MILL DOES NOT HAVE A HARM PRINCIPLE
Daniel Jacobson

That principle [of liberty] 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. (On Liberty, XVIII: 2231)

Mill termed his fundamental principle of political philosophy the “principle of liberty,” which he expressly intended to specify “the nature and limits of the power which can be legitimately exercised by society over the individual” (Liberty: 217). But philosophers typically refer to it as Mill’s “harm principle”—despite the fact that he never used that phrase. There is a straightforward explanation for this change in terminology imposed by scholars. When Mill gives what looks to be his official statement of the principle, in the passage quoted as this essay’s epigraph, he refers to prevention of harm to others as the sole end that can justify either the exercise of power over an individual or an interference with her liberty. Nevertheless, I contend that the attribution of a harm principle to Mill is so misleading as to have obscured not only the nature of his principle of liberty, but the argument of On Liberty and his political philosophy as a whole. Mill simply does not endorse any such harm principle, appearances to the contrary notwithstanding.

1 All references to Mill will be to the Collected Works of John Stuart Mill, ed. J. M. Robson (Toronto: University of Toronto Press, 1981) and given in the text initially as (title, volume: page number) and then subsequently as (short title: page number). See <http://oll.libertyfund.org/people/john-stuart-mill>.
This is not to say that he has no principle of liberty, of course, but rather that Mill’s principle cannot be understood in terms of harm—not even by positing a technical notion of harm. The only way to make the principle of liberty into a harm principle is trivially, by stipulating that harmful conduct is whatever Mill considers legitimately subject to social coercion. The problem is stated forthrightly by D. G. Brown who tries to solve it in his chapter, “Mill’s Harm Principle,” in the latest Companion to Mill anthology. He writes, “Reading Mill’s official statement simply as plain English the Harm Principle is simply false.” Yet Brown thinks that there is an extended reading of harm such that a harm principle is both substantively and exegetically plausible. This strategy gets used even by those interpreters who eschew the phrase “harm principle” but hold that actions harmless to others are immune to coercion; or who claim, like C. L. Ten, that Mill “treats harm to others as always a good reason” for intervention.

Although philosophers differ about how to extend or narrow the notion of harm, they almost universally attempt to understand the principle of liberty in these terms. Sometimes they take Mill’s references to harm to focus on physical injury, rather mere offense or hurt feelings, or on harm to a person’s interests. These are attempts to narrow the notion of harm so as to fit the

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4 For just two examples, David Brink’s interpretation rests on a distinction between mere offense and real harm: “some conduct affects others adversely by causing offense. But if it causes only offense, and not genuine harm, then liberty should not be restricted,” according to the harm principle he attributes to Mill. David Brink, Mill’s Progressive Principles (Oxford: Oxford University Press, 2013), p. 40. Although J. C. Rees does not use the phrase “harm principle,” he writes: “The revised version [of the principle of liberty] would read something like this: ‘Social control of individual actions ought to be exercised only in cases where the interests of others are either threatened or actually affected.’” J. C. Rees, “A Re-reading of Mill On Liberty,” reprinted in J. S. Mill On Liberty in Focus, eds. John Gray and G. W. Smith (London: Routledge, 1991), p. 181. But I will argue that no such theory focusing specifically on (the threat of) harm to an agent’s interests can succeed, for the same reasons.
class of actions that are, in principle, subject to social control. But interpreters also sometimes extend the notion of harm, such as by noting passages where Mill states that “all restraint, *qua* restraint, is an evil” (*Liberty*: 293). It might be legitimate to adopt a technical notion of harm, even one that narrows it in one respect and extends it in another, but any such notion must respect two platitudes about the concept. First, people must not (knowingly) prefer being harmed to not being harmed, other things equal. Second, there must (typically) be a difference between harming someone and failing to benefit her. Otherwise one is no longer talking about harm but some other concept.

Any adequate interpretation of the principle of liberty must not contradict how Mill characterizes the argument of *On Liberty*. It should allow him to claim retrospectively that the essay defends “the doctrine of the rights of individuality” (*Autobiography*, I: 260), and it should cohere with his description of those rights: specifically, that “the appropriate region of human liberty” protected by “the principle of individual liberty asserted in this Essay” comprises self-sovereignty and the freedoms of conscience and association (*Liberty*: 225-6, 293). No harm principle can meet these criteria. Therefore, the principle of liberty cannot be understood as a harm principle, especially when an alternative reading respects Mill’s contemporary and retrospective accounts of the central doctrine of his political philosophy.

1. **What is a Harm Principle?**

   My first task will be to derive the best formulation of the harm principle, while keeping the discussion broad enough to include every version commonly attributed to Mill. This proves
difficult, but we can start with some uncontroversial points. In the first place, the epigraph states that the relevant kind of harm is to others than the agent herself. Mill makes this rejection of paternalism explicit by declaring that the agent’s “own good, either physical or moral, is not a sufficient warrant” for compelling her (Liberty: 223). Second, he asserts that the prevention of harm to consenting others cannot justify coercion: “from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others” (Liberty: 224). He then goes on to draw further qualifications necessary for the principle to be at all plausible. It is meant to apply only to sound-minded adults. And some degree of danger must be counted as harm, whether or not it causes injury; otherwise the principle would immunize lucky drunk driving and the like. For the sake of simplicity, by a ‘harmful’ action I will hereafter mean something like one sufficiently dangerous to non-consenting others, and analogously for ‘harmless’, adding these further qualifications only when needed for clarity.

It is significant that the two consecutive statements given in the epigraph are not obviously synonymous. Is self-protection the same thing as prevention of harm? Perhaps this is true for individuals, but it is more dubious when applied to society as a whole. Those who would limit liberty for the sake of conserving or reforming the moral ecology often claim to be acting to protect society, but it is not clear that this counts as harm prevention rather than promotion of

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5 Also, the principle of liberty applies only to what Mill calls the free society, not at every stage of social development. “Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion” (Liberty: 224).

6 Mill expressly refers to the “definite risk of damage” and the “probability of damage” without worrying about the details, and neither will I.
the good. Moreover, an *exercise of power* seems a more expansive notion than an interference with an individual’s *liberty of action*. Although this distinction will prove important, for now I will speak of coercion, compulsion, and interference with liberty interchangeably—as if Mill’s principle limits all exercises of state and social power equally.

Despite its prominence, the epigraph seems rather casually expressed for an official statement. If it was instead intended as a rough-and-ready initial characterization of the doctrine, however—as I will argue—then we should be cautious about relying on a decontextualized close reading of the passage. Indeed, the most congruent aspect of the two statements is that both frame the thesis as a necessary condition: *only* harm prevention (or self-protection) can justify coercion. Yet in order for the principle to legitimize any particular form of coercion, harm cannot merely be a necessary condition. Such a weak harm principle would have to be supplemented to specify *when* harm prevention justifies compulsion. And there are other passages where Mill suggests that the crucial distinction is between harmless actions, which are immune to interference, and harmful ones, which are in principle subject to social control. For instance, he writes: “If anyone does an act hurtful to others, there is a prima facie case for punishing him” (*Liberty*: 224). Finally, Mill’s “one very simple principle” given by the epigraph later becomes “two maxims which together form the entire doctrine of this essay,” and these two maxims seem to concern harmless and harmful action respectively (*Liberty*: 223, 292). This is the best evidence in favor of a strong harm principle, and I will consider both passages in §2.

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7 As Brink writes: “if Mill wants to defend one very simple principle about restrictions on liberty, then harm prevention had better be a sufficient, as well as a necessary, condition for restriction.” Brink, *Progressive Principles*, p. 137.
Although there are reasons to attribute a strong, biconditional version of the harm principle to Mill—which makes harm prevention both necessary and sufficient grounds for an action to be subject to compulsion—this interpretation cannot rest on a close reading of the epigraph. Both its statements are conditionals, not biconditionals. Moreover, there is one respect in which any such gloss clearly must be weakened. Any biconditional gloss of the harm principle must be put in terms of what provides good reason to compel, not as what suffices to justify compulsion. Not all harmful action should be prohibited, as Mill repeatedly notes, since the costs of prohibition might exceed its benefits. In that case, even actions that are in principle subject to social control should not in practice be prohibited or compelled.

Here then is the version that Brown attributes to Mill, after claiming that “the Liberty Principle is a biconditional” and calling it a harm principle:

\[(HP) \text{ If and only if conduct is harmful to non-consenting others there is some reason to restrict it, and it becomes open to discussion whether it is actually justified to do so.}\]

This formulation accommodates Mill’s talk of a *prima facie* case for punishment—though I will ultimately argue that it does not go far enough. More controversially, Brown formulates (HP) as targeting harmful conduct rather than merely identifying harm prevention as the only legitimate reason to interfere with liberty (even when the conduct interfered with is not itself


\[9\] ‘Prima facie’ is ambiguous in just the crucial respect. It can mean either an apparent reason, which may or may not be genuine; or a *pro tanto* reason, which is always genuine but can be overridden. This is exactly the difference between my reading and that of proponents of the strong harm principle.
Since I reject both these approaches, I need not enter into this debate. It proves relevant to one step in my argument, however, so I will return to the issue when pertinent.

In Mill’s terms, the principle of liberty distinguishes *self-regarding* from *social* action (which interpreters typically call ‘other-regarding’). Its point is to identify those aspects of life where individuals have the right to do as they choose, not to determine when it is good policy to compel action that falls outside this protected self-regarding sphere. Consider his argument for free trade, by contrast, which he defends as a matter of policy rather than principle. “Trade is a social act,” in his view, which is to say that it is “within the jurisdiction of society” (*Liberty*: 293). Nevertheless, he thinks restraints on trade are misguided because they do not produce their intended results and have bad unintended consequences. The crucial point for present purposes is not whether Mill was correct about free trade in either respect. It is rather that, in his view, the doctrine “rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay” (ibid.).

My claim that Mill uses ‘self-regarding’ as a term of art, to mean action protected by the principle of liberty, requires elaboration because it deviates from the most common gloss of the phrase. As C. L. Ten notes, “According to the traditional interpretation, self-regarding actions

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10 Cf. David Lyons who takes the other side of this debate: “On the reading I propose, freedom may be limited only for the purpose of preventing harm to other persons, but the conduct that is interfered with need not itself be considered harmful or dangerous to others.” David Lyons, “Liberty and Harm to Others,” reprinted in *Rights, Welfare, and Mill’s Moral Theory* (New York: Oxford University Press, 1994), p. 91.

11 Certain restrictions on trade can be violations of liberty, in Mill’s view, but only on the liberty rights of the buyer, not the producer or seller (ibid.). The claim that trade is a social act requires argument, in my view; it does not simply fall out of the fact that trade can affect others than the buyer and seller. Of course, Mill was not arguing with modern libertarians about economic liberty: capitalist acts between consenting adults, in Robert Nozick’s phrase.
have no effect on others against their wishes; they only affect the agent and consenting adults.”¹²

Although this interpretation has been disputed by various scholars, including Ten, it remains widely held. Piers Norris Turner has recently claimed: “Any direct, negative (i.e., painful) effect on nonconsenting others, including mere offense, makes [an action] other-regarding.”¹³ There are two reasons to understand the self-regarding as the harmless (to non-consenting others).

First, some philosophers have the linguistic intuition that ‘self-regarding’ just means whatever affects no one other than oneself. Second, Mill does sometimes casually refer to action that affects only the agent herself, or only the agent and consenting others, as self-regarding.

Yet Mill explicitly qualifies these remarks in numerous ways. Though he occasionally describes self-regarding action as that which affects no one else without her consent, for example, he also refers to it as action that primarily concerns the agent herself. These are crucially different notions, since an action that offends you might not be (primarily) your concern. What counts as primarily your own concern is a normative question, over which political philosophers differ. And neither my linguistic intuition nor the OED favors one gloss of ‘self-regarding’ over the other.

But the decisive reason that ‘self-regarding’ does not simply mean harmless is that Mill expressly says so in several places, including immediately after his first casual reference to what affects only the agent himself. “What I say only himself, I mean directly, and in the first instance:

¹² Ten, Mill on Liberty, p. 10.

¹³ Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle,” Ethics 124 (2014), p. 319. Similarly, although Brink holds that the harm principle excludes offense, he nevertheless claims that “harmful conduct and offensive conduct are mutually exclusive and jointly exhaustive parts of other-regarding conduct.” Brink, Progressive Principles, p. 140.
for whatever affects himself, may affect others through himself” (Liberty: 225). He then adds that he will consider this objection in more detail later; when he does, he qualifies what counts as self-regarding action in crucial respects. I am not begging the question against those who take the self-regarding sphere to be coextensive with the harmless, but insisting that this equivalence is not true by definition. In what follows, I will argue that not all self-regarding acts are harmless, and that not all harmless acts are self-regarding. Mill rather uses ‘self-regarding’ action as a term of art, to mean those actions protected from interference by the principle of liberty.

According to both versions of the harm principle, all harmless action is self-regarding. The weak version of the harm principle stops there, while the strong version adds that harmful action is social, open in principle to coercive interference. That is to say, (HP) holds that there is reason to restrict all harmful action even if doing so would be misguided in practice. Since my concerns here are exegetical, I will not consider these claims on their merits except by Mill’s lights and insofar as it supports one interpretation over another. Nevertheless, my argument belies even the most modest attempt to understand the principle of liberty in terms of harm prevention. The problems it raises cannot be finessed with a technical notion of harm, such as one that excludes offense. In fact, Mill takes offense to be a genuine harm, albeit one that does not justify compulsion. The principle of liberty must be understood in different terms entirely.

My argument will proceed as follows. In the next section, I will show that Mill holds that certain harmful acts are within an agent’s rights to perform. This implies that not all harmful acts

are open to coercive interference even in principle, which undermines the strong version of the harm principle. In the final section, I will show that Mill grants (or rather insists) that some harmless actions are not self-regarding and can legitimately be punished. Moreover, he holds that certain exercises of social power can be justified on grounds other than harm prevention. This undermines the weak, conditional version of the harm principle.

My conclusion raises two obvious questions, however, which I must answer on pain of suggesting that Mill has no coherent principle of political philosophy. First: What is the principle of liberty if it is not a harm principle? I offer an alternative interpretation of Mill’s central principle that coheres much better with his conclusions, not only in On Liberty but throughout his work. Second: How can my gloss of the principle of liberty allow for the prohibition of some harmless acts and accommodate grounds for coercion other than harm prevention? My account accommodates both these points, as no harm principle can. Since I will have to make certain controversial exegetical claims, which cannot be adequately defended here, I will frame them as modestly as possible. Even if my positive proposal must remain provisional, surely the critical argument is significant enough. It suffices to show that Mill does not hold what is almost universally taken to be the centerpiece of his political philosophy.

2. Against HP: The Harmful and the Self-Regarding

According to (HP), all harmful action can be interfered with legitimately, in principle. Harm prevention always provides pro tanto reason for compulsion, though this reason can be outweighed by considerations of expedience. Consider for example the use of alcohol. Although
any harm principle excludes paternalistic reasons, several arguments for prohibition appeal to prevention of harm to others than the user. While (HP) rules out certain grounds for prohibition, it does not grant individuals the right to use alcohol, or to do anything else that might harm others without their consent. (HP) thus makes almost every action subject to social control, even though most now agree that prohibition is in practice misguided as public policy.\textsuperscript{15}

Someone might respond that although drunk driving and perhaps public intoxication are harmful, surely (HP) protects the private use of alcohol. But the moralists of the Victorian temperance movement and the modern drug war claim that to permit even private intoxication harms others by degrading social norms. Though this style of argument tends now to be scorned about alcohol, it still gets applied to actions that are abhorred by moralists. Some contemporary philosophers would ban pornography on analogous grounds—that is, not for paternalist reasons but to improve the moral ecology by encouraging egalitarian gender relations, or to diminish the harmful indirect effects of consensual behavior deemed sexist. The argument that everything we do inevitably affects others has been so influential, from Mill’s contemporary critics to modern communitarians, that I will call it the \textit{central challenge} to Millian liberalism. As John Gray remarks, “Ever since \textit{On Liberty} was published, the commonest line of criticism of his argument has been that it presupposes what does not exist—a domain of purely self-regarding actions which non-trivially affect only the agent himself and no one else.”\textsuperscript{16}

\textsuperscript{15} See Ten: “What is crucial to Mill’s defence of liberty is therefore his belief that certain reasons for intervention—paternalistic, moralistic, and gut reactions—are irrelevant, whereas the prevention of harm is always relevant” C. L. Ten, \textit{Mill on Liberty} (Oxford: Clarendon Press, 1980), p. 41. Ten notes that his reading denies that the principle of liberty “creates an area of conduct which must always remain completely free from intervention” (ibid., p. 40).

Since the central challenge claims that (almost) nothing is harmless, it presents the advocates of (HP) with a dilemma. They must either narrow the notion of harm in their account of the principle, or else forego the classically liberal conclusion that there is a substantial region of individual liberty protected from social interference. I will argue first that the illiberal option conflicts intractably with the gist of Mill’s political philosophy, and then that this problem with (HP) cannot be solved with a technical notion of harm.

Notice how Mill summarizes the principle of liberty at the culmination of the paragraph introducing it: “Over himself, over his own body and mind, the individual is sovereign” (Liberty: 224). The trouble is that (HP) cannot secure the sovereignty of the individual even over his own mind and body. If only harmless actions are self-regarding, as any strong harm principle claims, then that class is small and insignificant. But this result can be avoided if the principle of liberty is understood as focusing on sovereignty over oneself rather than on harm to others, as I will ultimately propose. This reading accords with Mill’s summary of the principle, which has been overshadowed by the problematic initial statements given in the same paragraph.

Surely the doctrine of sovereignty over one’s own body and mind must be understood to grant (most) adults the right to use alcohol. If one cannot choose whether to drink, even in the privacy of one’s home, then it is hard to see what self-sovereignty amounts to.17 Indeed, Mill unequivocally rejects of the claim of a contemporary temperance group that sobriety can be compelled for the protection of society:

17 This is not to say that there is a right even to private intoxication under any circumstances. The advocates of (HP) sometimes create a straw man by framing their opposition in terms of an untenable absolutism. But self-sovereignty need not treat every superficial interference as a substantive violation of liberty. This point will be developed in §3.
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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; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them; for, the moment an opinion which I consider noxious passes any one’s lips, it invades all the ‘social rights’ attributed [to] me …

*(Liberty: 288)*

He clearly holds that prohibition and other attempts to give society the right to dictate the moral ecology by compulsion are not merely bad policies but violations of individual liberty.¹⁸

Mill’s disparagement of any conception of the freedoms of conscience that requires us to keep our opinions secret displays another commitment that cannot be squared with (HP): his uncompromising defense of freedom of speech. He repeatedly insists that the right to free speech issues from the principle of liberty. In Chapter One of *On Liberty*, which introduces and explicates the principle, he writes: “If the arguments of the present chapter 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” *(Liberty: 228fn)*. He then explicates his argument by considering a “single branch” of the principle of liberty in Chapter Two—which is titled “On the Liberty of Thought and Discussion”—after claiming that the liberty of thought is “impossible to separate [from] the cognate liberty of speaking and of

¹⁸ This is why it is misguided to suggest that Mill would be so appalled by pornography (whether as a prudish Victorian or a proto-feminist) that he would support its censorship. Cf. David Dyzenhaus, “John Stuart Mill and the Harm of Pornography,” *Ethics* 102 (1992): 534-551. Mill’s defense of the rights of individuality rules out attempts to shape the moral ecology coercively regardless of their merit. What is more, Mill defends sexual autonomy specifically on the grounds that private sexual activity concerns (not merely affects) no one but those involved: “What any persons may freely do with respect to sexual relations should be deemed to be an unimportant and purely private matter, which concerns no one but themselves” *(Diary, XXVII: 664)*.
writing” (Liberty: 227). This claim has perplexed scholars for two reasons. Mill does not immediately defend his claim that the freedoms of thought and expression are practically inseparable (by which he means inseparable in practice), and it seems obvious that expressions of opinion can harm others without their consent. The profession of certain immoral opinions harms some directly, by fittingly offending them, and harms the interests of others indirectly.19

Jonathan Riley expresses the consensus view when he writes, “as all agree, Mill says that self-regarding actions do not directly cause nonconsensual harm to others.”20 Not all interpreters agree with this claim, since in fact I reject it; but I grant that most do. Riley therefore thinks it obvious that Mill takes the expression of opinion to count as a social, other-regarding act: Mill “admits that ‘expressing and publishing opinions’ is not conduct of the ‘purely self-regarding’ kind which his central liberty principle asserts ought to be protected by right from all forms of cohesive interference.”21 Riley grants that Mill defends freedom of speech, which makes no exception for the falsity or immorality of an opinion, but he insists that Mill’s defense must be pragmatic rather than principled, on analogy with his defense of free trade. The same view of

19 Mill does not hold that any offense taken in the sincere moral beliefs of others is unfitting or irrational, which would be quite implausible. Some opinions are genuinely offensive in the normative sense: they merit offense. His insistence on the toleration of immoral opinion is consistent with his repeated claims that society should do more to criticize certain admittedly self-regarding conduct. Toleration does not preclude criticism but compulsion.


self-regarding action leads Brink to claim that Mill makes only a qualified defense of speech, which does not extend to harmful speech; hence, it might be compatible with (HP).22

Although I cannot consider Mill’s defense of free speech in the depth it demands, it is important to show that both these interpretations conflict intractably with Mill’s description of his argument and its conclusion.23 He explicitly states that “the principle of individual liberty is not involved in the doctrine of Free Trade” (Liberty: 293), because trade is a social act. This explains why it gets discussed in the final chapter of On Liberty, where he considers difficult applications of the principle to public policy, and pragmatic rather than principled arguments for liberty. Mill not only claims that the liberties of conscience constitute a single branch of the principle of liberty, by contrast, but places them among the rights that constitute a free society: “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” (Liberty: 225-6). Unlike free trade, Mill defends free speech as one of the rights of individuality protected by the principle of liberty, thereby undermining Riley’s interpretation.

Since Mill insists that “human beings should be free to form opinions, and to express their opinions without reserve” (Liberty: 260), Brink’s argument that he does not defend the toleration of harmful opinions rests heavily on a limiting case discussed immediately after this

22 Thus Brink claims that Mill “is clearly not a free speech absolutist, as his application of the harm principle to the corn dealer case illustrates.” Brink, Progressive Principles, p. 171. Rather, insofar as regulations on the expression of opinion “target genuine harm, and not mere offense, they would be defensible according to Millian principles” (ibid., p. 164).

23 See Daniel Jacobson, “A Defense of Mill’s Argument for the ‘Practical Inseparability’ of the Liberties of Conscience (and the Absolutism it Entails),” forthcoming in Social Philosophy and Policy, for an argument in favor of the absolutist interpretation of Mill’s defense of freedom of speech, and against these pragmatic and qualified interpretations. But the claim at issue here does not rely on this argument.
pronouncement: the corn dealer example. But if that example does not involve a harmful opinion that can legitimately be silenced, as Brink asserts, then his interpretation founders.

The corn dealer example is not intended to show that harmful opinions fall beyond the pale of toleration, but rather to illustrate that freedom of speech is consistent with prohibiting the expression of an opinion specifically in those contexts where it constitutes incitement to riot.\textsuperscript{24} Mill considered Proudhon’s doctrine that property is theft both misguided and harmful, especially to the poor, yet its profession must be tolerated in ordinary discursive contexts.\textsuperscript{25} It “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” (\textit{Liberty}: 260). Indeed, Mill explicitly extends his argument to the expression of harmful opinions. “However positive any one’s persuasion may be, not only of the falsity but of the pernicious consequences … of an opinion,” he states, its advocacy must nevertheless be tolerated (\textit{Liberty}: 234).

Mill’s defense of freedom of speech thus directly contradicts (HP), contrary to the conflicting interpretations offered by Riley and Brink. Recall the grounds for reading the principle of liberty as a strong harm principle. First, the seemingly official statement of the principle of liberty mentions “harm to others” prominently—though not univocally or even

\textsuperscript{24} This resembles point-of-view neutral “time, place, and manner” limits to the First Amendment. The corn dealer example thus belies Brink’s interpretation, since it concerns an opinion Mill thinks genuinely harmful, not just offensive (cf. fn. 22). Mill’s absolutism is as described: it is the doctrine that all opinions must be tolerated, albeit not in every context. This is what absolutists defend, not the straw man “anything, anytime, anywhere” position.

\textsuperscript{25} “We suppose the majority [of the poor] sufficiently intelligent to be aware that it is not to their advantage to weaken the security of property” (\textit{Representative Government}: 442).

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consistently. Second, in order for the principle to distinguish self-regarding action from action that society can legitimately prohibit or compel, it must be taken as a biconditional that identifies the self-regarding with the harmless. Perhaps we would be forced into this reading if Mill’s treatment of self-regarding action suggested that it is always harmless to non-consenting others, and if there were no other plausible interpretation of the principle of liberty. But neither condition holds. His treatment of the expression of opinion coheres with his view of self-regarding action in general, both of which conflict intractably with (HP).

Mill’s most developed discussion of self-regarding action confronts the objection that, because what we do to ourselves affects other people as well, (almost) any action that can be criticized on paternalistic grounds also harms others without their consent:

> 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. 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 [punishment].²⁶ *(Liberty: 281; emphasis added)*

This passage is remarkable because it speaks directly to the central challenge to liberalism, one version of which cuts specifically against Mill’s anti-paternalism. His response uses the example of intemperance already discussed in this regard. Although drinking is ordinarily self-regarding

²⁶ Mill actually ends this sentence with the phrase: “moral disapprobation in the proper sense of the term.” But this reflects his view that moral disapproval, an external sanction, can be used as a form of punishment; and it is clear from the passage as a whole that he is talking about what can properly be punished.
action, part of an individual’s sovereignty over her own body and mind, Mill states that it is *taken out of the self-regarding class* and loses its immunity to compulsion not when it harms others but when it leads someone to be unable to support her family or pay her debts. The sphere of liberty thus extends to certain actions granted to be harmful to others without their consent—indeed, harmful not only to their feelings but their interests—so long as they do not involve the violation of an obligation. Hence, some harmful action is self-regarding.

In this passage and elsewhere, Mill implies that the sympathetic distress of others—such as when your dissolute lifestyle makes your parents despair—provides no reason to compel you. Unless he excluded such emotional pain as ground for compulsion, even his anti-paternalism would be trivialized. This is just one example of the point that people are often pained by what others do to (or among) themselves. Something similar is true about the expression of opinion, since we often take offense at what other people say. Many interpreters attempt to explain the exclusion of such distress by attributing a tacit theory of harm to Mill, in hopes that a technical notion can make (HP) tenable as a reading of the principle of liberty. The simplest way to do so is to follow Brink’s suggestion that although mere offense and moral distress cannot justify coercion, “genuine” harm to non-consenting others does. Other versions have been offered, which follow the spirit of Rees’s claim that Mill draws a crucial distinction between harm to others and harm to their interests (see fn. 4). We can use Brink’s proposal as a model, without considering these variations, because they all fail for the same reasons.

There are three problems with this interpretive strategy. It is a substantively deficient theory of harm; it is inconsistent the account of harm Mill adopts throughout his work; and it
does not cohere with Mill treatment of self-regarding action. It is a bad theory because it fails to respect the first platitude about harm: that one would not knowingly choose to be harmed rather than not, other things equal. Yet everyone prefers minor physical damage to severe emotional distress. It cannot be Mill’s theory of harm because, whether or not he is a hedonist, he consistently holds that all pain is intrinsically bad. Finally, the attempt to focus exclusively on harm to interests conflicts with Mill’s account of self-regarding action generally and freedom of speech specifically.

Mill never underestimates the severity of offense and other forms of moral distress, even though it does not amount to reason to silence immoral opinion. Rather, he insists that “there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it” (Liberty: 283). The lack of parity between the pain of someone offended by an opinion and the pain of having one’s opinions silenced is not a matter of the comparative badness of the two states of affairs. Since emotional distress is bad qua pain, this claim cannot be based on such a comparison. If enough people are offended by an opinion, then it will be wrong to tolerate it, according to a direct utilitarian calculation. It is telling that Mill summarily rejects this conclusion with a peremptoriness impossible to square with this sort of utilitarianism:

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. (Liberty: 229)
The unqualified and peremptory nature of Mill’s defense of free speech can only be understood as being based on a rights claim. There is no parity in these cases because it is your right to express your opinions, just as it is your right to keep your possessions—even when the thief would benefit more from them. Certain forms of utilitarianism famously cannot respect rights—whether speech rights or property rights—because they seem to require the violation of rights whenever that would be optimal. Nevertheless, Mill makes such claims throughout his work, including in both On Liberty and Utilitarianism. Although he famously forgoes arguing for the principle of liberty on the basis of “abstract” rights not grounded in utility, his arguments frequently appeal to moral rights.27 “When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it,” Mill declares (Utilitarianism: 250). Although these rights are grounded in utility, they are genuinely binding regardless of the expediencies of the specific case.

In Mill’s view, rights issue from “certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life” (Utilitarianism: 255). This claim strongly suggests that he holds an indirect version of utilitarianism, such as rule utilitarianism.28 My interpretation thus

27 He writes, “I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility” (Liberty: 224), while insisting on a large class of liberty rights. These are moral rights, not merely (or always) legal rights.

predicts that Mill’s argument for freedom of speech should rest on exactly what he says it does: “the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of expression of opinion” (Liberty: 257-8).

This explains why Mill can be so peremptory in his rejection of censorship, despite the fact that the toleration of opinions offensive to the majority will produce much more bad feeling than those that offend only a small minority. Similarly, Mill’s rejection of an offense standard extends to the right for individuals to act in ways that others find disgusting and impious. “The practice [of eating pork] really is revolting to [Muslims]. They also sincerely think it is forbidden and abhorred by the Deity,” Mill acknowledges; but he rejects its prohibition despite this grave offense, because “with the personal tastes and self-regarding concerns of individuals the public has no business to interfere” (Liberty: 285). Mill thus acknowledges that moral distress can be severe, contrary to theories on which it does not count as genuine harm. But the individual’s right to self-sovereignty trumps the distress of others, however profound and whatever their quantity. (Matters are different when it comes to public indecency, as will be discussed later.)

The alternative to trying to salvage (HP) with a technical notion of harm is to recognize that, in Mill’s view, not all harm to others provides reason for social compulsion. This must be the correct interpretation, although it undermines (HP). We do not have the right to protection from all forms of harm, because the adoption of such a moral rule would be counterproductive. It would be impossible to enforce, create moral hazards, and conflict with justified rights claims. Moreover, Mill expressly rejects it. The most telling passage comes after he notes that even fair competition produces losers whose interests are harmed by being beaten out. He writes:
But it is, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering. (Liberty: 292-3; emphasis added)

This passage also explains why not all harms provide reason to compel: it is better (for the general interest of mankind) not to inhibit competition by trying to calculate the costs and benefits of allowing it in specific cases. This indirect utilitarian argument coheres with Mill’s account of rights, on which they issue from those moral rules necessary to protect the essentials of human wellbeing. Though he does not give a full account of these rights, his argument rests on claims that are relatively uncontroversial, at least from his classically liberal point of view which embraces the value of competition, individuality, and liberty. Since competition is the great engine of progress, it would be counterproductive for society to protect people from the harm of competitive loss. The progress of society rests on its willingness to battle the conformist tendencies of democracy so as to encourage individuality. And the principle of liberty itself rests on the conviction that the rights it establishes, despite allowing some harmful action, ultimately benefit society. Hence, when Mill discusses the most important moral rules, “which forbid mankind to hurt one another,” he adds, “in which we must never forget to include wrongful interference with each other’s freedoms” (Utilitarianism: 255).

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29 “The spirit of commerce and industry is one of the greatest instruments not only of civilization in the narrowest, but of improvement and culture in the widest sense” (“De Tocqueville on Democracy in America” [2], XVIII: 197.)

30 In his view, “the free development of individuality is one of the leading essentials of well-being” (Liberty: 261).

31 None of this talk of rights and obligations belies the logical priority of the good to the right, which is characteristic of utilitarianism. It simply makes moral rules issue in binding obligations, as Mill expressly claims.
This indirect utilitarian justification explains why some harmful actions are nevertheless self-regarding—that is, within the individual’s rights to perform—and why harm prevention is not always a good reason for compulsion. Mill’s casual references to acts that affect or harm no one but the agent himself (and similar phrases) are misleading but explicable. He is focusing on the most straightforward case for illustrative purposes. Most of the time, to harm someone against her will violates her rights. Despite the passages where he focuses misleadingly on harm, he also makes explicit the qualifications that must be read into these statements. I will illustrate this point by considering the two most difficult passages in *On Liberty* for my interpretation.

At the beginning of Chapter 5, Mill refers to “two maxims that together form the entire doctrine of this Essay” (*Liberty*: 292). First, insofar as one’s actions concern the interests of no one but himself, he is not accountable to society. Second, individuals may legitimately be punished for actions harmful to the interests of others. These maxims seem to divide action into two classes: the harmless, which is self-regarding; and the harmful, which is subject to social control. Although Mill immediately adds that not all harmful actions should be interfered with, that caveat can be read as making the pragmatic point that compulsion is not always expedient, which is consistent with (HP). The example that he uses to illustrate the point is not pragmatic but principled, however; it is the case of competitive losses, from which there is no right to immunity. Hence, the passage taken as a whole is inconsistent with any strong harm principle.

In the second case, Mill writes:

> Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law. (*Liberty*: 282)
This “whenever” appears to contradict my central claim. But this statement is expressly a summation—whence the “in short”—and it immediately follows the passage stating that self-regarding acts may be harmful so long as they do not violate any obligation. Moreover, Mill has previously described these obligations as “not injuring the interest of one another; or rather certain interests, which...ought to be considered as rights” (Liberty: 276; emphasis added). The italicized clause supports my interpretation by contracting (HP). Some harms to others, even harms to their interests, do not violate their rights.

This argument raises an obvious question. How should the principle of liberty be understood, if not as a harm principle strong enough to distinguish self-regarding from social action. My answer puts Mill’s claim about self-sovereignty at the heart of his fundamental political principle. It allows for the prohibition of some harmless acts, and it accommodates grounds other than harm prevention for coercion that falls short of an interference with liberty. This interpretation undermines any harm principle, however weak, and it shows that the principle of liberty must be understood in other terms entirely.

3. The Principle of Liberty is not a Harm Principle

Although the fact that some harmful action is nevertheless self-regarding belies (HP), it is consistent with the weak, biconditional version on which only harmful acts can be punished. The crux of my argument will be to show that every thesis associated with even a weak harm principle turns out to be false as a matter of interpretation. Thus “harm principle” is not just a misnomer but constitutes a fundamental misunderstanding of the principle of liberty.
After showing why the harm principle is too weak to support anything like Mill’s argument, I will develop an alternative that respects his doctrine of the rights of individuality. Then I will use three examples to illustrate its superiority to any harm principle interpretation.

(1) Consideration of harmless free-riding shows that some harmless actions are not self-regarding, and can legitimately be punished. (2) The case of taxation shows that harm prevention is not the only justifiable rationale for exercises of power that fall short of interference with an individual’s liberty of action. (3) Mill’s treatment of public indecency shows that severe offense counts as genuine harm, and that even moral distress can justify certain kinds of coercion. If these three claims are correct, then no doctrine associated with the harm principle remains viable. These examples also cut against interpretations that eschew the phrase “harm principle” but similarly identify the self-regarding as action harmless to non-consenting others.

As previously noted, the weak harm principle says nothing about when harm prevention constitutes a reason to interfere with liberty. Any such interpretation must deny that Mill means to imply that harm prevention always provides such a reason, lest it revert to (HP). But this is to reject his claim that the principle of liberty should “govern absolutely the dealings of society with the individual in the way of compulsion and control” (Liberty: 223). Since the harm principle does not circumscribe the appropriate region of human liberty, it must be supplemented in order to claim anything more than that those few actions that genuinely affect no one but the agent herself are immune to coercion. For instance, Turner has recently argued that “the harm
principle is merely an anti-paternalism principle.” Yet even a ban on paternalist reasons does not secure self-sovereignty, as the central challenge to liberalism insists—and as Mill admits. As he puts the point: “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” (*Liberty* 280).

This interpretation of *On Liberty* cannot be correct, as it is inconsistent both with Mill’s explicit conclusions and his arguments for them. His commitment to a substantial region of human liberty, containing “large departments of human life from which [coercion] must be unreservedly and imperiously excluded” (*Principles of Political Economy*, III: 937), is not limited to that essay and the principle of liberty at its core. No harm principle can support the leading thought of his political philosophy. Consider how Mill explicates the region of liberty he claims in the *Principles* to be immune to coercion:

> [T]here is a circle around every individual human being, which no government ... ought to be permitted to overstep. That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intervention, no one who professes the smallest regard for human freedom and dignity will call into question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not

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32 Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle,” *Ethics* 124 (2014), p. 301. Turner proposes to supplement the weak harm principle with a direct appeal to utility. “The second stage [of Mill’s defense of liberty], going beyond the harm principle, involves a tally of the specific social costs and benefit of interference, which fall under society’s rightful authority” (ibid.)—an authority that extends to all harmful acts. As Riley notes, this interpretation makes Mill an illiberal utilitarian. See Riley, “Illiberal Utilitarian?”
affect the interest of others, or affects them only through the moral influence of example. (*Political Economy*: 938)\textsuperscript{33}

Note that he again qualifies “does not affect others” by identifying another kind of harm against which we have no right to protection: harm from bad example. Since these too count as harms, Turner’s interpretation would subject them to a direct utilitarian calculus, whereas Mill excludes them from social interference in principle.

There is an alternative interpretation that respects Mill’s argument and does not compromise his conclusion. Instead of reading the epigram as a clumsy attempt at an official statement, it focuses on the conclusion of the paragraph, where Mill claims that his principle entails the sovereignty of the individual over her own body and mind. The doctrine of self-sovereignty rejects paternalism in the right way. It does not merely rule out certain reasons for coercion but supports Mill’s contention that that “[t]he only freedom which deserves the name, is that of pursuing our own good in our own way” (*Liberty*: 226). We cannot effectively pursue our own good all by ourselves, however, because we are social creatures whose happiness requires the liberty to unite with consenting others to pursue our shared projects. One way to put this point is that the freedom of association is *practically inseparable* from self-sovereignty. This is exactly what he claims about the liberties of conscience (ibid.).

Mill goes further to circumscribe the rights of individuality in Chapter One of *On Liberty* than he does in the *Principles* (which is primarily dedicated to economic issues). He expressly

\textsuperscript{33}This passage refers specifically to governmental coercion because it is taken from the “Limits of Laissez-Faire” section of the *Principles of Political Economy*, but the argument of *On Liberty* extends to social coercion as well.
characterizes these rights as comprising self-sovereignty, freedom of association, and “the liberty of conscience, in the most comprehensive sense” (Liberty: 225-6). The concept of self-sovereignty does not exactly cover the freedom of association, let alone the liberties of conscience as he understands them. It is important not to let the argument for my reading of the principle of liberty get sidetracked by the question of why Mill claims that freedom of expression is impossible to separate from freedom of thought.\textsuperscript{34} For present purposes, the argument can focus simply on self-sovereignty and the freedoms of speech and association. Although we might call Mill’s doctrine of the rights of individuality a sovereignty principle, its extension to expression and association shows that there is a better name for it: the principle of liberty.

This gloss of the principle of liberty as the doctrine of the rights of individuality, as Mill explicitly circumscribes them, is as much a principle as are the alternatives. It differs by setting out what primarily concerns others, an essentially normative claim, rather than what harms them, an ostensibly empirical claim.\textsuperscript{35} This normative claim is grounded in utility but mediated by rights based on the moral rules most essential to human wellbeing—just as Mill claims. Though the weak harm principle offers the most natural reading of the epigraph, when taken in isolation, my interpretation is more faithful even to that passage as a whole. Taken in context, that passage does not support (HP) at all, because it expressly rejects paternalism despite Mill’s admission that almost everything one does to oneself can affect and harm others without their consent.

\textsuperscript{34} For that argument, see Jacobson, “A Defense of Mill’s Argument for the ‘Practical Inseparability’ of the Liberties of Conscience.” In short, it is because justification, and hence knowledge, is social. The crucial point for present purposes is that the rejection of the harm principle obviates the need to claim that speech is harmless.

\textsuperscript{35} Insofar as interpreters are forced to use a technical notion of harm in their principle, which conflicts with commonsense and Mill’s own view, harm might be only ostensibly an empirical notion.
Moreover, harm principle interpretations cannot claim to be more coherent with utilitarianism. Orthodox utilitarianism of the sort attributed to Mill by Turner (and many others) does not support the dictum that harmless acts are immune to coercive interference, since that theory holds that it is legitimate to compel self-sacrifice whenever optimal. But Mill declares himself an unorthodox utilitarian, and his arguments cohere with certain indirect forms of the theory, at least given empirical claims that he expressly endorses. This is just how Mill justifies his central claim that people should be free to pursue their own good in their own way: “Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest” (Liberty: 226).

Having now sketched my alternative, I will now use three examples to show that no harm principle interpretation can respect Mill’s conclusions. These cases demonstrate that he does not draw a strict dichotomy between harmful and harmless actions, that harm prevention is not the only legitimate rationale for any exercise of power, and that even moral offense can justify those forms of social coercion that do not constitute interference with liberty.

The first example is free riding, where someone takes advantage of a public good without paying his share. Consider what two different forms of utilitarianism characteristically hold about it. According to simple act utilitarianism, when a free rider can get the benefit of the good without imposing any other costs, it is (at least) permissible to do so, other things equal. Rule utilitarianism typically holds that even harmless free riding is wrong, by contrast, on the grounds that the best set of moral rules will ban free riding quite generally. There are various

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36 See Jacobson, “Diversity of Utilitarianism.”
complications, but we need not attend to them here. The point is simply that different versions of utilitarianism come to different verdicts about harmless free riding.

What does Mill think about those cases where a moral rule, such as to pay one’s fair share, can be violated without cost? He speaks to just this possibility:

If a hundred infringements would produce all the mischief implied in the abrogation of the rule, a hundredth part of that mischief must be debited to each one of the infringements, though we may not be able to trace it home individually. ("Whewell on Moral Philosophy," X: 182)

Mill thus treats harmless acts of rule breaking as if they had bad consequences that, by stipulation, they do not actually have. This is not just an epistemic principle, which applies only when we cannot be sure whether a given case will undermine the rule. He consistently regards the rightness and wrongness of actions as issuing from moral rules grounded in the (expected) consequences of that type of action, considered generally. He consistently regards the rightness and wrongness of actions as issuing from moral rules grounded in the (expected) consequences of that type of action, considered generally. Hence, some harmless actions can be prohibited and punished because they violate a justified moral rule. It follows that not all harmless actions are self-regarding, contrary to even the weak harm principle.

It might be objected that though these are harmless token actions that can legitimately be punished, nevertheless the rationale for prohibiting this type of action is harm prevention. This objection amounts to a crucial retreat, since it concedes that some actions that affect the

\[\text{\textsuperscript{37}}\text{ For just one instance: "In the case of abstinences indeed—of things which people forbear to do, from moral considerations, though the consequences in the particular case might be beneficial—it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class which, if practiced generally, would be generally injurious, and that this is the ground of the obligation to abstain from it" (Utilitarianism: 220).}\]

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interest of no one but the agent himself are not self-regarding but can be prohibited for violating justified moral rules. This undermines the “two maxims” dichotomy—and the identification of the self-regarding with the harmless—by returning to the epigraph’s claim that the only good reason for the exercise of social power over an individual is to prevent harm to others.

Moreover, I contend that this proposal fails to respect Mill’s rationale for punishing harmless tokens of harmful types of action, which is better understood in terms of justice rather than harm prevention. Justice requires treating like cases alike, and the sentiment of justice that Mill finds deeply ingrained in human moral psychology balks at refusing to punish harmless free-riding. As he puts it:

>[T]he idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions that rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule. (Utilitarianism: 249-50)

Justice requires that the rule banning free riding must be applied to everyone and enforced against all infringements, whether or not they are harmful.

The second example shows that harm prevention is not the only legitimate rationale for any exercise of power over the individual. Almost immediately after introducing the principle of liberty, Mill states: “There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform” (Liberty: 224-5; emphasis added). If these “positive compulsion” cases are justified because they benefit others, as Mill explicitly claims, then certain
exercises of power can be justified on grounds other than harm prevention. Before coming to such a radical conclusion, we should examine the details of these rightful positive compulsion cases; to do otherwise would run contrary to my general approach to Mill interpretation, which avoids relying too strongly on any single passage.

When Mill goes on to illustrate his claim about positive compulsions, his examples seem to cut across the distinction between harm prevention and promotion of the good. Although he says that one must perform “certain acts of individual beneficence” (Liberty: 225) when they are obviously duties, his specific examples are rescue cases and protection of the defenseless, both of which count as harm prevention. But he also states that one can be compelled to “bear his fair share in the common defence, or in any other joint work necessary to the interest of the society” (Liberty: 225). Since conscription is the paradigmatic case of the self-defense of society, we can grant that it falls under the category of harm prevention as well. Yet many cases where collective effort is necessary for the good of society differ greatly from rescue and conscription, and Mill does not limit positive compulsions to those justified by harm prevention.

The most obvious case to illustrate this point is taxation, which must be considered an exercise of power over an individual. If Mill held any form of harm principle, he would seem to be committed to holding that tax revenue can only be used for the purpose of harm prevention, never for other benefits to society. There are two obvious problems with this constraint. First, it is untenable for any but the most minimal state. Second, Mill overtly contradicts this limitation

38 This alone entails that all versions of the harm principle, weak and strong, are false. But this short route to refuting harm principle interpretations rests heavily on a single passage, and it is merely a negative claim; it does not point to any better interpretation of the principle of liberty.
on the use of taxation. He defends taxation for such purposes as guaranteeing universal public education, albeit while insisting that the state must not have a monopoly on education (*Liberty*: 302). He also advocates for certain welfare programs—that is, taxation for broadly redistributive purposes—though he has classically liberal worries about those forms of public assistance that would diminish the incentive to work and “sap the very foundations of self-respect, self-help, and self-control which are the essential conditions both of individual prosperity and social virtue” (*The Subjection of Women*, XXI: 330). In short, Mill does not hold that taxation can only be used for the purpose of harm prevention.

I see two responses available to the challenge posed by legitimate positive compulsions. The first is to shoehorn these cases into harm prevention. That comes at the cost of blurring the line between preventing harm and promoting good, thereby undermining the second platitude about harm, on which any harm principle depends. The second response is more compelling. One might try differentiating between legitimate exercises of power and interferences with liberty, notwithstanding the fact that Mill uses both phrases in his initial statements of the principle of liberty. It is not implausible to think that taxation is an exercise of power that does not amount to an interference with liberty. Unlike prohibition, taxation does not rule out any type of action per se—except for the action-type created by the institution itself, namely tax evasion. Of course, your tax burden makes it impossible to do everything you could otherwise afford. But it is one thing for the state to ban foreign travel and another merely to make it more expensive.39

39 Mill recognizes the commonsense point that the line between taxation and prohibition can be blurred, but this does not undermine the intuitive distinction: “On this as on most other practical questions, many distinctions require to be made. To tax stimulants for the sole purpose of making them more difficult to be obtained, is a
Suppose then that we understand the principle of liberty not as restricting all exercises of power but only those that constitute interference with an individual’s liberty of action. For this limitation to save the harm principle, it must be the case that the only legitimate rationale for interference with liberty—as opposed to exercises of power like taxation, which do not prohibit any type of non-derivative type of action (e.g. tax evasion)—is harm prevention. Since we’ve seen that Mill peremptorily rejects the idea that putatively immoral acts performed in private by consenting adults can be interfered with on the grounds that they offend or distress others, any harm principle must combine the narrow focus on liberty of action with the familiar distinction between offense and “genuine” harm. The third example demonstrates that even this weakest vestige of a harm principle is untenable as an interpretation of Mill’s political philosophy.

The case of public indecency shows most clearly why the distinction between harmful conduct and harm prevention cannot save the harm principle, and it illustrates the superiority of my gloss of the principle of liberty. Mill asserts that some acts that fall within the self-regarding sphere when done privately can nevertheless be banned from public performance as offenses against decency:

[T]here 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 against good manners, and coming thus within the category of offenses against others, may rightfully be prohibited. (Liberty: 295)
Although modern readers of Mill sometimes treat his references to good manners and public indecency as quaint anachronisms, such a distinction between what can be done privately and in public is necessary for any tenable public policy. It is required in order for the liberal to get off of Feinberg’s bus—the parade of horribles that Joel Feinberg uses to motivate an offense standard—before its terminus in a *reductio ad absurdum* of the idea that only harm and not offense can justify interference with liberty.\(^{40}\)

The trouble for any harm principle is that, although it must make a sharp distinction between offense and harm in order to be remotely plausible as an interpretation of Mill, indecency causes merely emotional distress. Yet Mill here recognizes that actions such as public fornication and defecation can legitimately be prohibited precisely for their offensiveness. Consider again what my gloss of the principle of liberty puts in the realm of self-regarding action: the agent’s sovereignty over her own body and mind, freedom of association with other consenting adults, and the liberties of conscience. This protected sphere of liberty does not rule out restraints on public indecency, even those determined by popular morality. Mill’s broad defense of consensual sexual practices, which he claims concern no one but the parties involved, is a defense of private behavior. The principle of liberty does not guarantee any right to exhibitionism, since that does not fall under self-sovereignty, freedom of association, or the liberties of conscience. Only in the case of freedom of speech must the sphere of liberty reach into the public square—and we are mostly setting aside that argument here.\(^{41}\)


\(^{41}\) This is the most challenging problem for Mill’s defense of free speech, since the expression of opinion is public. Mill has distinctive arguments for that conclusion based on epistemological and psychological considerations.
This argument does not imply that every prohibition on indecency can be justified, or that limitations on public behavior cannot violate the principle of liberty. The point is rather that the prohibition of what Mill terms “offenses against decency” must violate any harm principle, since its rationale is the prevention of offense rather than (other forms of) harm. Yet Mill insists that some offensive but otherwise harmless actions can be prohibited from public performance.

The final question I proposed to answer is how my gloss of the principle of liberty succeeds where harm principle interpretations fail. How can it justify the punishment of certain harmless actions, and how does it allow for exercises of power whose rationale is not the prevention of harm? Once we understand the crux of the principle of liberty as the protection of the rights of individuality, we can make sense of both claims. When an exercise of power does not infringe on this sphere of liberty, it can be justified in various ways including by appeal to the benefit of society, as with taxation. Moreover, token harmless actions that violate a moral rule can legitimately be punished, as with harmless free riding. And certain harmless actions that are immune from interference when done in private can nevertheless be prohibited from public performance as indecent. Mill does not draw any strict line between offense and other forms of harm, contrary to all harm principle interpretations, but instead distinguishes the specific forms of harm from which we have a right to protection. He includes offense taken in public indecency as such a harm—as does every actual human society, albeit in different ways.

When the principle of liberty is understood as defending the existence of a substantial sphere within which the individual is sovereign, Mill’s conclusions have a chance of success. His argument hangs on indirect utilitarian premises that he expressly avows, concerning the
importance of individual freedom for human flourishing. He can defend the right to perform potentially harmful actions manifesting this self-sovereignty without jeopardy from the claim that everything we do can affect others harmfully. And he can reasonably describe the leading thought of *On Liberty* as the defense of the doctrine of the rights of individuality. Mill’s principle of liberty is the declaration of a substantial region of life properly immune from compulsion; it is not a harm principle.