do so.[32] As Fred Berger notes, there are two main reasons that act-utilitarianism is sometimes thought to be inconsistent with this strong conception of rights. It is supposed to make the existence of a right dependent upon the consequences of particular cases, and to be committed to infringing rights whenever it would be optimific to do so. Although I follow Urmson and Lyons in thinking that Mill's moral theory has more in common with rule-utilitarianism, the best act-utilitarian readings of Mill also grant, with Berger, that "Mill's theory, even on the act-utilitarian interpretation I have attributed to him, has neither of [these] untoward consequences" which threaten rights.[33] I will not pursue the question of how best to understand Mill's utilitarian commitments. The crucial point is that Mill consistently exempts certain kinds of action from restriction on the basis of general utility, specifically because they are within our rights to perform. Hence,

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thinks "conduct which is harmful to others ought actually to be interfered with if and only if it is better for the general interest to do so" (Brown, "Mill on Liberty and Morality," p. 141).

32. Mill, *Utilitarianism*, p. 250.

33. Berger, "John Stuart Mill on Justice and Fairness" reprinted in Lyons, ed., *Mill's Utilitarianism: Critical Essays* (Lantham: Rowman & Littlefield, 1997), p. 54. See also Berger, *Happiness, Justice and Freedom: The Moral and Political Philosophy of John Stuart Mill* (Berkeley: University of California Press, 1984). For rule-utilitarian interpretations of Mill, see J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill" and Lyons, "Human Rights and the General Welfare" both reprinted in Lyons, ed., *Mill's Utilitarianism*.

Mill is quintessentially liberal in his normative convictions, whatever their ultimate metaethical justification.

Mill puts forward his clearest statement of the central thesis of Millian liberalism immediately after giving his equivocal statement of HP in (I, 9) and then drawing from it the rejection of paternalism. He winds up this extravagant paragraph with what I am calling the Doctrine of Liberty, the claim that there is a substantial sphere of liberty rights with which society must not interfere. Mill declares: "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" (I, 9). He then refers to HP, the rejection of paternalism, and DL as "this doctrine"—that is, the one simple principle that is the object of the essay. How, then, can I justify my claim that DL is a distinct principle from HP? The answer is that Mill is once again the victim of his tendency to simplify even his most fundamental claims for the sake of rhetorical force but at the cost of precision. Even so, he is careful to make the necessary qualifications elsewhere, albeit often in less prominent passages.[34] This tendency is particularly misleading here, since it can seem like a platitude that what I do to myself—to my "own mind and body"—cannot harm others. DL is not just about what I do to myself, though, since the sphere of liberty explicitly includes the freedoms of association and expression as well. And, despite the suggestion that the only reasons for society to interfere with what someone does to himself are either paternalist or moralist, Mill ultimately acknowledges that this is not the case. What I do to myself can—like my speech—harm others, both directly (through their feelings) and indirectly (through the actions of another).

But we need not take Mill's declaration of one simple principle too seriously, since it is clearly a rhetorical flourish and is contradicted by his discussion in Chapter 5. There Mill proposes to offer a few detailed practical applications of his doctrine, "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*" (V, 1; emphasis added). Unfortunately, Mill's statement of these two maxims, which involve what does and does not legitimately concern society, is not entirely perspicuous. They can be

34. I will therefore follow this methodological precept: All the qualifications to and refinements of Mill's doctrines that I will propose are drawn from textual sources, although I will make certain overt terminological substitutions when it aids clarity.

read either as a gratuitous division of a biconditional Harm Principle, as the traditional interpretation has it; or as simplified statements of HP and DL in which, as I contend, HP is subject to a rights constraint and DL is not limited to harmless action.

We will examine the two maxims in more detail presently, but for now we should consider the context of this passage. In Chapter 5, Mill primarily considers the costs and benefits of government interference in cases where it expressly does *not* involve the infringement of liberty—in particular, the case of trade. Mill's brief explanation for classifying trade as other-regarding is that it affects the interests of others. Hence, restraints on trade "affect only that part of conduct which society is competent to restrain" and are wrong "solely because they do not really produce the [intended] results" (V, 4). Commentators have tended to let this remark go unquestioned, perhaps because it seems so obviously true that trade affects others. But when we recall that the relevant question is whether (and how) trade affects *nonconsenting* others, this claim becomes more problematic. Why is trade so different from speech that even commercial acts with no direct impact on anyone but the buyer and the seller are not within the sphere of liberty? This question cannot be answered solely by considerations of harm, unless there are no harmful acts of speech and no harmless acts of trade—two claims that seem equally dubious.

On Mill's view, all restraint is an evil, qua restraint, though sometimes it is the lesser evil. Because the costs of protectionism almost always exceed its benefits, Mill rejects tariffs and price fixing. These economic doctrines are sufficiently radical as to count, by contemporary standards, as advocacy of free trade.[35] Yet Mill claims that "as the principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine" (V, 4). This curiously neglected statement has two clear implications. In addition to confirming that not every exercise of social power over the individual counts as an infringement of liberty, it implies that there is a more fundamental objection than mere inexpedience when restraint does restrict liberty. This is most evident in the one circumstance where Mill grants that liberty is to some extent infringed by trade regulations.

35. Mill saw extant protectionist regulations as being not merely inefficient but, worse, as unjust subsidies for those who need them least. See Mill, "The Corn Laws," *Westminster Review* III (April 1825), reprinted in Robson, ed., *Collected Works,* vol. 4.

Mill is prepared to accept certain outright prohibitions of commodities that have no legitimate use. When there are legitimate purposes for the possession of dangerous goods, he allows for various precautions and controls. These are acceptable because "such regulations would in general be no material impediment to obtaining the article, but a very considerable one to making an improper use of it without detection" (V, 5). But Mill is well aware that regulation can be used as an underhanded means of restriction, and he therefore rejects the regulation of goods that have any legitimate use whenever "the object of the interference is to make it impossible or difficult to obtain a particular commodity. These interferences are objectionable, not as infringements on the liberty of the producer or seller, but on that of the buyer" (V, 4). The obvious question is why such regulations aren't infringements of both the buyer's and the seller's liberty. Were HP the relevant principle of liberty, the contrast drawn between buyer and seller would be entirely unmotivated. After all, both parties are being prevented from doing what they want to do. Legitimate regulation of trade would be an application of HP—that is, infringement of liberty for the sake of harm prevention—whereas illegitimate regulation (of harmless trade) would be objectionable as infringement of the liberty of buyer and seller alike.

I contend that there is a relevant distinction between the buyer and seller, concerning their respective interests in the commercial act, which must be implicit in Mill's conception of liberty. The principal aim of the seller is simply to make a profit. Trade regulations do not prevent him from doing so, though they may keep him from doing it most effectively. While such restraints place obstacles on the means by which an individual can pursue his conception of happiness (e. g., the accumulation of wealth), they do not rule out its pursuit. And Mill expressly states that there is no general right to the optimal conditions for success in one's endeavors (V, 3). The reason that even outright prohibitions on certain kinds of commerce are disanalogous to prohibitions of other kinds of action—even such putative vices as drinking and gambling—is that they play a fundamentally different role in what Mill calls an agent's *individuality:* the development of her character, ideals, and conception of happiness. As an approximation, we can say that what makes an exercise of power an infringement of liberty is that it prohibits some type of action that is necessary for the development and exercise of individuality. Of course, selling handguns is as much a kind of action as is buying handguns. Yet the

liberty of the buyer infringed by a ban on the sale of handguns—under the stipulation that they are dangerous items with some legitimate use—is not the liberty to *buy* a gun but to *have* one, because the legitimate reason for possessing a handgun (viz., self-defense) does not require its purchase. Thus, even on the contentious hypothesis that our basic interest in self-protection supports a right to handgun ownership, it would not infringe one's liberty to be prevented from buying a handgun, were it otherwise possible to get one. What concerns liberty here has nothing to do with trade, except inasmuch as "the State might just as well forbid [an action], as purposely make it impossible" for an individual to obtain the means to perform it (IV, 19).

If we grant the Millian premise that the uninhibited discussion of opinion and sentiment is a prerequisite for the development of individuality, then this line of argument coheres neatly with the central conclusion drawn from Mill's defense of speech rights. The rationale for free speech motivates type-identifying expressive acts by their content and requires that no opinion can be prohibited expression, but this does not mean that any interference with a token act of assertion infringes liberty. While these remarks on Mill's conception of liberty require more development than I can afford here, the basic elements are already in place. On Mill's view, a person learns what constitutes her flourishing through what he called experiments in living, which entail observing, discussing, and trying out various ways of life—for instance, as a philosopher, drunk, entrepreneur, or gambler.[36] Of course, not all such experiments are permissible. The life of the assassin, the pedophile, and the slave-owner all, by necessity, violate the rights of others. Hence, prohibitions of the kinds of action necessary for leading those lives, such as murder, constitute legitimate restrictions of liberty.

Since the life of a capitalist does not necessarily violate the rights of others, it constitutes a permissible way of life. While this means that capitalism as such cannot be prohibited, it does not imply that "capitalist acts between consenting adults"—to borrow a phrase from Robert Nozick—are within the sphere of liberty.[37] That is because the relevant principle of liberty here is not HP but DL. Were it HP, then any harmless capitalist act could not legitimately be interfered with—not merely because of the in-

36. For a more detailed discussion, → Elizabeth Anderson, "J. S. Mill's Experiments in Living," *Ethics* 102 (1991): 4–26.

37. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 163.

expedience of interference, but because to do so would be an illicit infringement of liberty. However, this conclusion runs contrary to Mill's overt and consistent remarks about trade and its regulation. I will argue in the following section that trade is other-regarding simply because, by stipulation, it is not within the sphere of liberty recognized by Mill's free society. In this respect the free society differs from Nozick's minimal state, where trade is in effect treated as a self-regarding act. To say that trade is other-regarding by stipulation is not to trivialize Mill's argument but to identify its burden. In the case at hand, Mill needs to give us reason to believe that the free society will be more conducive to the development and flourishing of its members than would the minimal state. Many readers will not think this the most exigent of Mill's argumentative burdens, but it bears saying that Mill must argue for the free society against both more and less minimal conceptions of the state.

If DL does not follow from HP by way of a class of harmless acts, then it requires its own justification. Mill's arguments for DL rest on speculative and controversial claims about human nature and society—particularly concerning the course of its future development under different political circumstances. I believe that a perspicuous assessment of these claims, almost a century and a half later, would not be unflattering to Mill; but I will not pursue this task here, since I cannot hope to do so adequately. In any case, an analogous burden must be met by any interpretation of Mill's defense of liberty that does not saddle him with inconsistency. Whatever one's gloss of HP, it cannot stand as a basic principle of natural rights but must be given an indirect (or otherwise sophisticated) utilitarian justification.[38] Since HP strictly forbids paternalism, any such argument will be highly controversial. In this respect, all interpretations of Mill that are not unacceptably revisionist are on similar footing.[39] But in other respects there are some crucial differences. According to the traditional interpretation, the Doctrine of Liberty is merely a corollary of the Harm Principle, in that the sphere of liberty it posits encompasses only

38. For discussion of "sophisticated" forms of direct (act-) utilitarianism, → Peter Railton, "Alienation, Consequentialism, and the Demands of Morality," *Philosophy & Public Affairs* 13, no. 2 (Spring 1984): 134–71; and "How Thinking About Character and Utilitarianism Might Lead to Rethinking the Character of Utilitarianism," in *Midwest Studies in Philosophy*, vol. 13 (Notre Dame: University of Notre Dame Press, 1988).

39. Indeed, it seems to me considerably more difficult to argue against some of the overtly paternalist laws banned by HP (such as those requiring seat belts) than for even the unqualified speech rights posited by DL.

actions that are harmless to non-consenting others. This reading leaves Millian liberalism vulnerable to the objection that HP is too weak to support the substantial sphere of liberty posited by DL.

III. Self-Regarding Action and the Doctrine of Liberty

The reason HP is claimed to be too weak to support DL, remember, is that there are very few self-regarding (understood as harmless) acts; hence, there can be only a very small sphere of liberty. Mill anticipated the challenge to his distinction between "the part of a person's life which concerns only himself, and that which concerns others" (IV, 8)—that is, between self- and other-regarding conduct. In fact, he dedicates Chapter 4 ("Of the Limits to the Authority of Society over the Individual") to answering this challenge:

> How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connexions, and often far beyond them. (IV, 8)

Mill met this objection by introducing several qualifications to the claim that self-regarding action can harmfully affect no one but the agent himself—qualifications that the simple gloss ignores. Indeed, the trouble is not that Mill fails to make these qualifications, but that he does so in several different ways and with insufficient clarity about his intentions.

When Mill first states that the region of human liberty comprises "all that portion of a person's life and conduct which affects only himself," he continues: "When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself" (I, 12). Although Mill often elides this qualification, he clearly means it to be implied throughout the essay. Moreover, in characterizing self-regarding action, Mill slides almost indiscriminately between writing of what does not *affect*, *harm*, and *concern* others. And when talking of harm, Mill alludes to acts that do not harm others, harm them "without justifiable cause" (III, 1), harm their interests, or even "certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights" (IV, 3). This last, most carefully qualified statement must be taken seriously when we ask how to understand self-re-

garding action, if not as harmless action. Consider that when Mill poses the question of "the rightful limit to the sovereignty of the individual over himself," at the beginning of Chapter 4, his answer is that both society and the individual will get their proper share if each controls that which *primarily 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" (IV, 2).

I contend that this must be understood as a fundamentally normative claim. More specifically, it is a claim of rights: to say that an act is self-regarding is simply shorthand for claiming it to be within the sphere of liberty. What Mill cannot then say, on pain of tautology, is that an action is in the sphere of liberty (and hence within one's rights to perform) *because* it is self-regarding. But it is unnecessary, and uncharitable, to attribute any such argument to Mill. He can instead make the plausible but substantive claim that an action is self-regarding because it doesn't affect others, or it doesn't really harm them, or the harm that it causes isn't one that society should protect us from. Indeed, he cites each of these as reasons to pronounce various actions self-regarding. All these claims can sensibly be denied, as societies famously hold disparate views about what aspects of the lives of their members, if any, are their own concern. The claim that some type of action is self-regarding cannot simply be an appeal to some descriptive feature of it, because no such description entails that an action is within the agent's rights.[40] There must be an implicit justification for why we have the right to criticize the government, drink ourselves to death, engage in homosexual (or for that matter sexual) acts, and so on. But these arguments need not proceed piecemeal, one action at a time. Indeed, Mill's arguments for liberty seek to show precisely that we should *not* allow the state to engage in such piecemeal deliberation. For instance, Mill thinks he can argue for free speech quite generally, without having to consider the putative harmfulness of every opinion.

Hence, the best way to define self-regarding action is by saying that these are the actions one has the right to perform in the free society that

40. It must be admitted that the term 'self-regarding' might lend some illicit support for the claim that any action intuitively done to oneself is within one's rights, since the term can seem to apply to such acts by definition. In defense of Mill's terminology, however, the less an action affects anyone but the agent himself, the harder it is to deny that it is within his rights to perform. What (primarily) affects the agent himself is, plausibly, (primarily) his own concern.

Mill champions as an ideal.[41] That is, Mill has a substantive conception of the free society, characterized partly in terms of its sphere of liberty. He describes this sphere in three distinct ways, which correspond to the three branches of the sphere of liberty. First, he appeals to the useful but not fully determinate slogan that "over his own mind and body, the individual is sovereign" (I, 9). Next, Mill extrapolates from this dictum by claiming that whatever it is within one's rights to do by oneself, one may unite with consenting others to do together. Finally, Mill uses direct ostention to claim that the freedom of conscience demands not only free thought but free expression as well. What unifies these three branches of the sphere of liberty is, ultimately, not some common descriptive feature but their common justification. In order to reap the benefits of autonomy, we must be able to compare, criticize, and experiment with different ways of life, as well as to stand open to criticism ourselves. This requires not just the personal sovereignty granted by the second branch of the sphere of liberty, but the freedoms of expression and association guaranteed by the first and third branches, respectively.

I should reiterate that several commentators on Mill have recognized that, as J. C. Rees put it, "actions of the so-called 'self-regarding' variety may frequently affect, even harmfully, persons other than the agent."[42] This insight has not been assimilated into the literature, though, in part because of the lack of an adequate alternative. Nevertheless, when we examine the passage dedicated to explicating self-regarding action, it is obvious that Mill does not adopt the simple gloss. He expressly grants that a self-regarding vice such as drunkenness, which is ordinarily immune to legal or moral sanction, can be injurious to others. But someone's decision to drink is his concern alone, unless he has some specific duty to another person which intemperance keeps him from performing.

> I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him, and in a minor degree, society at large.

41. By "as an ideal," I mean to mark that Mill did not advocate that all societies, regardless of their current condition, should be made into free societies as quickly as possible—on this point, see (I, 10).

42. Rees, "A Re-reading of Mill on Liberty," p. 172. See also C. L. Ten, "Mill's Defense of Liberty," and Wollheim, "John Stuart Mill and Isaiah Berlin: The Ends of Life and the Preliminaries of Morality" (p. 275), both reprinted in Gray and Smith, eds. *J. S. Mill.* Also Gray, *Mill on Liberty*, esp. p. 50.

> *When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class,* and becomes amenable to moral disapprobation in the proper sense of the term. (IV, 10; emphasis added)

If a person becomes unable to support his family or to pay his debts, for instance—whether through drunkenness, extravagance, or even excessive philanthropy—then he is blameworthy and may be punished, but only for his breach of duty, not for his drunkenness. Whereas the solvent and single drunk, who has no obligations he is too besotted to meet, is not punishable by legal or even moral censure. Thus, as I claimed earlier, Mill's treatment of self-regarding action in general parallels his treatment of expression. Although he does not ignore offense or the indirectly harmful effects of speech, Mill unambiguously rejects counting these considerations as reasons for interference. This restriction rules out a variety of spurious or even genuine harms (including morality-dependent distress, the bad example set by a self-regarding vice, and the harms caused by the expression of dangerous sentiment or opinion). It rules them out not axiologically, but as providing good reason for interference with an individual's liberty.[43] Mill's justification of this restriction, which eluded Sidgwick, is that such harms are particularly costly for society to try to prevent, because doing so involves appropriating the most important task of the individual: that of critically developing his own conception of happiness and ideals of virtue.[44]

Nevertheless, were there circumstances in which a particular act of expression would violate a "distinct and assignable obligation," we can infer that it would then be taken out of the self-regarding class and become punishable. This is precisely how Mill treats speech that is beyond the pale of immunity: as instances of assertion which, because of the context of their utterance, violate an obligation. My treatment of Mill on speech thus dovetails with his general account of the self-regarding. This concept must be explicated in terms of rights and obligations, not harm. Token acts of

43. Mill confirms in his discussion of offense (see IV, 12–13) that in such cases the free society "admits no right . . . to immunity from this kind of suffering" (V, 3).

44. It is a nice question whether a thoroughgoing utilitarian can believe, with Mill, in "the absolute and essential importance of human development in its richest diversity"—but it cannot be doubted that Mill chose this quotation from Wilhelm Von Humboldt as the epigraph to *On Liberty*. On this point, see Wollheim, "John Stuart Mill and Isaiah Berlin."

an ordinarily self-regarding type, such as expressive acts or things done to oneself, are taken out of the self-regarding class (and become open to disapprobation and punishment) not because they are harmful per se, but because they breach an obligation. Therefore, harm—even to nonconsenting others—is not sufficient for there to be good reason to infringe individual liberty. Despite the fact that almost every act potentially affects others and can in some manner harm them, HP is not too weak to support Millian liberalism as embodied in DL. And Mill can defend unqualified speech rights consistently with his admission of exceptional cases.

In the remainder of this section, I propose to demonstrate that our analysis of DL and the concept of the self-regarding shows that the traditional interpretation is mistaken in all of its central tenets. In particular, since self-regarding action is not harmless action, DL is not a corollary of HP, and harm cannot be a sufficient condition even for there to be good reason to interfere with an individual's liberty. This conclusion is bound to raise objections, since in several places Mill seems to imply that HP gives both necessary and sufficient conditions; but these passages give only equivocal support to the traditional interpretation. Two passages in *On Liberty* speak directly and in detail to this question: (IV, 2–3) and (V, 3).[45] The discussion at the beginning of Chapter 4 is especially important, because that chapter is dedicated to considering "the rightful limit to the sovereignty of the individual over himself" (IV, 1). A much-quoted sentence offers the best support for the traditional interpretation:

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. (IV, 3)

I have denied that the harmfulness of an action as such renders it punishable—that is, subject to deliberation over the utility of its prohibition.

45. There are a few other passages that offer specious support for the traditional interpretation, but their force is undermined by readily apparent qualifications. Thus, in (I, 14) he speaks of a "prima facie" case for punishment, without explaining whether such cases offer reasons that are defeasible or merely that can be outweighed; and in (III, 1) he opens a huge loophole by allowing that there may be "justifiable cause" for harming others. Finally, the only part of (IV, 10) that might be thought to support the traditional reading is Mill's final summation, which begins "in short" and elides the qualifications made earlier in the paragraph. The gist of the passage as a whole strongly supports my reading.

Why then isn't this passage a direct refutation? The answer is that Mill has here elided a crucial qualification, as he is wont to do.[46]

Earlier in the same paragraph, Mill draws a distinction that he must intend to be implied here. What line of conduct, he asks, is an individual obligated to observe, in return for the protection of society?

> 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*; and secondly, in each person's bearing his share . . . of the labors and sacrifices incurred for defending the society or its members from injury and molestation. (IV, 3; emphasis added)

If we read this qualification into the claim that comes a few sentences later in the paragraph, it is evident that the relevant criterion for social coercion adopted in (IV, 3) is the violation of rights constituted by the harmful act, rather than the harm per se. More accurately, this is the first of two related criteria. In *Utilitarianism*, Mill draws a distinction between *perfect* and *imperfect* obligations, where only the former corresponds to another person's right.[47] Here he claims that social coercion is open to deliberation when an action or the failure to act constitutes a breach of either sort of obligation. In short, the fact that an instance of some ordinarily self-regarding type of action would, on a particular occasion, violate either a perfect or an imperfect obligation removes that token act from the self-regarding class.

The other crucial passage comes at the beginning of Chapter 5, where Mill lays out what is no longer one simple principle but rather two maxims. The language of the two maxims refers to what does and does not concern the interests of others, which is again superficially more compatible with the traditional interpretation. This suggests that Mill's two maxims amount to the gratuitous bifurcation of a single, biconditional

46. This is another case of stylistic policy taken to a fault. Mill complained that Bentham "could not bear, for the sake of clearness and the reader's ease, to say, as ordinary men are content to do, a little more than the truth in one sentence, and correct it in the next. The whole of the qualifying remarks which he intended to make, he insisted upon imbedding as parentheses in the very middle of the sentence itself" ("Bentham," p. 114).

47. See Mill, *Utilitarianism*, p. 247. This is not Kant's distinction between perfect and imperfect duties, where the latter do not create any particular obligations, only general ones. Mill's imperfect obligations can be particular and binding, although no one has any corresponding right.

Harm Principle which makes harmfulness the criterion of the punishable. But that reading cannot be correct. Immediately after seeming to claim that any harmful action is punishable, Mill cautions: "it must not be supposed, because damage, or the 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). Clearly, harm is not a necessary and sufficient condition for justifying interference; but the traditional interpretation merely claims that harm provides good reason for interference. It recognizes that these reasons can be outweighed by the costs of restraint, which might make legal or even moral sanction inexpedient.

The trouble for the traditionalist is that when Mill goes on to explain why harm isn't sufficient reason for restraint, he does not appeal to such straightforward utilitarian considerations. The example he gives is not one where good reasons for interference are outweighed by stronger countervailing reasons, but where there is no good reason at all. When two people compete for some good, there is a necessary conflict of interest, Mill observes, and the harm one may do to another's interests through fair competition provides no reason for society to interfere. In such cases, "society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering." Moreover, Mill defends this rights claim with an indirect utilitarian argument, that "it is, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequence" (V, 3). This is not anomalous. Mill must hold that some harmful acts can justifiably be performed—they are not merely permitted because prohibition is too costly. This is implicit in the passage that speaks most directly to the issue, where Mill catalogues the things an agent can properly be punished for doing to others. They include "encroachment on their rights; infliction on them of any loss or damage *not justified by his own rights* . . . even selfish abstinence from defending them against injury" (IV, 6; my emphasis).

This duty to rescue (when it is sufficiently easy that the failure to do so would be a selfish abstinence) is one of the positive compulsions that Mill grants to be legitimate exercises of power in the free society. These cases too have been thought to be problematic for Mill, because they are supposed to be in tension with HP—which is now claimed to be too limiting of social power. With the first half of the challenge to Millian liberalism now answered, two tasks remain. If HP is not a futile attempt to secure a

sphere of liberty by way of a class of harmless acts, then I need to explain its role in Mill's argument. And I must answer the other half of the challenge: the claim that Mill's free society is untenable because HP would prohibit even such necessary state powers as taxation and subpoena, and such obvious moral duties as rescue of the helpless. This is the problem posed by Mill's examples of legitimate positive compulsion.

IV. Justifying Positive Compulsions

The Harm Principle states that the only good reason to interfere with an individual's liberty is to prevent harm to others. Yet Mill adds that, in addition to the restriction of certain harmful acts,

> There are also many positive acts for the benefit of others, which [someone] may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defense, 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. (I, 15)

It is crucial that Mill be able to square these legitimate positive compulsions with his defense of liberty, for two reasons. First, he recognizes such powers as taxation and subpoena as necessities for any viable state. Second, minimal requirements of beneficence are surely moral duties, even when it would be inexpedient to enforce them legally; and HP is supposed to provide a necessary condition for either legal or moral sanction. The commentators who take up this issue, most notably David Lyons and D. G. Brown, are properly dissatisfied with Mill's brief explanation in (I, 15) that a person can cause harm to others by his inaction as well as his action and may be punished in either case.[48] They note that several of Mill's examples are not in fact cases where one's inaction can plausibly be

48. The exchange between Lyons and Brown over positive compulsions is briefly commented on in Ten, *Mill on Liberty*; Berger, *Happiness, Justice and Freedom*; and Gray, *Mill on Liberty*, but without significant advance on the central problem. None of these commentators acknowledge that both solutions would traduce Millian liberalism, nor do they offer any more acceptable alternative solution.

said to cause harm. But they do not adequately account for the fact that in the other passages where Mill defends these positive compulsions, such as (IV, 3) and (IV, 6), he does so simply by appeal to the individual's obligations rather than by adducing harm at all.

Lyons proposes that, in order to be consistent with Mill's examples, HP needs to be given a very broad reading, which allows for a great deal of interference with liberty.Brown makes the even more revisionist claim that, since Mill's examples are fundamentally inconsistent with HP, the principle must be replaced with one more permissive of interference. Both these attempts to square Mill's examples of legitimate positive compulsions with HP would undermine Millian liberalism. Lyons's version of HP permits any justification for the restriction of liberty that can invoke harm prevention even indirectly, and Brown's proposed Morality Principle allows for the restriction of any harmful or immoral act. Once it is granted that the expression of opinion and sentiment can be harmful, these alternative principles cannot support Mill's defense of free speech (or much other self-regarding action). They therefore constitute drastic and, I will argue, unnecessary revisions of Mill's view.

Let us grant that, as Brown claims, "we have duties to help other people which go beyond the avoidance of harming them, [the performance of which] can legitimately be exacted from us."[49] Mill explicitly accepts this claim. His examples of legitimate compulsion include both rescue cases (of perfect obligation) and cooperation cases (of imperfect obligation). While rescue cases can perhaps be said to be motivated by the aim of harm prevention, even Lyons admits that many of the cooperation cases are not plausibly so described. Besides, Mill justifies the positive compulsions by calling them acts for the benefit of others, not for the prevention of harm to them. If HP does not permit even such modest exercises of state power, then so much the worse for it; but if Mill was right to think that there is no tension here, then we need not revise the principle in ways that threaten DL. It should be clear why both Brown and Lyons take Mill's examples to jeopardize HP. There is an obvious sense in which any positively compelled action constitutes interference with one's liberty of action: it is an exercise of social power over the individual. If I am required to honor a subpoena to appear in court on Wednesday, then I cannot spend the day playing poker as I had planned. Merely being com-

49. Brown, "Mill on Liberty and Morality," p. 158.

pelled to save someone's life, on my way to the game, might make me miss a crucial hand. Yet what I am being prevented from doing—playing cards for money—harms none but consenting marks (myself perhaps included), and Mill understands the sphere of liberty to include such freely chosen acts between consenting adults. So why doesn't Mill recognize the threat posed by these examples?

As we've glossed HP, it gives a necessary condition on social interference. But we have seen that Mill cannot be read as taking every exercise of power over an individual, or interference with her, to be an infringement of her liberty. The crucial question, then, is when does an exercise of social power over an individual constitute an infringement of liberty? The preliminary answer I have proposed is that an exercise of power constitutes an infringement of liberty when it prohibits a type of action that is necessary for the development of individuality. Illegitimate infringements, then, prohibit types of action that do not necessarily violate rights or breach obligations. Hence, interference with a particular act of an ordinarily self-regarding type—such as in Mill's exceptional cases of speech— is not an infringement of liberty unless its intention is to create a material impediment to performing the relevant type of action. Analogously, it does not infringe my liberty to require me to honor a subpoena when I would rather be playing poker. There is an intuitively salient distinction between laws enforcing subpoena powers and laws prohibiting gambling, which I have glossed by saying that laws enforcing the powers of subpoena, taxation, or even conscription do not prohibit any (nonparasitic) type of action. Hence, these are cases of interference without infringement of liberty. Once it is granted that not every interference is an infringement of liberty—as Mill repeatedly declares—the positive compulsion cases seem much less problematic.

But there is an obvious objection to this interpretation of Mill's conception of liberty. Every particular act is a token of indefinitely many action types. I am simultaneously gambling, playing cards, playing poker, and cheating my friends out of their money; more to the point, I am also engaging in the act of gambling while under subpoena. Although the law that forces me to appear in court does not prohibit gambling, or even gambling under subpoena per se, it can be said to prohibit the parasitic and negative action type of "doing anything other than appearing in court when summoned." As with tax evasion, I think it invites confusion to consider this an action type at all, but our intuitions here rest partly on the

contingencies of natural language. When we have a term for some behavior that flouts a positive compulsion (such as draft dodging or free riding), one might think it ad hoc to deny that these are bona fide action types. Even so, this objection is superficial. It is a purely semantic matter whether we say that cooperation requirements prohibit no type of action and, hence, do not infringe liberty; or if we call free riding, for instance, a genuine action type and conclude that laws against it are justifiable infringements of liberty. It must be admitted that the claim that liberty isn't being restricted in the compulsion cases rests on an unanalyzed distinction between genuine and parasitic action types. But the crucial distinction for Mill's argument is a different one, between legitimate and illegitimate restrictions of individual liberty. Therefore, it will suffice to show that the compulsion cases are not in tension with the gist of Mill's defense of liberty.

Let us begin by considering these examples as action types, for the sake of argument. It should be clear that the types of action (created and) prohibited by positive compulsions are not self-regarding: like murder and robbery, tax evasion necessarily constitutes the breach of an obligation.[50] In rescue cases this is a perfect obligation to the victim, whereas cooperation cases are breaches of an imperfect but still exceptionless obligation to society. Laws enforcing the specific positive compulsions Mill defends are justifiable, then, even on the stipulation that such dubious action types as tax evasion are genuine. Now let us drop that stipulation and consider these examples as token acts. As we've seen, even certain acts of expression can legitimately be interfered with. Specifically, those token acts that violate a distinct and assignable obligation are "taken out of the self-regarding class" (IV, 10) and thus "lose their immunity" (III, 1). Hence, laws enforcing Mill's positive compulsions are not in tension with DL, any more than it is a qualification of speech rights to allow for exceptional cases. If these positive compulsions or the exceptional cases can be said to prohibit any type of action (such as free riding or incitement to riot), then it is one that by necessity violates either a perfect or an imperfect obligation. Even in cases where the specific act interfered with is harmless when considered in itself, that is no objection to the exercise of social power, so long as the rationale for interference is acceptable. A singular

50. Again, when I say that this is clear, I am not denying that it is a substantive moral claim, only that we clearly have an obligation to save the helpless when we can do so safely, or to pay our share of the taxes necessary for the functioning of society.

case of free riding, for example, can be harmless; but it is always a violation of the obligation to bear one's fair share of the costs of those social institutions necessary for the common good. Hence, it is neither the harmfulness of the particular act nor its inherent wrongness that makes it punishable, but the pernicious general tendency of that class of action—i.e., of free riding. This issues in an exceptionless (though imperfect) obligation, not to be maximally productive but to bear one's fair share, which justifies the prohibition.[51]

Nevertheless, some positive compulsions would clearly be violations of liberty in Mill's view. The legitimacy of any exercise of social power hangs on the justification of its underlying claim of obligation. Some claim that individuals *do* have an obligation to be maximally productive of the common good, and others defend prohibition by claiming that traffic in alcohol violates the community's "social rights" to security, equality, integrity, and free moral and intellectual development. But these claims are anathema to Mill, despite the fact that they both appeal to central Millian values. What is more, Mill objects to them precisely as my interpretation predicts, by disputing their underlying claims of obligation on the grounds that they violate rights guaranteed by the free society. In fact, he goes so far as to compare the former claim—which might be thought to issue from act-utilitarianism—unfavorably with paternalism. "If grown persons are to be punished for not taking proper care of themselves," he writes, "I would rather it were for their own sake, then under the pretense of preventing them from impairing their capacity of rendering to society benefits which society does not pretend it has a right to extract" (IV, 10). And Mill expresses contempt for the argument for prohibition from the putative social right to regulate the conduct of others, even for the sake of genuine goods and noble ideals: "So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify" (IV, 19). Thus, since certain claims of obligation or right would conflict with the sphere of liberty, DL must be understood as precluding them—as Mill explicitly does. But the apparent tension between Mill's specific examples of legitimate positive com-

51. This is just the argument Mill gives in "Whewell on Moral Philosophy," a crucial and neglected essay: "If a hundred infringements would produce all the mischief implied in the abrogation of a rule, a hundredth part of the mischief must be debited to each one of the infringements, though we may not be able to trace it home individually" (*Complete Works,* Robson, ed., vol. 10, p. 182).

pulsions and his commitment to liberty is specious, because the obligations they establish do not restrict an individual's liberty of action, properly understood.

If some harmful acts are within one's rights and some harmless acts can be interfered with legitimately, as I have argued, then how are we to understand HP as an authentically Millian doctrine? The answer I propose is that HP can properly be read in two ways, corresponding to the central ambiguity concerning 'interference,' which can be disambiguated by stating the principle first in terms of the infringement of liberty and then in terms of any exercise of power. The narrow reading of HP, directed at infringements of liberty, states that the only legitimate reason to do so is the prevention of harm specifically to those interests of others that ought to be considered as rights. The broader reading of HP, which concerns all exercises of social power over the individual, is even less about harm. Rather, as Mill suggests immediately after his equivocal official statement of the principle in (I, 9), its force is negative: it rules out two particularly common and illegitimate justifications—those based on paternalist or moralist reasons.

A great advantage of my interpretation is that it can answer both aspects of the twofold challenge to Millian liberalism on which the traditional interpretation founders. Moreover, it answers them both in the same way: by offering more viable notions of self-regarding action and the infringement of liberty. If these conclusions suggest that Mill does not endorse anything perspicuously called a harm principle, then we can take some comfort from the fact that Mill never used that phrase himself. Surely it is preferable to reconsider the role and content of HP in Mill's argument than it is to undermine his commitment to liberalism by attributing to him a principle that is both too weak and too strong to be tenable. Furthermore, my reading explains how Mill can defend free speech as a paradigm of self-regarding action without thinking it harmless, and despite granting exceptional cases where interference is allowable. And it shows why his specific examples of legitimate positive compulsions, where it is hard to deny that we have at least a moral obligation to act, are not in tension with the Doctrine of Liberty.