

PHIL 168: Philosophy of Law
 Spring 2005; David O. Brink
 Handout #8: Revisiting Millian Categories

We have now looked at some general issues about the nature of Mill's liberal principles. Our focus will be on apparent qualifications and exceptions to Mill's categorical principles. We need to see what these apparent qualifications and exceptions tell us about Mill's principles and his consistency. Then we should look at the consequences and plausibility of Mill's categorical approach. Here we might also consider alternatives to Mill's categorical approach.

THE HARM PRINCIPLE

Before noting qualifications or exceptions to the harm principle, we should rehearse some facts about the harm principle.

First, Mill distinguishes between harm and mere offense; to constitute a harm an action must be injurious or setback important interests of particular people, interests in which they have rights (i 12; iii 1; iv 3, 10, 12; v 5).

Second, to satisfy the harm principle, an action need not cause harm; it is enough if it poses a substantial risk of imminent harm (iv 10).

Third, it should be noted that Mill wants to **extend the scope** of the harm principle. He insists that the harm principle is not just for social settings; its application should include the family, in particular, relationships between husbands and wives and parents and children (v 12). Here, he prefigures some claims he will develop in The Subjection of Women (1869). Also, notice that he here seems to extend his analysis not just to the relations between governments or societies and individuals but to the relations among individuals, in particular, family members.

Is harm sufficient to justify regulation? In general, Mill writes as if the prevention of harm is a sufficient justification for restricting liberty. However, at one point, he claims that causing harm to others creates a prima facie case for restricting liberty (i11). The suggestion seems to be that causing harm is always pro tanto reason to regulate the action, but that regulation may not always be on balance best. Perhaps effective restriction of the harmful behavior is very costly or has other bad side-effects. If the regulation is more harmful than the behavior in question, it may be best not to regulate. This suggests that we might distinguish strong and weak versions of the idea that harm is sufficient to justify regulation.

- Weak principle: harm is always a prima facie justification of regulation.
- Strong principle: harm is always a conclusive justification of regulation.

In another passage, Mill claims that actions that cause losses/harms in (fair) competition should not be regulated (v 3). If I beat you out in a fair competition for a job, you arguably suffer a loss or harm, but Mill thinks that it would be wrong to restrict my liberty. Insofar as this case threatens sufficiency, it's not entirely clear if it threatens weak, as well as strong, sufficiency. Also, we might wonder if it is a genuine counterexample to either form of sufficiency. Does my getting the job harm you? Mill links harms with rights (i 12; iii 1; iv 3, 10, 12; v 5). Do you have a right to the job or just to a fair opportunity at the job? What about non-economic losses and harms? Suppose you promised to marry me but leave me standing at the altar. Here you

may well harm me. But presumably we do not think, and Mill does not claim, that you can be legally prevented from doing so.

Is harm necessary to justify regulation? Here, the answer seems to be clearly No. It seems abundantly clear from various claims Mill makes both within On Liberty and elsewhere, that he is willing to countenance restrictions on individual liberty that do not appear designed to prevent harm to others. Here is a partial list of such commitments.

1. Some actions for the benefit of others may be compelled on the ground that their omission causes harm. These include (a) giving evidence in court, (b) contributing one's fair share to common defense and other public goods, and (c) certain kinds of mutual aid (e.g. Good Samaritanism) (i 11).
2. Each may be required to bear his fair share of the costs of securing public goods (iv 3).
3. Government may regulate trade (e.g. fixing prices or regulating manufacture), because such conduct is not purely private (iv 4).
4. The state should make education compulsory (v 12-14). (a) This is a form of paternalism that is consistent with Mill's scope worry (i 10), but also (b) a restriction on the liberty of parents that seems not to conform to the harm principle.
5. Mill accepts many forms of social welfare legislation. He thinks that local and central government are empowered to enact various kinds of legislation pursuant to the community's interest (PPE: V.i.2/803-4; CRG: xv/368, 369). He explicitly includes the following items on the governmental agenda: (a) the redistribution of wealth (through taxes on earned and unearned income and inheritance) so as to ensure a decent minimum standard of living, (b) Poor Laws that provide work for the able-bodied indigent (PPE: II.xii.2/359-360, V.xi.13/960-962), (c) labor regulation (e.g. regulation of the hours of factory-laborers) (PPE: V.xi.12/956-958), (d) provision for a common defense (OL: i 11; PPE: V.viii.1/880), (e) development of a system of public education (OL: v 12-13; PPE: II.xiii.3/374-375, V.xi.8/948-950; CRG: viii/278; A: v/128), (f) maintenance of community infrastructure (e.g. roads, sanitation, police, and correctional facilities) (PPE: V.viii.1/880; CRG: xv/368, 371, 373), and (c) state support for the arts (PPE: V.xi.15/968-970). Some of these regulations restrict liberty directly; others do so indirectly inasmuch as the implementation of the legislation can only be supported by compulsory taxation.

In all of these cases, liberty is restricted not, it would seem, to prevent harm to others but rather to provide **benefits** to others. (1) alone explicitly tries to convert the benefits to harms by alleging that the failure to supply the benefits results in harm. But we might try to generalize this strategy to the other cases as well. How well does it work? I think that there are two sorts of worries about this strategy.

There is a general worry about whether the failure to provide benefits always counts as a harm. In many cases it seems not to. You would benefit me by transferring all your savings to my bank account (let us assume); it doesn't follow that your failure to do so harms me. Why not? Presumably, because we assess harms counterfactually: if x harms me, it makes me significantly worse off than I would have been otherwise. This makes clear that harms are assessed relative to some baseline. It's an interesting question how to set the baseline. What seems clear is that the baseline cannot be set by the restriction on liberty itself; that would convert all failures to benefit into harms. The baseline must have some independent rationale. Take Mill's example of Good Samaritan laws. Suppose I fail to rescue the drowning child when I can do so at little or no cost to myself. We may agree that my failure to rescue is wrong and

perhaps that the law ought to compel aid in such cases. But it's not clear that my failure to rescue harms the child. Have I made the child worse-off than he would otherwise have been? Well, relative to what baseline? Of course, I have made him worse-off relative to the baseline situation in which Good Samaritanism is compulsory. But why select that baseline? I haven't made him worse-off relative to the situation he would have been in had I not been there.

If so, then it seems I do not harm the person whom I fail to rescue. Nonetheless, the person whom I fail to rescue does seem to be harmed, not by me, but by his falling into the pond and drowning. After all, he would have been better off had he not fallen into the pond and drowned. This suggests a possible way for Mill to square Good Samaritan laws with the harm principle. It requires distinguishing two different readings of the harm principle.

- HP1: A can restrict B's liberty in order to prevent B from harming others.
- HP2: A can restrict B's liberty in order to prevent harm to others.

It's hard to justify Good Samaritan laws if HP is the sole basis for restricting liberty as long as we understand HP as HP1. If we understand HP as HP1, then we must either reject Good Samaritan laws or the claim that HP is the sole basis for restricting liberty. However, for all we've said so far, we could square Good Samaritan laws with HP if we interpret HP as HP2. That's some reason to interpret HP that way. But notice that if we do HP is likely to allow a good many more restrictions on liberty than we might have thought.

A different worry about the necessity of harm concerns those cases in which the benefits secured by individual restrictions are small. The problem arises primarily for laws that compel contribution of one's fair share of public goods, as in (1b), (2), (5d), and (5f). For it is part of the structure of public goods that the effect of individual contributions on provision of the public good is quite small. The negative impact of an individual's failure to contribute is both small and is spread widely over the population. But that means that even if failure to confer such benefits would otherwise count as harmful, the cost of individual failures does not seem to meet Mill's criteria for harmful conduct – the costs are not sufficiently great and they are spread too widely and, as a result, are not borne by assignable individuals. This is a worry for both HP1 and HP2.

Finally, as we will see shortly, Mill does not in fact accept a blanket prohibition on paternalism. He allows paternalistic restrictions that have a certain structure – roughly, autonomy enhancing forms of paternalism (v 11). If so, this shows that Mill does not think that the only acceptable restrictions on liberty are those that prevent harm to others.

These claims show that Mill is no libertarian. By itself, that is no problem. But it's hard to see how he can reconcile these claims about the way in which the state can and should interfere with individual liberty with his frequent claims that liberty may be restricted only in accordance with the harm principle. Mill's simple statement of his basic principle is vastly over-simple.

PATERNALISM

Despite Mill's many blanket prohibitions on paternalism, he does not (consistently) reject paternalism per se. For instance, Mill is forced to qualify his blanket prohibition on paternalism in order to maintain his claim that no one should be free to sell himself into slavery.

The ground for thus limiting his power of voluntarily disposing of his own lot is apparent, and is very clearly seen in this extreme case. ... [B]y selling himself for a slave, he

abdicates his liberty; he foregoes any future use of it beyond that single act. He, therefore, defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself [v 11].

Because it is the importance of exercising one's deliberative capacities that explains the importance of certain liberties, the usual reason for recognizing liberties provides an argument against extending liberties to do things that will permanently undermine one's future exercise of those same capacities. In this case, an exception to the usual prohibition on paternalism is motivated by appeal to the very same deliberative values that explain the usual prohibition. So this seems to be a principled exception to the usual prohibition on paternalism. We might call these autonomy enhancing forms of paternalism.

Notice that Mill claims that the reasons for allowing paternalism in “this extreme case” are “evidently of far wider application” (v 11). That raises the question of what other forms of paternalism might be justified as principled exceptions to the usual prohibition on paternalism.

One possibility might be a paternalistic prohibition on unjustified suicide. We can imagine cases of justifiable suicide in which someone with a terminal and degenerative illness who is racked with pain seeks to end her life with dignity. But many suicides are committed in temporary periods of depression or emotional pique. Such suicides appear to be irrational, and one can imagine applying Mill's justification of the prohibition on selling oneself into slavery to a prohibition on unjustified suicide. Perhaps suicide would be permitted but only upon successful petition to a medical-psychological advisory board, as in the Netherlands.¹

One can also imagine a principled paternalistic prohibition on the use of drugs likely to lead to significant permanent cognitive or volitional impairment or perhaps to certain kinds of drug addiction. Mill does discuss drunkenness at v 6. There he suggests that drunkenness as such is not restrictable but becomes so when the drunk is unable to fulfill obligations toward others. (Is he assuming that in such there is harm to others in such case?)² This may suggest that he has no problem with the purely self-regarding drunk. But Mill seems to focus only on episodes of being drunk (e.g. being inebriated for a period of several hours); he does not seem to address the condition of genuine alcoholics whose use of drink impairs their decision-making abilities (cognitive impairment) and whose addiction arguably prevents them from properly regulating their actions in accordance with their deliberations (volitional impairment). We might wonder whether some aspects of Mill's justification of the prohibition on selling oneself into slavery wouldn't apply to drug addiction. It wouldn't justify prohibition, but it might justify the prohibition of drug abuse and addiction. Whether it does might depend on just how complete the degree of cognitive and volitional impairment is for the drug addict, and this might vary significantly among drugs and among addicts. If the possibilities for recovery are always real, then this might limit the value of the analogy with the slavery contract.

CENSORSHIP AND FREE EXPRESSION

Mill sometimes seems to assert that censorship is never permissible and that freedom of expression is absolute. Were we to confine this free speech absolutism with the assumption that

¹ In v 5 Mill endorses the permissibility of restricting the liberty of someone who would otherwise inadvertently fall off a washed out bridge, but he says that this is permissible because we can assume that the person would not attempt to cross the bridge if he knew that it was out. But that doesn't discuss the case of the suicide.

² In v 7 Mill suggests that public drunkenness may be restrictable in ways that private drunkenness is not. This raises questions about Mill's views about public decency and offense that we will discuss below.

liberty can be restricted iff it causes harm, we would have to conclude that Mill believes that speech can never be harmful – “sticks and stone can break my bones, but words can never hurt me”. However, Mill does recognize that speech can be harmful, and he applies the harm principle to speech, as well as other action, when he claims that the regulation of incendiary speech is permissible.

[E]ven 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. 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 justifiably 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].

One question is whether Mill’s reasons for valuing freedom of speech would make him receptive to the categorical approach to freedom of expression embodied in First Amendment jurisprudence. When the Court determines that a particular interest or liberty is a fundamental constitutional value, it accords that value special protection by subjecting legislation that interferes with that value to strict scrutiny or some comparable standard. To pass strict scrutiny, legislation must pursue a compelling state interest in the least restrictive manner possible. Strict scrutiny and its relatives contrast with a weaker standard of review, known as rational basis review, that is applied to legislation affecting interests and liberties that are not fundamental. To pass rational basis review, legislation need only pursue a legitimate interest in a reasonable manner. With some notable exceptions in which the Court recognizes intermediate levels of scrutiny, its analysis of the importance of interests or liberties and associated standards of scrutiny is generally bivalent: interests or liberties are either fundamental or they are not; fundamental ones trigger strict scrutiny or some comparable standard, whereas nonfundamental ones trigger rational basis review or some comparable standard.³ For the most part, liberties of expression are treated as fundamental liberties, because of the central role open discussion plays in both public and private deliberations. Insofar as liberties of expression are fundamental, the Court protects them by subjecting legislation that interferes with them to strict scrutiny or some comparably exacting standard, such as the clear and present danger test.⁴

However, not all liberties of expression are treated the same. For instance, First Amendment analysis distinguishes between content-neutral restrictions on speech that restrict the time, manner, and place of speech but not its content and content-specific restrictions that restrict some forms of speech on account of the topic discussed or the viewpoint expressed in the speech. Whereas content-specific restrictions are subject to heightened scrutiny, content-neutral restrictions

³ The Court’s treatments of commercial speech, under First Amendment jurisprudence, and gender classifications, under Equal Protection jurisprudence, are among the exceptions to this rule, insofar as the Court subjects restrictions on commercial speech and regulations distributing social benefits and burdens by gender to an intermediate standard of review.

⁴ Besides employing strict scrutiny, there is an important line of cases articulating a “clear and present danger” standard. See, for example, *Schenck v. United States*, 249 U.S. 47 (1919) (upholding conspiracy convictions, under the Espionage Act of 1917, for the distribution of literature aiming to obstruct the military draft), *Terminiello v. Chicago*, 337 U.S. 1 (1949) (invalidating a disorderly conduct conviction in which the jury was instructed that it could convict if it found that the speech in question “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance”), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down convictions of the organizers of a KKK rally under the Ohio Criminal Syndicalism Act). I take the clear and present danger standard, as currently understood, to be more or less a special case of strict scrutiny.

are subject to weaker forms of scrutiny. Deliberative values would seem to explain the Court's special concern with content-specific restrictions. Often, time, manner, and place restrictions leave open many avenues of expression and so do not significantly restrict the production, distribution, or consumption of ideas. By contrast, content-specific, especially viewpoint-specific, restrictions make it harder for certain messages to be heard and evaluated. If the representation of diverse perspectives, even mistaken ideas, improves public and private deliberations, then there is general reason to think that content-specific restrictions constrain deliberative values in unacceptable ways.

Indeed, not all content-specific regulations are thought to restrict fundamental liberties. First Amendment jurisprudence also distinguishes between low-value and high-value speech. The liberty to engage in low-value speech is not a fundamental liberty; content-specific regulation of low-value speech, as a result, need not satisfy strict scrutiny. By contrast, other forms of speech are high-value, and the liberty to engage in them is a fundamental liberty; as a result, content-specific regulation of high-value speech must satisfy strict scrutiny or some comparable standard. The Court formulated the distinction between low-value and high-value speech in Chaplinsky v. New Hampshire:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵

Here the Court associates central First Amendment liberties with what is an essential part of the exposition of ideas and what is of value as a step toward truth. Like Mill, the Court justifies freedom of expression as a way of promoting true belief. However, if the Court values freedom of expression only as a means of promoting true belief, then it becomes difficult to extend protection to false beliefs, as the Court has. But we need not interpret the Court as valuing freedom of expression only as a means of acquiring true beliefs. The Court appeals to what is an essential part of the exposition of ideas and what is of value as a step toward truth. We can see this rationale as invoking, as Mill also does, deliberative values about the way in which beliefs are formed, assessed, and accepted. If we interpret the Court's rationale this way, we can provide a more wide-ranging conception of high-value speech that includes the advocacy of some false beliefs and recognize some forms of low-value speech. On this reading, low-value speech is not protected, because it does not contribute to the deliberative values that justify protecting other forms of speech.

This claim can be made out reasonably well in the case of libel. Libel is false and defamatory speech in which the speaker knew that her statement is false and defamatory or acted in reckless disregard of these matters. It is true, as Mill claims, that the careful consideration of claims, advanced in good conscience, that are in fact false can advance deliberation by forcing us to consider the grounds of their falsity. But libelous speech is not advanced in good conscience. It is arguably a case in which more speech is not better insofar as the introduction of false and harmful claims with no concern for their truth and consequences arguably hinders, rather than promotes, reasoned assessment of issues.

⁵ 315 U.S. 568 (1942) (upholding a state prohibition on the use of offensive language in face-to-face exchanges in public spaces) at 571-572.

Deliberative values also explain why fighting words are low-value speech. Chaplinsky characterizes fighting words as those that "by their very utterance inflict injury or tend to incite an immediate breach of the peace". As a matter of subsequent constitutional doctrine, the Court has interpreted the category of fighting words narrowly, focusing on their tendency to incite violence. Fighting words, so understood, are words that in their context tend to evoke visceral and violent -- rather than articulate -- responses. However, it would be a mistake to focus on pugilistic responses, and this is why Chaplinsky rightly construes fighting words more broadly, so as to include words whose utterance would cause injury in a reasonable person. A natural response to the use of insulting epithets in many such contexts is visceral but non-violent; the victim of fighting words might be intimidated and silenced as well as provoked. Whether silence or fisticuffs, the natural response is not articulate. But then fighting words simply express, without articulating, the speaker's perspective, and they invite various inarticulate responses. If so, we can see why the Court might reasonably claim that they do not contribute to deliberative values, but often hinder them.

Mill might defend a categorical approach to speech that does not extend significant protection to libel by appeal to the harm principle. Libelous speech is harmful. But it's less clear that fighting words are always harmful. When uttered in the right context, fighting words can cause physical harm, as in the corn dealer case (iii 1). And in other cases fighting words may cause genuine psychic harm. But it's doubtful that fighting words, as such, are always harmful. If not, must Mill treat fighting words as high-value speech? Mill might justify recognition of the category of low-value speech, in general, and fighting words, in particular, in the same sort of way that he justifies the prohibition on selling oneself into slavery. In this case, an exception to the usual prohibition on paternalism is motivated by appeal to the very same deliberative values that explain the usual prohibition. Perhaps a similar exception can be made in the case of fighting words and other forms of low-value speech. Fighting words and other forms of low-value speech do not advance and typically retard deliberative values. If so, the liberty to engage in low-value speech, for instance, involving libel or fighting words, is not a fundamental liberty, and, as a result, restrictions on low-value speech need not satisfy strict scrutiny or similarly demanding standards. The rationale for this treatment is that low-value speech does not engage deliberative values that underlie central First Amendment liberties.⁶

OFFENSE

As we've seen, Mill distinguishes between merely offensive and genuinely harmful behavior; whereas genuinely harmful can be regulated, merely offensive behavior cannot (i 12; iii 1; iv 3, 10, 12; v 5). However, in his discussion of drunkenness, he does at one point allow

⁶ In this connection, one might note that Mill does consider restrictions on "intemperate" speech that exceeds "the bounds of fair discussion" (ii 44). He observes that there is more to be said on behalf of such restrictions when they are applied to the expression of prevailing views than when they are applied to the expression of minority views.

In general opinions contrary to those commonly received can only obtain a fair hearing by studied moderation of language and the most cautious avoidance of unnecessary offense, from which they hardly ever deviate even in a slightest degree without losing ground, while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions and from listening to those who profess them. For the interest, therefore, of truth and justice it is far more important to restrain this employment of vituperative language than the other ... [ii 44].

But he ultimately rejects all such restrictions, claiming that it is "obvious that law and authority have no business ... restraining either" (ii 44).

that offenses against others may be prohibited, at least when they involve acts of public indecency.

Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may be rightly prohibited. Of this kind are offenses against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so [v 7].

The immediate context is otherwise paternalistic restrictions with drink. But when drinking that is otherwise purely self-regarding is done in public, it becomes offensive and, Mill here claims, regulable. I see no way to square this with Mill's blanket prohibition on offense regulation. However, it might be claimed that this is best viewed as a qualification, rather than a rejection, of his opposition to offense regulation. Though still opposed to offense legislation per se, he indicates here that he is not opposed to the regulation of public offenses. Not everything that's permissible to do in private is permissible to do in public. Even if this is a coherent position, we might wonder if it is attractive. If it's impermissible to regulate in private, why is it okay to regulate in public? Mill's answer is that when done in public, the conduct comes "thus within the category of offense against others". But if publicity is relevant because it makes the conduct offensive, then Mill's real appeal is to offense. But then this exception threatens to swallow the rule.

Mill may not have a consistent view about offense. His considered view seems to be that offense is an inadequate basis for restricting liberty. Should we agree? One could imagine a categorical approach which was more fine-grained than Mill's and recognized the permissibility of legislation designed to prevent profound offense. Just as Mill distinguishes between offense and harm, allowing regulation of the latter but not the former, so too we might distinguish between mere offense and profound offense, allowing regulation of the latter but not the former. To see whether this is plausible, we have to see what would count as profound offense. In Offense to Others -- the second volume of his The Moral Limits of the Criminal Law -- Joel Feinberg defends just such a modified Millian categorical approach. Many offensive things are nuisances; they cause passing disagreeable mental states or sensations. But even if many nuisances are just the price one has to pay to live in a free society, Feinberg thinks that some nuisances -- especially public nuisances -- are beyond the pale. He describes a series of possible cases in which you are riding a bus and cannot get off without seriously inconveniencing yourself (pp. 10-13). In each case people get on the bus, sit near you, and start doing things that you find it impossible to ignore and that cause reactions in you ranging from mild disturbance to shock and revulsion. He categorizes the cases (31 in all) into six categories: (a) affronts to the senses, (b) disgust and revulsion, (c) shock to moral, religious, and patriotic sensibilities, (d) shame, embarrassment (including vicarious embarrassment), and anxiety, (e) annoyance, boredom, and frustration, and (f) fear, resentment, humiliation, anger (from empty threats, insults, mockery, flaunting, or taunting). In most, if not all, cases, the occurrence of such behavior in private, while not unobjectionable, would nevertheless present no case for restriction. What's crucial is that the indecency is public. Indeed, it may be significant that Feinberg cases involve a captive audience, for whom it is possible but costly to avoid the offense. No doubt, people's sensibilities differ. I hope mine aren't too idiosyncratic. I found most troublesome the cases of the disgusting picnickers (#s7-8), the corpse desecraters (#10), the people having

various kinds of sex (esp. #s15-17, 20-23), and the faux commando (#27). The last case involves a false threat and, hence, isn't a paradigm case of offense or nuisance. If the threat is credible, it seems to fall under the harm principle or perhaps legal moralism. If the threat is not credible – e.g. he's clearly an actor in costume – then there seems nothing especially objectionable. So we might focus on the other cases.

The public indecency may seem outrageous. If there's a captive audience, legal regulation may seem called for. Surely, we ought to be able to be spared these sorts of displays on public transportation. Mill's attitude, we've seen, is ambivalent. On the one hand, his coarse-grained categorical approach would appear to condemn regulation of such acts. On the other hand, he does allow at one point for the regulation of public indecency (v 7). But why should Mill or anyone else think that we can regulate the public display of behavior that we cannot regulate in private? Moreover, much of what we find offensive is the result of culturally conditioned sensibilities. One can well imagine stable democratic regimes that would tolerate offense, and it's quite possible that societies that tolerate what we find offensive would not perceive any or as much offense in the same conduct.

Feinberg assumes that at least some of the offenses in question are evils that create a reason for regulation. But he thinks that we have to perform a balancing test in which we weigh the seriousness of the offense against the importance of the agent's interests being regulated. When assessing the seriousness of an offense, we must consider several factors (Offense to Others 35). We do not need to consider offenses that result from abnormally sensitive sensibilities or those to which someone has consented to expose himself. We should pay attention to the magnitude of the offense, where that is a function of the intensity, duration, and extent of the offense. We should also pay attention to the degree of avoidability, attaching less significance to offense that are easily avoidable and more significance to offenses that fall on captive audiences. Similarly, Feinberg recognizes several dimensions to the importance of the offensive conduct, including its personal and social value (where this can include expressive value), the availability of alternative avenues of expression, whether the conduct is motivated by spite or malice, and whether the locale for the offensive conduct is a public space (44).

Perhaps all these dimensions are relevant, but I would like to highlight a few. I don't know how much weight should be given to the abnormality of the sensibility underlying the offense. Even if I learn that you are abnormally sensitive to noise, I should still take reasonable steps to avoid causing you auditory offense. Besides the intensity and duration of the offense, the most important dimension of the seriousness of offense appears to be its avoidability. If I can avoid the conduct at little or no cost, then the offense I do experience if I don't avoid it seems to have very little normative significance. So if we allow sex orgies in a tent in the town square between 8am and 9am on Saturdays, I don't see the problem. When assessing the seriousness of the offender's interests, we should obviously focus on the centrality and expressive role of those interests to the individuals in question. But this has a comparative dimension. It depends on the availability of other avenues for expressing those same interests. Intimate association is an extremely important personal interest – perhaps as important as any other. So a prohibition on sexual activity or a prohibition of certain forms of sexual activity (e.g. sodomy or homosexual sodomy) is extremely invasive. But a prohibition on sexual activity in public is not nearly so invasive, because it leaves private outlets for these forms of intimate association. In effect, many regulations of public indecency can be understood as analogous to **time, manner, and place restrictions**. Provided such regulations leave alternative avenues of expression and do not have a significantly differential impact, they do not present a serious threat to expressive interests.

This is perhaps the single most important fact in the case for regulating public offenses imposed on a captive audience.

Before moving on, it's worth mentioning a dimension for assessing the seriousness of an offense that Feinberg eschews, viz. its **reasonableness**. Feinberg thinks that abnormality is a reasonable proxy for unreasonableness and worries about allowing the state to make determinations of reasonableness (Offense to Others 35-37). We might also note that even in the cases where we think regulation might be justified we needn't suppose that the offensiveness is especially reasonable or rational. Perhaps there's nothing especially reasonable about the offense we take at the coprophagic picnickers on the bus (#8). But one needn't think that offenses have to be reasonable to be regulated; it might be enough if they are not unreasonable. If there are some offenses that are unreasonable, then I'm not sure that they should contribute to a pro tanto case for regulation, no matter their intensity or duration. Consider the offense that racial bigots experience at seeing interracial couples. I don't see that we make much progress by appealing to abnormality as a proxy for unreasonableness. Such offense was presumably not abnormal, that is, uncommon in the Jim Crow south. Yet, it was then unreasonable. Feinberg may think that when we balance interests the scales will always favor the freedom of association interests of the interracial couple over the interests in being free of offense by racial bigots, no matter the intensity, duration, and extent of the offense. But one might wonder if that's true, and, in any case, one might wonder whether bigoted offense creates even a prima facie case for restricting interracial dating.

I conclude that if one is going to consider modifying the categorical approach so as to allow the prevention of profound offense, then one must restrict potential regulation to offense that is not unreasonable, and one must allow restriction only when the expressive interests of the offenders are modest and where offenders have ample alternative avenues of expression.

Feinberg himself distinguishes profound offense, which he treats separately, from the profound nuisances of the sort displayed on his bus ride and which we have been discussing. Though he mentions several examples of profound offense, the two most interesting, which he discusses at greatest length, are mistreatment of the dead, involving desecration of the dead and use of corpses contrary to the wishes of the deceased and his kin, and psychologically traumatic displays of hate, as in the neo-Nazi march in Skokie. Feinberg says that this class of offenses is different from the extreme nuisances. Feinberg says that in contrast with mere nuisances profound offenses are less ephemeral and trivial, do not depend upon being personally experienced but arise from the bare knowledge of the conduct in question, and have a moral character (57-60). This last difference requires attention. Feinberg believes that whereas nuisance, such as public indecency, tends to be wrong (when it does) because it is offensive, profound offense tends to be offensive because of its perceived wrongness. But to the extent that this is true, so-called profound offense legislation is better justified, if at all, under legal moralism. This is not so different from Feinberg's own conclusion. Moreover, Feinberg takes it to be constitutive of liberalism to reject legal moralism. As a liberal, Feinberg appears to reject any appeal to legal moralism to justify the regulation of profound offense.⁷ However, he does think that some disgust and offense in such cases is or can be personal. The next of kin

⁷ Does this give Feinberg an answer to my worry about treating the offense experienced by the racial bigot at the sight of interracial couples on the nuisance model? For it appears that he might say that this is better understood on the profound offense model, which shows that restrictions on interracial association designed to prevent the bigot from experiencing offense are really illicit forms of legal moralism. Is that a satisfying solution to Feinberg's problem?

experiences a kind of revulsion at the desecration of the body of a loved one that a disinterested observer does not. The Holocaust survivor in Skokie experiences a kind of trauma by the bare knowledge of the Nazis marching in Skokie that a disinterested observer would not experience and, moreover, a kind of trauma that she would not experience by the bare knowledge of the Nazis marching in Chicago. Feinberg's view appears to be that these pure offense-based reasons for restriction can be handled by the balancing test that he employs for mere nuisances. In the Skokie case I would add that the harm principle is arguably applicable, inasmuch as Holocaust survivors are a captive audience and experience psychological trauma that is no less harmful for being psychic. Moreover, the prohibition can be not on their marching, but on their marching in Skokie and is thus analogous to a time, manner, and place restriction.

LEGAL MORALISM

Finally, we turn to legal moralism, which Mill appears to reject categorically and whose rejection Feinberg treats as a constitutive component of being a liberal (i.e. belonging to the liberal tradition in moral and political philosophy). One might well wonder whether there are cases of legal moralism that aren't cases of the harm principle because one might wonder if there are forms of immorality that don't cause harm. We might fail to see a gap between harm and immorality for one of two reasons. (1) One might think that the only real immorality is the sort that causes harm, as in murder, rape, assault, extortion, etc. (2) Or one might think that that any immorality causes harm because it harms the agent's soul.

Neither reason should be an obstacle to us taking legal moralism seriously. Even if immorality necessarily harms one's soul, the harm principle clearly applies to conduct that causes harm independently of its immorality. Though paradigm forms of immorality cause harm (independently), it's not at all clear that all forms of immorality involve such harm. In traditional debates about legal moralism, of the sort waged between Devlin and Hart, the issues concerned the legislative enforcement of sexual morality, in particular, the regulation of homosexuality and pornography. For the most part, both sides conceded that these activities were harmless but then debated whether it could be permissible to regulate them as a matter of enforcing sexual morality. And, as we will see later, there are other sorts of conduct that appear not to cause harm but nonetheless to be wrong, including, but not limited to, such things as criminal attempts (e.g. attempted murder), crimes that don't harm (e.g. the murder of someone whose life is not worth living or nonharmful fraud), the nonharmful causing of negative utility (that results from the so-called non-identity problem), desecration of the dead, and bestiality.

It's important to see that the case for legal moralism is not exhausted by Devlin's defense of the legislative enforcement of sexual morality. But it's impossible to have a useful discussion of legal moralism that is not informed by an understanding of the debate between Devlin and his Millian critics. Though Mill would presumably oppose moral legislation that prevents no harm, Lord Devlin defends its permissibility by appeal to two arguments.⁸ Liberals, such as Hart, Dworkin, and Feinberg, have rejected Devlin's arguments, his defense of the moral legislation of sexual morality, and, more generally, his defense of moral legislation.⁹

Devlin's first argument appeals to a society's right of self-defense. It has something like this structure.

⁸ See Patrick Devlin, The Enforcement of Morality (Oxford, 1965).

⁹ See H.L.A. Hart, Law, Liberty, and Morality (Stanford, 1963); Ronald Dworkin, "Liberty and Moralism" reprinted in Taking Rights Seriously (Harvard, 1977); Joel Feinberg, The Moral Limits of the Criminal Law, vol. 3 [Harmless Wrongdoing] (Oxford, 1988).

1. Society has right to protect its own existence by prohibiting behavior that threatens its existence.
2. Homosexuality and pornography threaten society's existence.
3. Hence, society has a right to prohibit homosexuality and pornography.

Both Hart and Dworkin have effectively criticized this argument as unsound. Its plausibility appears to rest on a tacit equivocation between two different ways of thinking of society.

- (a) a culturally elastic entity that persists through various changes in social mores.
- (b) a culturally inelastic entity that is defined by its current social mores.

(1) is plausible only on the (a)-reading. Indeed, so understood, it might be defended by appeal to the harm principle. (2) is plausible only on the (b)-reading. But if we read the premises so as to maximize their plausibility, then the argument is unsound because it equivocates between these two readings. On either univocal reading, the argument is valid but not sound. On the univocal (a)-reading, (1) may be true but (2) is false, and on the univocal (b)-reading (2) may be true but (1) is false. On no reading, is the argument sound.

Devlin also appeals to public censure as a reason to regard the behavior as immoral and subject to regulation. Here, he seems to argue as follows.

1. Society has reason to prohibit behavior that is immoral, whether or not it causes harm.
2. Hence, society has reason to prohibit behavior that it has good reason to believe is immoral.
3. Public censure of behavior provides good reason to think that the behavior is immoral.
4. There is public censure of homosexuality and pornography.
5. Hence, society has a right to prohibit homosexuality and pornography.

Some critics, such as Dworkin, have focused on (3), claiming that public censure is not very good reason to think that the object of censure is immoral. Censure might register disgust (Icky!) or alienation (That's weird!) rather than a moral judgment. Even when censure reflects moral beliefs, censure itself provides no good reason to think that the censured conduct is immoral. People have all sorts of moral beliefs that are ill informed, dogmatic, superstitious, and the product of prejudice. One has to be able to tell some secularly plausible story about why the censored conduct is wrong before one should treat censure as a reliable indicator of immorality. Not only should we reject (3) as such; but also we should reject the specific suggestion that public censure of homosexuality and pornography provide good evidence of their immorality.

Mill and anyone else who categorically rejects legal moralism will think that the plausibility of (3) is neither here nor there. The real problem with the argument, they claim, is (1). Much immoral conduct is harmful and that is why it is immoral. This is true of central provisions of the criminal law, such as the prohibitions on murder, rape, assault, and theft. This sort of moral legislation is fine. But moral legislation as such, in particular, moral legislation that does not aim to prevent harm is impermissible. Criminal legislation deprives people of liberty and, as such, imposes quite significant harm. The only good reason for imposing such harm is the prevention of harm.

Perhaps there is no very good reason to think that homosexuality and pornography are immoral. But consider the case of promise-breaking or deception that actually fails to result in harm. Junior takes the car out without permission but nothing untoward happens. Here is a case of harmless wrongdoing. Consider this argument

1. Society has reason to prohibit behavior that is immoral, whether or not it causes harm.
2. Junior's taking the car without parental permission is a case of harmless wrongdoing.
3. Hence, society has a right to prohibit Junior's behavior.

Presumably, liberals think this is a case in which the law should not intervene. Here, it might seem that we need to agree with Mill in order to avoid the illiberal conclusion. Indeed, I think that many people tend to think that to avoid illiberal conclusions about moral legislation one must reject legal moralism as such.

But this line of reasoning assumes that Devlin's argument is valid. But it is not. The conclusion of his argument -- (5) -- and the conclusion of this last argument -- (3) -- are all-things-considered conclusions. But they rest on the legal moralist principle (1), which asserts only pro tanto or prima facie reason to regulate. But a pro tanto reason to regulate does not entail an all-things-considered reason to regulate. In particular, even if there is some reason to regulate conduct, there may countervailing reasons not to regulate it. Perhaps the costs of regulation -- administrative and otherwise -- exceed the benefit of regulation. But this shows that the legal moralist need not regulate all harmless wrongdoing, and this shows that it is not necessary to reject legal moralism as such in order to defend liberal conclusions. This does not entail that Mill's rejection of legal moralism is wrong, only that it is not necessary to deliver most of his liberal conclusions.¹⁰

But we do force a choice between the Millian rejection of legal moralism and the more liberal form of legal moralism if there are cases of harmless wrongdoing where legal regulation is appropriate. Consider the following list of candidates for harmless immorality that it is appropriate to regulate.

- Criminal attempts, such as attempted murder, that aim to harm but do not succeed.
- Crimes that don't harm, such as the murder of someone whose life is not worth living or nonharmful fraud.
- The nonharmful causing of negative utility in cases in which one's actions determine not only how benefits and harms are distributed but also who exists to be benefited or harmed. My action may make someone (e.g. my child) badly off without harming him, because he wouldn't exist if I had not acted as I did.
- Desecration of the dead.
- Bestiality.

If any of these involve harmless immorality that it is permissible to regulate, then we must reject the Millian categorical ban on legal moralism.

¹⁰ This is one way of understanding the significance of Michael Moore's defense of legal moralism in Placing Blame (Oxford, 1997), ch. 16.

PRIVACY AND LEGAL MORALISM

Even if we reject Mill's categorical prohibition on legal moralism that doesn't mean that we have to accept Devlin's defense of the permissibility of regulating homosexuality and pornography. We might doubt that either is morally wrong. Even if we conceded its wrongness, it wouldn't follow that it was right or wise to prohibit it.

We can also address issues about the legitimacy of legal enforcement of sexual morality by looking at constitutional debates about whether regulation of homosexual sodomy, for example, violates a constitutional right to privacy. This debate is at work in two related constitutional cases Bowers v. Hardwick (1986) and Lawrence v. Texas (2003).

BOWERS v. HARDWICK

Griswold justifies a right to privacy or personal autonomy as a value that would rationalize otherwise diverse liberties recognized in the Bill of Rights, in particular, the First Amendment guarantee of free speech and association, the Third Amendment guarantee of a home owner's right not to have his house invaded during peace time without his consent, the Fourth Amendment guarantee against unreasonable search and seizure, the Fifth Amendment guarantee of due process, and the Ninth Amendment guarantee of nonenumerated rights retained by people. If a married couple really has a right to privacy that covers such sexual and reproductive decisions, then this implies that the state may not interfere with such decisions in pursuit of majority preferences. Recognition of a right to privacy, therefore, requires strict scrutiny. In Bowers the Court concluded that the right to privacy does not extend to consensual homosexual practices, even in the privacy of one's home. As such, it raises important questions about the scope of a right to privacy.

The majority appeals to the line of privacy cases beginning with Griswold and notes that most of these cases protect personal liberty in decisions involving "the family, marriage, and reproduction" and claims that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated". But this begs the question about whether past privacy decisions exhaust the scope of a right to privacy.

If, as Griswold claims, the a right to privacy is justified by virtue of rationalizing diverse liberties in the Bill of Rights, then its scope cannot sensibly be limited to matters of traditional family relationships and reproduction, because the specific guarantees in these amendments contain no such restrictions. A plausible claim about the scope of a right to privacy is that it is roughly the freedom to make choices and pursue plans and associations central to one's conception of oneself provided that these freedoms are not exercised in ways that threaten immanent harm to comparably important interests of others. Hardwick's choice and pursuit of consensual homosexual relationships in the privacy of his own home arguably falls within the scope of this right to privacy.

If so, then the Georgia statute should be subject to strict scrutiny. Does Georgia have any compelling state interest in regulating consensual sexual relations between adults in the privacy of the home? The majority appealed to the heterosexual tradition that is "deeply rooted in this Nation's history and tradition" and the state's interest in upholding these moral traditions (see White's majority opinion and Burger's concurring opinion). But this fails to recognize a right to privacy or self-determination, as Stevens points out.

Is the preservation of traditional values even a legitimate state interest? The state must defend its interests in secular ways. As Blackmun points out, whereas this can be done with many interests underlying the criminal law, it's not clear this can be done with the alleged

wrongs or harms of private consensual homosexual relations. The demand for secular justifications of public policy is articulated in the anti-establishment clause of the First Amendment. But it is a special case of a more general demand of public justification, according to which we must be able to justify our conduct to others -- especially if we are imposing burdens on them -- in terms that we might reasonably expect them to be able to accept. If the main basis for claiming that homosexuality is immoral lies in certain religious doctrines, acceptable only on the basis of faith, rather than reason, then the filter of public justification promises to screen-off the primary justifications of this sort of moral legislation.

It's worth noting that White is mistaken in claiming that opposition to Bowers must reject moral legislation per se. The criminal law can and does reflect moral claims about the wrongness of murder, rape, assault, and theft. But these laws represent application of the harm principle; they are not merely moralistic. As such, these restrictions on liberty can be given a secular justification.

LAWRENCE v. TEXAS

Lawrence presented a case whose facts were very much like Bowers -- with the significant difference that the Texas statute prohibited only homosexual sodomy, not sodomy as such. A majority in Lawrence (Kennedy, Stevens, Souter, Ginsberg, and Breyer) struck down the Texas statute and overruled Bowers in the process in an opinion authored by Kennedy. O'Connor joined in the decision, but filed a separate opinion that did not overrule Bowers. She thought that a prohibition on sodomy as such, as in Bowers, was consistent with Due Process analysis. She thought the Texas statute should be struck down on Equal Protection grounds, because in targeting only homosexual sodomy it discriminated against homosexuals in an unacceptable way.

In some ways, Kennedy's majority opinion in Lawrence simply accepts the principles underlying Steven's dissent in Bowers; in other ways, not. Kennedy's opinion appeals to several considerations.

1. The majority claim in Bowers that the prohibition on homosexual sodomy has a long historical tradition is a dubious historical claim.
2. The principles on which Bowers was decided have been extensively criticized domestically and are out of step with practices in other Western democracies.
3. There has been no important societal reliance on Bowers which would argue against overturning Bowers if there were otherwise good reasons to.
4. Bowers was wrongly decided; homosexual association is within the scope of the right to privacy, and the statute furthers no legitimate governmental interest.

Kennedy's opinion is puzzling in one way. He suggests that the historical and social claims embodied in (1) and (2) are not essential to the ruling (at 519), yet he devotes the lion's share of his opinion to such issues, reserving a few paragraphs to (4).

Scalia raises some good questions about the plausibility of Kennedy's alternative historical analysis and about the relevance of Kennedy's historical and sociological claims. If there is a protected privacy right to homosexual association, then it must trump any appeal to majority preferences or maintaining traditional mores. To show that miscegenation laws violate the right to equal protection (Loving v. Virginia), there is no need to dispute the history of hostility to mixed race marriages or to show that enlightened people here and abroad disapprove

of miscegenation laws. So the really important issue is (4). Issues (1) and (2) only confuse the issue.

(3) makes the case for overruling *Bowers* easier. But the central issue is (4). Here, Kennedy accepts the arguments of Stevens and Blackmun in *Bowers* about the need to interpret the scope of the right to privacy in such a way that it recognizes an autonomy interest in determining one's ideals, commitments, and forms of association provided that these do not harm the comparable interests of others (at 525). This involves recognition of a privacy interest in determining one's form of intimate association. He then claims that traditional mores and majority preferences cannot be a sufficient reason for upholding a law that restricts this privacy right.

Scalia complains that the majority in *Lawrence* is not willing to recognize explicitly a "constitutional right to homosexual sodomy" or to insist that the appropriate standard of review is strict scrutiny (at 531, 535) and that its implication that the Texas statute cannot survive rational basis review is without merit. Moreover, he criticizes as overbroad the majority's conception of the scope of the right to privacy as involving autonomy (at 532). Such a conception of privacy would be incompatible with central provisions of the criminal law that rest on moral assumptions (at 533).

It's perhaps true that Kennedy could have been clearer about some of these matters, but it's not hard to see how he would reject the terms of Scalia's dissent.

(a) There is not a fundamental constitutional right to homosexual sodomy any more or less than there is a fundamental constitutional right to be a member of the Boy Scouts. Perhaps neither would appear on a short list of fundamental human rights. However, in both cases, Kennedy believes, there is such a right that is part of or derived from a more general and perhaps more fundamental right. The right to join the Boy Scouts is derivative from a constitutional right of association. The right to engage in private consensual homosexual sodomy is derivative from the constitutional right to privacy, which Kennedy plausibly construes as requiring autonomy in matters of intimate association that are private, consensual, and do not harm others.

(b) It follows that strict scrutiny is the standard of review appropriate for the Texas statute. Kennedy insists that traditional mores against homosexuality, even if they were historically robust, would not be a sufficient basis for state action. He clearly believes that this rationale would not satisfy strict scrutiny. He may also believe that it doesn't even amount to a legitimate state interest, inasmuch as there seems to be no secularly acceptable justification for the restriction on homosexual association, for instance, that can appeal to the harm principle. If there is no legitimate state interest, then a fortiori there is no compelling state interest.

(c) It's true that privacy cannot be understood to involve an absolutely general conception of autonomy that would preclude all sorts of moral legislation, including central provisions of the criminal law. But, as Stevens points out in his dissent in *Bowers*, central provisions of the criminal law – prohibitions on murder, rape, assault, theft, and fraud – can be justified in secularly acceptable ways – typically by appeal to harm prevention. The sort of legislation of sexual morality at stake here cannot be so justified and infringes in significant ways with liberties of intimate association that would seem to be central, rather than peripheral, to autonomy. Bans on public sodomy leave important private avenues for free intimate expression (though, of course, a ban on public sodomy that was limited to homosexual sodomy would run afoul of equal protection concerns). But a ban on homosexual sodomy as such leaves no alternative outlets for these important expressive interests.