

JOHN STUART MILL

‘The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.’ (*Essay on Liberty* John Stuart Mill [1859].)

This is Mill's *harm principle*, which has had great influence in determining what behaviour should be made unlawful. It is based on Mill's emphasis on **LIBERTY** (aka freedom) where law is seen as a constraint on the exercise of individual liberty or freedom so, in order to allow as much liberty as possible, there should be as little legal interference as possible.

In arguing that the only justifiable constraint on an individual's exercise of his/her liberty is in order to prevent harm to others, J S Mill distinguished two types of behaviour:

1. **SELF-REGARDING ACTION** - this is behaviour by an individual that affects no one else; and
2. **OTHER-REGARDING ACTION** - behaviour that affects others.

“Mill...say[s] that the law may legitimately take an interest in our ‘*other-regarding*’ but not our ‘*self-regarding*’ behaviour. He defines self-regarding behaviour as behaviour which affects only oneself or other adults who have voluntarily consented to be affected.” (*Understanding Jurisprudence* D Meyerson p.135)

In respect of self regarding action, Mill argued that the individual was **SOVEREIGN**. As such behaviour affects no one else, then, by definition, nobody else can intervene or seek to constrain it, even if it causes harm to that individual, e.g. Parliament cannot pass laws banning such behaviour. Each individual should have the liberty (or freedom) to make their own decision on such matters. For example, it should be left to each individual to decide if they want to smoke 60 cigarettes a day or drink alcohol to excess, rather than the state passing laws banning that behaviour. As to other-regarding action, only such behaviour that causes **HARM** to others should be constrained/controlled/made criminal.

On the basis of these two criteria, murder, assault, rape and theft would, for example, all be criminal offences, because they clearly are all forms of behaviour that are ‘other regarding action’ that harms others. However, victimless behaviour that only affects the individuals engaging in it, such as cigarette smoking or the taking of soft drugs, or activities that involve all parties consenting e.g. prostitution and other forms of sexual activity that some would deem deviant etc., does not cause harm to others, even if some of this behaviour harms the individuals indulging in it, e.g. smoking cigarettes. These are self regarding actions and, consequently, should **NOT** constitute a criminal offence.

In this respect, Mill was the great **ANTI-PATERNALIST**. This means that he objected to the state passing laws in order to protect individuals, against their will, even if it is aimed at benefitting those individuals. Critics of road safety legislation such as that which requires car drivers and passengers to wear seat belts and motor cyclists to wear crash

helmets usually adopt a Mill anti-paternalist perspective by arguing that such legislation smacks of the **NANNY STATE** intervening into matters that should be left to individual choice. A good recent example of the harm principle in action is displayed by some of the views opposing the following Bill currently going through Parliament.

TOBACCO AND VAPING BILL 2024

The Bill makes it illegal for anyone born after 2008 to buy cigarettes and clamps down on e cigarettes that appeal to children. On 16 April 2024, it had its 2nd Reading in the House of Commons, passing by 383 votes to 67. However, only half of Conservative MPs voted in support of the Bill, with a number of critics embracing the harm principle by claiming that it should be left to individuals to decide whether to smoke or not, rather than the state passing a law banning smoking.

Support for the Bill was, however, provided by the chief nursing officers of England, Scotland and Wales and Northern Ireland in an open letter:

“In an unusual intervention, the four chief nursing officers said they were in favour of the...Bill...They wrote in the open letter:

‘As nurses and midwives, we have witnessed the huge harm and devastation that smoking causes for individuals, families and society as a whole as a result of preventable illness, death and health inequalities.’ (The i newspaper 16.4.24)

Criticism of this view, reflecting Mill’s harm principle, was made by a number of Conservative MPs, including two former Prime Ministers:

“The former Prime Ministers Liz Truss and Boris Johnson have led Conservative opposition to the phased smoking ban, describing it as ‘nanny state’ and ‘absolute nuts’ respectively.” (The Times 16.4.2024)

“Liz Truss led attacks in the Commons on what she called a ‘fundamentally un-Conservative’ measure that she said was ‘emblematic of a technocratic establishment in this country that acts to limit people’s freedom’. She accused ministers of caving in to the ‘health police’ as she blamed Sir Chris Whitty, the government’s chief medical adviser, and other professionals for pushing policies based on ‘a belief that government knows best’.” (The Times 17.4.2024)

In its editorial on April 17th 2024, The Times challenged these views:

“Those who mobilise liberty of the individual as an argument for allowing fellow citizens to poison themselves to death by inhalation of tobacco – while poisoning others around them – may as well deploy that argument in favour of heroin. Governments ban all kinds of lethal things. In Britain guns are hard to get; in America access is much easier. Britons are less free than Americans when it comes to owning a handgun or semi-automatic carbine but distinctly more ‘free’ when it comes to surviving a robbery...Boris Johnson and Liz Truss...both deployed the sham ‘freedom’ argument...[b]ut then in 2006 Mr Johnson described child safety seats in cars as ‘crack-brained’.”

CRITIQUE OF MILL'S HARM PRINCIPLE

1. In respect of Mill's so-called 'self regarding' action is the claim that 'no man is an island'. What this means is that nearly all behaviour that an individual pursues affects someone. Thus, there is, from this perspective, a very limited scope to 'self-regarding action' - if any scope at all.

2. This brings us to a second criticism, which centres on Mill's definition of liberty. Mill presupposes that law and state action automatically threaten liberty. Laws and other state action, for Mill, constitute constraint, control and limitations on liberty. Others challenge this. They argue that, in fact, law and state intervention are sometimes necessary in order for liberty (or freedom) to be achieved. In a laissez faire economy, runs this argument, there are winners and losers, the latter often living in poverty. To say they have liberty is absurd - they only have the liberty to be poor which is a sham liberty. Therefore state intervention, such as laws, are required to establish a welfare state in order to bring the poor out of poverty in order to give them effective liberty. Laws and state intervention, therefore, are not always a threat to liberty, rather they can be a vehicle to **achieve** liberty