

The Three (Four) Criteria of Legitimate Coercion in Mill's Moral Theory

I Introduction

When analysing the scope and nature of Mill's "one very simple principle" in *On Liberty*, it is understandable that scholars focus on his initial articulation of the Principle in the opening pages of the essay:

“that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their numbers, 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.”¹

This passage comprises the starting point for the understanding of what has come to be known as Mill's Principle of Liberty. It states that the only legitimate *reason* for coercively interfering with a person's liberty is self-protection and to prevent harm to others. Shortly thereafter, Mill clarifies that “it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference.”² This passage is key, because it makes clear that though self-protection and the prevention of harm to others are the only reasons for legitimate coercion, and that other reasons may weigh in *against* this sanction. The purpose of the Principle is to assert that when no harm to others is involved, or self-protection not at risk, individual liberty cannot be restricted. By providing the only reason for legitimate coercion, and not telling us when coercion is legitimate, the Principle supplies the necessary – *though not sufficient* – conditions that must be met before legitimate coercion or punishment is warranted. In this article I want to offer a new way to understand both the necessary and sufficient conditions for coercive interference. In order for coercive interference to be legitimate in response to, or in anticipation of an action, the action must meet three criteria: it must be other regarding, harmful, and most importantly, wrongful. Wrongfulness is indicated by the arousal of a modified desire to punish the wrong-doer. What constitutes coercive interference for Mill is another point of controversy in the literature, but he does make

¹ John Stuart Mill, “On Liberty”, in *Collected Works XVIII*, J.M. Robson (ed.), (Toronto: Routledge, Kegan & Paul), 1977, p. 223.

² Mill, “On Liberty”, p. 292.

clear that punitive coercive interference can range from state coercion (e.g. taxes, fines, imprisonment) to the moral condemnation of society, to the actor's own guilty conscience. When a wrongful harm to others is committed, a guilty conscience and the moral condemnation of society are the minimum punishments. In order for the state to exercise its penal authority, the action must also be grave enough that the costs of exercising such authority does not exceed the benefits, and such utilitarian calculations are usually (though not always) institutionalized in positive law (from henceforth I will only discuss the punishment of such actions). Before articulating the four criteria and the advantages of understanding the legitimacy of coercion in this way, I briefly discuss some of the confusions that arise from conflating these criteria with the notion of harm.

II Harm and Legitimate Coercion

Ambiguity over the scope of legitimate coercive interference has led to diverging interpretations of his entire liberal-utilitarian project.³ Mill's stated aim in *On Liberty* is to correct the balance between individual freedom and social control.⁴ Individuals feel at liberty in some matters where they ought not to, and simultaneously individuals experience coercive interference in other matters where they ought not. To correct this imbalance, Mill concerns himself primarily with the social norms within culture and society, and to lesser extent with the law. As Chapter III eloquently argues, the introspective development of individuality is necessary both for individual well-being, and for social progress. Mill views the tendency to conform to the standards of conduct determined by tradition, custom, or the preferences of the "ascendant class" as the chief obstacle to progress and happiness.⁵ This tendency to conform, which exists

³ Maurice Cowling and Joseph Hamburger question Mill's inclusion in the liberal tradition. See Maurice Cowling, *Mill and Liberalism*, (Cambridge: Cambridge University Press, 1990); and Joseph Hamburger, *John Stuart Mill on Liberty and Control*, (Princeton: Princeton University Press, 1999). Isaiah Berlin and C.L.Ten argue that Mill's doctrine is in tension with its own utilitarian and liberal commitments. See Isaiah Berlin, "Two Concepts of Liberty", in *The Proper Study of Mankind*, Henry Hardy and Roger Hausheer eds., (London: Pimlico, 1998); Ten, C.L., *Mill on Liberty*, (Oxford, Clarendon, 1980). The vast majority of the literature on Mill seek to provide charitable interpretations of Mill's liberal-utilitarianism. Some examples include Berger, Fred, *Happiness, Justice, and Freedom*, (Berkeley, University of California Press, 1984); Gray, John, *Mill on Liberty: A Defence*, (London: Routledge, 1996); Habibi, Don, *John Stuart Mill and the Ethic of Human Growth*, (Dordrecht, NL: Kluwer Academic Publishers, 2001); Riley, Jonathan, *Mill on Liberty*, (London: Routledge, 1998).

⁴ Mill, "On Liberty", p. 220.

⁵ Mill, "On Liberty", p.221, 261.

simultaneously with the need to express one's uniqueness, exists largely because the defenders of tradition, custom and aristocratic preferences wrongly elevate their displeasure of deviations from their standards of conduct to the level of moral disapprobation. Many people “consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings”.⁶ Therefore, Mill attempts to differentiate between actions that, though unpopular, must be tolerated, and actions that rightly incur moral condemnation or even physical punishment.

In light of the statement of his 'one very simple principle', scholars have focused on Mill's conception of harm in order to understand how he strikes the right balance between liberty and control. The problem is that Mill never explicitly defines harm. Scholars use harm as a term to denote a range of particular adverse effects, and are forced to deduce its scope from its relationship to the Principle of Liberty, and Mill's disparate discussions on the legitimacy of coercion. The textual evidence is ambiguous. For example, there are plenty of passages to interpret Mill as utilizing a narrow conception of harm. Mill argues that the only justification for moral judgement-cum-punishment is “injury to others” (pg. 261). “definite damage” (pg. 282), “injuring the interests of one another” (pg. 276), or “offences against the rights of others” (pg. 279). And even if a person experiences such a harm, it must have been “directly” and in the “first instance”.⁷ Mill wants to exclude harms that are “merely contingent” (pg. 282), or at best be considered “constructive injury” (pg. 282) to a person as a valid reason for coercive interference.⁸ Such a narrow conception of harm combined with the requirement of strict causality, has the effect of enlarging the individual sphere of liberty, but at the cost of allowing all sorts of adverse consequences to other people that do not quite meet these stringent requirements for societal protection. If *maximizing* the socio-political space for individuals to explore their individuality is Mill's goal, then there is a clear advantage to minimizing the conception of harm, which then provides the broadest protection for individuals who would otherwise be tyrannized by public opinion.

At the same time, there are also passages suggesting Mill holds a rather broad conception of harm that includes actions no less controversial today, than they would

⁶ Mill, “On Liberty”, p 283.

⁷ Mill, “On Liberty”, p. 225.

⁸ Page numbers refer to *Collected Works, Vol XVIII*.

have been during his time. “It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society.”⁹ Throughout his writings, Mill puts great emphasis on the importance of education for a variety of ends, and so to claim that such neglect is criminal is consistent with the wider trends in his thought. However, it seems highly debatable whether Mill can cast society as the victim of the “moral crime” of a poor upbringing of one of its members. Mill goes so far as to consider multiple offspring in a highly populated country a “serious offence” against the country's workforce!¹⁰ To include such uncertain consequences in the concept of harm would seem to render it so inclusive as to defeat the stated purpose of the essay. Such a broad conception of harm gives ammunition to the people who elevate their personal displeasure to the level of moral outrage in order to oppress nonconformists, the very same people Mill seeks to protect.

Whether the text supports a broad or narrow conception of harm, Mill makes clear that some harms to others are to be tolerated by society. Some legitimate pursuits necessarily entail thwarting other people's interests, such as economic competition. “Whoever succeeds in an overcrowded profession, or in a competitive examination...reaps benefit from the loss of others, from their wasted exertion and their disappointment.”¹¹ Nonetheless, it is “by common admission, better for the general interest of mankind, that persons should pursue objects undeterred by this sort of consequences.”¹² Mill calls this limit to the Principle of Liberty the Doctrine of Free Trade, which “rests on grounds different from, though equally solid with, the principle of individual liberty asserted in the Essay.”¹³ In other words, even though failure in the market economy, as described by Mill, would seem to warrant protection by society, there are good reasons for society to allow such failures. Mill does not explicitly state these reasons, but such reasons can only be conduciveness to the promotion of utility. This reason is, of course, the ultimate justification for the Principle of Liberty as well.

⁹ Mill, “On Liberty”, p. 302.

¹⁰ Mill, “On Liberty”, p. 304.

¹¹ Mill, “On Liberty”, p. 292.

¹² Mill, “On Liberty”, p. 293.

¹³ Mill, “On Liberty”, p. 293.

Mill argues for liberty in terms of its instrumental value to knowledge, individuality and progress, without reference to the ultimate standard of utility (apart from the passing reference made in the introduction). The “different grounds” of Doctrine of Free Trade are its economic benefits to society, and this justification is “equally strong” because like the other benefits of liberty, economic benefits are also conducive to utility.¹⁴ That said, conduciveness to utility also limits the doctrine on Free Trade, by allowing the state to coercively maintain standards of safety and to prevent fraud.¹⁵ Ultimately, in order to know when coercive interference is legitimate, it will be necessary to appeal to the standard of utility, which necessarily entails moving beyond the arguments in *On Liberty*.

The final difficulty to address is the supposed necessity of harm itself. Even though the Principle of Liberty is primarily about demarcating the sphere of individual liberty, rather than stating when coercive interference is legitimate, it appears that there are certain cases where individuals can be coercively interfered with even when they are engaged in no activity at all. Mill recognizes that it is possible to harm others by inaction, in addition to by action. Such cases as “saving a fellow-creature's life”, or “interposing to protect the defenceless against the ill-usage” can be made legitimate obligations by circumstances.¹⁶ Even though holding people morally responsible for not preventing harm is the exception to the rule of holding them responsible for causing harm to others, Mill recognizes that there are cases grave enough to justify this exception. Similarly, but more problematically, Mill also claims that individuals can be compelled to perform positive acts of beneficence for the maintenance of society. Obligations like testifying in court, or serving in the military, “society is justified in enforcing at all costs to those who endeavour to withhold fulfilment.”¹⁷ Such enforceable obligations seems troubling because it would mean that despite the Principle of Liberty demarcating a sphere of absolute liberty, there exist grounds for the state to coercively interference in the lives of

¹⁴ One of the difficulties for Mill scholars is that he does not explicitly argue for the individual liberty in terms of utility maximization. His arguments vary: in Chapter II argues that liberty promotes the growth of knowledge, and Chapter III argues that liberty is required for individuals express their individuality. The problem is that Mill nowhere makes the subsequent argument that knowledge and individuality promote utility, even though he is committed to this position. Supplying the link between liberty and utility has been the primary challenge for the revisionary literature in Millian scholarship. See Gray, Berger, Lyons, Riley, Crisp, Rees, Wollheim, etc...

¹⁵ Mill, “On Liberty”, p. 293.

¹⁶ Mill, “On Liberty”, p. 225.

¹⁷ Mill, “On Liberty”, p. 225.

people who otherwise abide by the Principle. This question over the scope the Principle has lead to diverging interpretations offered by D.G. Brown and David Lyons. Brown attaches much weight to the reasons Mill provides for legitimate coercion. In order to legitimately coerce an individual, “the conduct from which it is desired to deter him, must be calculated to produce evil to some one else.”¹⁸ Brown thus ascribes to Mill a fairly laissez faire version of the Principle, one that makes it impossible to justify the legitimacy of coercing individuals to perform positive acts of beneficence or to help maintain society.¹⁹ David Lyons, on the other hand, considers these several obligations that Mill imposes on all people living in society, and concludes that the Principle is not so much about preventing harmful conduct, and more about preventing harm in general.²⁰ Such a reading finds no contradiction of the Principle with Mill's several statements that the state can compel its citizens to take positive steps to maintain society. Finally, the contractual obligations of citizenship aside, one difficult passage makes clear that even some actions harmless to other people can be legitimately coerced.

“Again, there are many acts, which, being directly injurious only to the agents themselves... but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency”.²¹

The crucial feature of this class of actions is the fact of publicity. Harm is still involved, but it is experienced by the (presumably) consensual participants themselves. This application of punishment also seems to clash with Mill's statement that even within a country whose majority was Muslim, it would be wrong to prohibit the eating of pork, despite the widespread offence caused.²² If we wish to maintain any relationship between harm and the legitimacy of punishment, we need to ascertain what it is about indecency that makes it punishable in public but not in private, while the religious offence a Muslim may experience, or the financial destitution one may incur in the market do not legitimate coercive punishment. In light of Mill's discussion of the positive demands of society and

¹⁸ Mill, “On Liberty”, p. 224.

¹⁹ D.G. Brown, “Mill on Liberty and Morality”, in *Philosophical Review*, 81 (April), p. 136.

²⁰ David Lyons, *Rights, Welfare and Mill's Moral Theory*, (New York: Oxford), 1994, p. 96.

²¹ Mill, “On Liberty”, p. 295.

²² Mill does not specify whether he is referring to the public or private consumption of pork.

his prohibition of indecency, it seems questionable if harm even supplies the necessary condition for the legitimacy of punishment.

III The Four Criteria

Other-Regarding

The first criterion that must be met is that the action in question must be other-regarding. That is to say, there must be some perceptible consequence to someone other than the agent. One of Mill's central aims in Chapter IV of *On Liberty* is to establish the distinction between actions that concern others, and actions that concern only the agent. Mill's project depends on the possibility of isolating a self-regarding sphere within which moral appraisal is not appropriate, and indeed much of the initial criticism of *On Liberty* turned on this very point, that no action can ever be truly self-regarding.²³ The problem is that Mill conflates his statements about the distinction between the self- and other-regarding spheres of action with his discussion of the particular effect relevant to legitimate coercion, harm. For example, he states that "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it."²⁴ Or, "When... 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".²⁵ Finally, "the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself."²⁶ These statements are helpful for our understanding of harm (as I will discuss below), but they imply that the distinction between the self- and other-regarding spheres *is* this adverse effect - harm. In other words, only actions that harm other people are properly considered other-regarding. To think of actions that only harm other people as properly being other-regarding is to construct a normative notion of other-regarding that would be contestable. When Mill describes the liberty of expression, he implies that such a normative notion is at work with regards to the Principle.

²³ For an excellent summary of this line of criticism, see J. C. Rees, "A Re-Reading of Mill On Liberty", in *J. S. Mill On Liberty in Focus*, John Gray and G.W. Smith eds., (London: Routledge, 1996), p. 171.

²⁴ Mill, "On Liberty", p. 276.

²⁵ Mill, "On Liberty", p. 281.

²⁶ Mill, "On Liberty", p. 292.

“The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.”²⁷

And sure enough, the literature on the Principle of Liberty has taken this course, originating in the works of Rees and Wollheim, as I will discuss in the next section.²⁸ For Mill, and his interpreters, the purpose of the Principle is to de-legitimize the unfounded moral outrage of slavish Victorians, but we need not do so because nonconformity is not 'other-regarding', in some normative sense. By making explicit the three criteria that must be met before coercion is appropriate, we have other resources to discount the false moral outrage of people attempting to defend Victorian values. And while the Rees-Wollheim line of argumentation does help clarify the nature of morally significant actions (and help defend against *On Liberty's* initial critics), it also raises an ambiguity, as Jonathan Riley points out. Is the self-regarding sphere really one in which a person's conduct does not affect any one else's interests, or is the self-regarding sphere the net sum of all those actions that are protected by the Principle, whether they affect other people or not?²⁹ I will address this question shortly.

In Chapter IV, Mill considers some complications to the sovereignty of the self-regarding sphere, such as when an individual's activities derivatively affect people who depend on the individual. But Mill rightly states when an activity causes one to violate an express or implied commitment to another person, the activity really is other-regarding, even if no one perceives it.³⁰ Mill also considers the possibility of an activity serving as a bad example to others, such as when a child witnesses the local drunk imbibing liquor on his front porch. Here, Mill also seems to employ the normative notion of self-regarding

²⁷ Mill, “On Liberty”, p. 226.

²⁸ J. C. Rees, “A Re-Reading of Mill On Liberty”, in *J. S. Mill On Liberty in Focus*, John Gray and G.W. Smith eds., (London: Routledge, 1996), p. 174. Richard Wollheim, “The Limits of State Action”, in *Mill's Moral, Political and Legal Philosophy*, C.L.Ten ed., (Aldershot: Ashgate, 1999), p. 96.

²⁹ Jonathan Riley, *Mill on Liberty*, (London: Routledge), 1998, p. 93.

³⁰ Mill, “On Liberty”, p. 281. Mill considers the case when an individual's activities are a detriment to her material resources or mental capacities, and whether the activity in question affects others who depend on her. He also considers if the activity in question might serve as a bad example to others, and thusly fall under society's jurisdiction. Whereas the former case is properly the concern of society, the latter case is one that society should endure so as to expand the sphere of liberty.

when he asserts that “the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.”³¹ Very quickly, the distinction between the self and other regarding spheres becomes contentious, if we follow the Rees-Wollheim interpretation. However, if we consider the self-other distinction as in independent criteria for the legitimacy of coercion, then we can use an empirical and ordinary sense of the distinction between self- and other-regarding actions. First of all, there is a self-regarding sphere, within which an individual has a *prima facie* right to absolute liberty. This sphere contains, at the minimum, a person's body and mind. Beyond this minimum, if the individual engages in activity that is not perceived by others, then this activity would also fall into this sphere. This ‘private’ realm would constitute the *minimum* sphere of action within which one was totally at liberty. There will, of course, be dispute over what constitutes this sphere, and what constitutes “perception”. Mill never uses such terms in relation to the distinction, but he does limit the scope of the Principle to consequent effects “directly, and in the first instance”.³² Other-regarding activity would entail actions that are perceptible by other people, simply put. And since nothing is riding on this particular aspect of an activity, we can accept activity like speech or being visible to the neighbour's children as being other-regarding. For the purposes of determining the legitimacy of coercion, instead of focusing on *whether* an activity affects other people or not, we should accept that all activities affect other people in some way, as Stephen argues.³³ The legitimacy of coercion turns on whether an activity has a specific affect on others, namely, if it harms them.

Harm

The second criterion that must be met in order for coercion to be legitimate is that activity must be harmful, which is independent to whether it is self or other-regarding. The best way to understand Mill's conception of harm, is to build on a tradition of interpretation within the revisionary treatment of Millian scholarship. J.C. Rees is influential in distinguishing between actions that merely affect others, and those than

³¹ Mill, “On Liberty”, p. 282.

³² Mill, “On Liberty”, p. 225.

³³ James Fitzjames Stephen, Liberty, Equality and Fraternity. R. J. White (ed), (London: H. Elder and Co.), 1874, FIND CITATION.

affect people's *interests*.³⁴ However, one could be said to have an interest in market success just as one could have an interest in bodily integrity. This definition merely shifts the interpretive burden from "harm" to "interest", and so further clarification is needed. Richard Wollheim rightly perceives Rees's conception of harm as too "conservative" and "relativistic".³⁵ A Christian might have an interest in forgoing all business and leisure activities on Sunday in order to properly observe the *Sabbath* (and, in fact, may have a divine interest in *others* doing the same), and could, on Rees's account, claim to be harmed when compelled to engage in some such activity. The Muslim example that Mill cites in Chapter IV of *On Liberty* clearly indicates that he was aware of such cultural relativism, and wanted to exclude interests derived from particular religious outlooks. Indeed, Wollheim specifically articulates his notion of harm to exclude such "morally-dependant-harms",³⁶ which is intended to reduce the legitimate sphere of interests (with regard to legitimate coercion) to those that are generic, as opposed to those that are derived from a more parochial identity. Is this sufficient? First of all, and as C.L. Ten notes, this interpretation is essentially a departure from the classical utilitarian framework from which Mill hails.³⁷ Bentham, for example, attached equal value to equal amounts of pain, regardless of their source or nature, just as he attached equal value to equal amounts of pleasure, regardless of its origins. Wollheim's reading disregards much of the professed harm experienced by religious fundamentalists, so prevalent in modern society. Furthermore, it presupposes an "unencumbered self", one that can differentiate between those harms that occur from damaged generic interests, and harms that originate from a specific religious belief about the world.³⁸ Dale Miller proposes thinking about interests in terms of the Rawlsian basic structure of society, or Brian Barry's Lockean civil

³⁴ J. C. Rees, "A Re-Reading of Mill On Liberty", in *J. S. Mill On Liberty in Focus*, John Gray and G.W. Smith (eds.), (London: Routledge, 1996), p. 174.

³⁵ Richard Wollheim, "The Limits of State Action", in *Mill's Moral, Political and Legal Philosophy*, C.L.Ten (ed.), (Aldershot: Ashgate, 1999), p. 96.

³⁶ Wollheim, "The Limits of State Action", p. 102. The term "morally-dependant-harm" comes from Ted Honderich, "'On Liberty' and Morality-Dependant Harms", in *Mill's Moral, Political and Legal Philosophy*, C.L.Ten (ed.), (Aldershot: Ashgate), 1999.

³⁷ C.L. Ten, "Mill's Defence of Liberty", in *J. S. Mill On Liberty in Focus*, John Gray and G.W. Smith eds., (London: Routledge, 1996), p. 229. C.L. Ten, "Mill on Self-Regarding Actions", *Philosophy*, (Cambridge: Cambridge: University Press), vol, 43, no. 163, January 1968, p. 33.

³⁸ For the full utilization of the "unencumbered self" to critique Rawls, see Michael Sandel, "The Procedural Republic and the Unencumbered Self", in *Communitarianism and Individualism*, Shlomo Avineri and Avner de-Shalit eds., (Oxford: Oxford University Press), 1992.

interest.³⁹ We should only acknowledge as interests the generic means to attain a person's ends, such as liberty, health, and income, among others. Hence, we can exclude the harms derived from particular religious or philosophical interests, in favour of protecting everyone's interests in free speech and Millian experiments in living. This strategy is a very promising line of interpretation, although it is still controversial for the same reasons that Rees and Wollheim's conception of harm are, namely, from the utilitarian perspective, it is not clear why we should exclude these interests if significant numbers of people claim them as central to their ends. Clearly, a more refined concept is needed to limit the morally significant harms that get factored into considerations about punishment.

Thinking of legitimate coercion as entailing various criteria supplies the resources to discount these sorts of morally derived harms, not because of their suspect sources, but because they are essentially *self-inflicted*. Ten and Jonathan Wolff ask how it is that the source of a harm renders it categorically different, from a utilitarian standpoint.⁴⁰ A Muslim or Jewish person might experience great shock and dismay at the mere thought that her neighbours were freely and happily eating pork. Must we completely disregard the harm from thought of others eating pork, as opposed to harm from the sight of it? On the one hand, we could say yes because society has such a strong interest in individuals being capable of performing experiments in living, in this case experiments with pork, as to *always* outweigh the dis-utility of the shocking thought, and this is the position that Wolff takes in justifying what he calls, the Indecency Principle.⁴¹ It expands the other-regarding sphere to include speculation. The mere thought of someone's behaviour would then convert that behaviour into an other-regarding one, and if it were injurious enough to one's fragile sensitivities, would constitute harm. This interpretation would be more consistent with classical utilitarianism, but also shrinks the self-regarding sphere into non-existence.

³⁹ Dale E. Miller, *J.S. Mill*, (London: Polity Press), 2010, p. 120.

⁴⁰ Wolff, "Mill, Indecency, and the Liberty Principle", p. 5. Wolff is actually citing Jonathan Riley with this question. See Riley, Jonathan, 'One very Simple Principle', *Utilitas* Vol. 3, 1991, p. 23. C.L. Ten, Mill's Defense of Liberty, in *J. S. Mill On Liberty in Focus*, John Gray and G.W. Smith eds., (London: Routledge, 1996), p. 233.

⁴¹ Wolff, "Mill, Indecency, and the Liberty Principle", p. 155.

The self-regarding sphere is clearly intended to be the actual spatial-conceptual realm wherein one's actions do not affect anyone else. As Mill's contemporary critics have argued, no such sphere can exist because everyone's actions affect others, even if in remote ways. Demarcating some boundary between the self- and other-regarding spheres would basically be arbitrary and without utilitarian support.⁴² Against this claim, I maintain that it is possible to make a demarcation between actions that hurt others and actions that do not, *precisely* at this contentious boundary region of perception and thought. The sight of some action clearly makes it other-regarding, and possibly even harmful depending on the sensitivities of the witness. However, the mere thought or speculation of some offensive action does not render the imagined action other-regarding. It is one thing to witness (or recall) some indecent or blasphemous act and to be offended or possibly even harmed by it; it is quite another thing to experience the same level of shock by the mere speculative thought of some act. Empirically - although highly unlikely - the pain may be the same, but the causal agent of the pain would not be indecent actor, it would be the supposed 'victim', thereby making the offence/shock/harm self-inflicted.⁴³ Whereas witnessing an offence renders the act other-regarding, imagining an offence is an act initiated by the thinker. Recalling the *memory* of some offensive act would be the product of an other-regarding act, as it would be based on an original visual experience, but the mere suspicion of such acts would not suffice, provided that the people supposedly involved in the offensive behaviour took adequate steps to maintain privacy. If the mere thought of some offence was sufficient to render it an other-regarding act, then there would be no means by which to differentiate between the knowledge of such act, the suspicion of such act, and the fabrication of such act. Any notion of security would evaporate as nobody could be certain that somebody was taking offence to something they may or may not be doing. The thought of some offensive action, and the subsequent shock, can only be considered self-inflicted, and so it would not meet the first criterion for the legitimacy of coercion, even if it did constitute harm empirically.

⁴² James Fitzjames Stephens, *Liberty, Equality, and Fraternity*, R. J. White ed., (Cambridge: Cambridge University Press), 1967, pp. 137 – 150.

⁴³ Riley makes a similar point about alleged harms from moral offence, but in an attempt to always exclude such morally dependant harms from consideration.

Beyond limiting consideration to only other-regarding harms, in the manner described, no further exclusions need to be made at this level of analysis. There is no reason to construct a normative conception of harm in order to exclude certain consequences and include others. Certain harms will automatically be excluded because they are really self-inflicted, as described above. Hence, like the distinction between self- and other-regarding spheres, we can continue to use an ordinary-sense conception of harm, limited only by the understanding that it must entail a setting back of one's interests, whatever one takes them to be. Thinking of harm in terms of interests may be the only strategy, given the language Mill uses in *On Liberty*, but elsewhere he also specifically warns against any attempt to impose upon people what they should take to be their interests.

“When we talk of the interests of a body of men, or even of an individual man, as a principle determining their actions, the question what would be considered their interest by an unprejudiced observer, is one of the least important parts of the whole manner....What it is the man's interest to do or refrain from, depends less on any outward circumstances, than upon what sort of man he is. If you wish to know what is practically a man's interest, you must know the cast of his habitual feelings and thoughts. Everybody has two kinds of interests, interests which he cares for, and interests which he does not care for.”⁴⁴

This passage recommends against exactly what Wollheim and others do, i.e. to tell individuals that as far as legitimate coercion is concerned, their religious interests count for nothing. Like the distinction between self- and other regarding-actions, we must defer to whatever people take to be their interests and hence harm, *for the most part*. I qualify my statement because for Mill there is one interest that truly is universal, namely security.

“Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully forgone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every

⁴⁴ John Stuart Mill, “Considerations on Representative Government”, in *Collected Works XIX*, John Robson (ed.), (Toronto: Routledge, Kegan and Paul), 1977, p.444.

good, beyond the passing moment; since nothing but the gratification of the instant by whoever was momentarily stronger than ourselves.”⁴⁵

Security is the interest that all people living in society share, whether they acknowledge it or not. There may be some disagreement over subsidiary aspects of security, but Mill presumes that once individuals broaden their range of sympathy, enough consensus will converge on a special category of interests that are so essential to society that they warrant communal protection, and are granted rights. These essential interests are those that concern the next level of analysis, moral wrongfulness and injustice.⁴⁶

Injustice and Moral Wrongfulness

The third criterion that must be met in order for legitimate coercion to be employed is normative. The other-regarding harm must in the end be also morally *wrongful*. Whereas at the previous levels of analysis, we can employ empirical conceptions of other-regarding and harm, it is *here* where the normative analysis appropriately belongs. Not only does it enable us to use conceptions of 'other-regarding' and 'harm' in their ordinary senses, it consolidates the normative analysis to its rightful place, regarding questions of morality, justice and law. Morality for Mill is not merely a set of rules, which people must follow to promote general utility, as this would reduce it to expediency. Justice, and morality in general, is a pattern of expected behaviour of others, which when disappointed arouses a particular sentiment. The patterns of expected behaviour are derived from the Principle of Utility, but the sentiment is a generic one, derived from primitive instincts that humans share with animals. Mill's account of morality is ambiguous, but it is important to keep in mind that in *Utilitarianism*, Mill is attempting to defend the utilitarian conception of justice against the claim that it is no different than mere expediency, or doing whatever promotes immediate utility, in the ad-

⁴⁵ John Stuart Mill, "Utilitarianism", in *Collected Works X*, John Robson (ed.), (Toronto: Routledge Kegan and Paul) 1969, p. 251.

⁴⁶ Mill, *On Liberty*, p. 224. Mill's Principle relies on a particular theory of progress, which entails a gradual convergence of interests that citizens come to share in a community. But as value pluralists and multiculturalists have pointed out, Mill's theory of progress is too ethnocentric to sustain, being largely a product of his 19th century European, colonialist outlook. Nonetheless, the presumption has no bearing on the coherency of Mill's Principle. See John Gray, Postscript, in *Mill on Liberty: A Defence*, (London: Routledge, 1996), p. 132; Will Kymlicka (ed.), *The Rights of Minority Cultures*, (Oxford: Oxford University Press), 1995, pp. 5-6. Ira Katznelson, *Liberalism's Crooked Circle*, (Princeton: Princeton University Press), 2005, p. 138-141.

hoc manner. Mill begins the articulation of his moral theory in the opening pages of *Utilitarianism* with the misleading statement that "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."⁴⁷ The statement is misleading because in isolation it implies exactly what Mill is attempting to refute - that when an agent is confronted with a range of options, the option that promotes her own happiness best is the morally correct one. There are certainly cases where this will be true, but it would be wrong to posit causality between this particular affect and its moral status. This interpretation is incorrect for several reasons, the most obvious being that the standard for Mill is general happiness, and not the agent's individual happiness. There are other passages that preclude this maximizing consequentialist reading, and I will discuss them shortly.

The best way to understand Mill's moral theory and his formal conception of moral wrongfulness is to reconstruct Mill's naturalist account of the sentiment of justice, and then show how patterns of legitimate expectations have emerged in humans from animalistic instincts. This sentiment of justice consists of two parts: the desire to punish or retaliate against someone or some group, and the recognition of a definite victim.⁴⁸ These two aspects are derived from the primitive instincts of self-defence and sympathy, which humans share with all animals. When any animal is threatened, it naturally retaliates. But animals are also capable of sympathizing with their offspring and sometimes even their kin group, such that when a relative is threatened, or *victimized*, the instinct to retaliate is also aroused. Where humans differ is with our ability to extend the range of sympathy beyond our immediately family, to encompass all of society, and eventually all of humanity. Moreover, humans are capable of conceiving of a range interests beyond the animalistic ones of bodily and territorial integrity, and material security. For example if a person fails to meet her express or implied contractual obligations to another person, or if an agent of state suppresses certain forms of political speech, the desire to retaliate will naturally emerge in all members of society. The formal idea of justice, or rather injustice, differs from the larger category of moral wrongfulness

⁴⁷ Mill, "Utilitarianism", p. 210.

⁴⁸ Mill, "Utilitarianism", p. 248.

in the necessary identification of a victim. But wrongfulness can be an aspect of an action (or inaction) even when no specific victim is involved.

“For the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own consciencewe say that it would be right to do so and so, or merely that it would be desirable or laudable, according as we would wish to see the person whom it concerns, compelled, or only persuaded and exhorted, to act in that manner”⁴⁹

Morality is an aspect of an action that indicates whether it promotes or reduces utility, but any non-moral actions have this quality as well. Where morality differs from this more common aspect of expediency is this unique sentiment that accompanies our moral judgment. The formal conception of wrongfulness would appear to simply be the desire to someone for some action.

But let’s be honest, the desire punish or retaliate will emerge in response to any action that is contrary to one’s preferences, such as when one’s favourite basketball team loses, or when one loses a significant investment in the stock market. Even if one feels oneself to be a victim, the desire to retaliate does not itself identify an injustice. There is nothing inherently moral about the two parts of the sentiment of justice. Mill makes clear that it is the subordination of the desire to punish to the Principle of Utility that *moralizes* this sentiment.

The sentiment, in itself, has nothing moral in it; what is moral is, the exclusive subordination of it to the social sympathies, so as to wait on and obey their call. For the natural feeling [the desire to retaliate] tends to make us resent indiscriminately whatever any one does that is disagreeable to us; but when moralized by the social feeling, it only acts in the directions comfortable to the general good: just persons resenting a hurt to society, though not otherwise a hurt

⁴⁹ Mill, “Utilitarianism”, p. 246.

to themselves, and not resenting a hurt to themselves, however painful, unless it be of a kind in which society has a common interest with them in the repression of.⁵⁰

This passage is one of the several passages that precludes the maximizing consequentialist reading of Mill's moral theory. The truly moral person only desires to retaliate against setbacks to the communal interests of justice, and does not desire to retaliate against legitimate set-backs to their own personal interests. Hence the formal criterion of wrongfulness is this enlightened, or *modified*, desire to punish. It is the desire to punish that arises in response to a threat to communal security. The desire to punish would not be moral if it arose in response to one's basketball team losing, or when one loses money in the stock market. But the desire to punish would be properly moral if it arose in response to the winning team cheating, or if one's investments were lost due to maleficence. The desire to punish is generic, but the modified desire must be developed. All of the socializing agents of society, from parenting to education to religion must be brought to bear in order to restrain the egoistic tendencies, and develop the social ones. Mill's entire doctrine of reform can be seen as promoting this one goal, in various ways. In order to know when the desire to punish is moral, and thus serve as the formal conception of wrongfulness, it will be necessary to know the content of morality.

Morality begins as a pattern of behaviour that has shown to promote general utility. Over time, some of these patterns give rise to the legitimate expectations that these behaviours will be followed. But the expectation that one will promote their own utility does not comprise morality alone, because there will be occasions when promoting one's own utility will entail diminishing others' utility. Even though behaving justly promotes general utility, what sets this pattern of behaviour apart from mere expediency is the protection of the sentiment of justice. As primitive individuals instinctively retaliate against threats to their narrow material interests (just like animals), the expectation that evil should be met with evil is established. As human society and intellect evolves, the inverse expectation becomes established, that of returning good for good. As these patterns of behaviour reiterate themselves in the social context, and as individuals come to sympathize with a wider range of people, the expectations give rise to the notions of

⁵⁰ Mill, "Utilitarianism", p. 249.

desert and contracts. And because evil must be met with evil, and good with good, we have no other grounds for treating people partially or prejudiciously. In fact, impartiality and the closely related concept of equality are the “first of judicial virtues”, being necessary to fulfil all obligations of justice.⁵¹ The interest of security is thus a pattern of legitimate expectations that comprise the portion of morality that Mill calls justice.

"Justice is a name for 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"⁵²

All individuals have an interest in maintaining these patterns of behaviour, some being more important than others. For the more important patterns of expected behaviour, like the expectation that one's neighbour will not steal one's vegetables from the garden, individuals are conferred with moral rights to institutionalize the expectation: “Justice implies something which it is not only right to do, and wrong not to do, but which some individual person [the victim, or society] can claim from us as his moral right.”⁵³ These rights are largely negative, but Mill makes clear that inaction can violate rights just as much as actions.⁵⁴ Whereas primitive humans were motivated only by their selfish interest in security, evolved and socialized humans sympathize with their fellow citizen to such an extent that a violation of any of these expectations in any of their dealings is experienced as an offence to the entire society, and arouses the modified desire to punish. As Mill puts it, 'the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule.'⁵⁵ The rule is the expectation of just behaviour, and the sentiment is the desire to punish (combined with the identification to a victim), which differentiates justice and morality from mere expediency.

It remains to distinguish justice from the remaining non-justice category of morality. The purpose of wrongfulness in any moral theory is of course to indicate an obligation to a particular value. In Mill's case the value is utility, and his moral theory entails both stronger and weaker obligations, corresponding to the more and lesser

⁵¹ Mill, “Utilitarianism”, p. 257.

⁵² Mill, “Utilitarianism”, p. 255.

⁵³ Mill, “Utilitarianism”, p. 249.

⁵⁴ Mill, “On Liberty”, p. 225, 276.

⁵⁵ Mill, “Utilitarianism”, p. 249.

important patterns of behaviour. The former refer to the absolute obligations of justice, and the latter to the discretionary obligations of non-justice morality. The obligations of justice are perfect, meaning they must be respected absolutely. The remaining non-justice obligations of morality are imperfect, and allow discretion with their fulfilment. In other words, the disappointment of this weaker expectation does not entail a definite victim. *Perfect* obligations are to respect the moral rights that protect the essential interests of justice, which are both negative obligations of non-interference, and positive obligations of contract. At the same time, everybody also has weaker expectations that all people are to be beneficent in certain ways, which generate *imperfect* obligations. For example, it is incumbent upon all people to be charitable, but no philanthropic organization has a right to our donation. The obligation is a general one, allowing each person discretion with the meeting of this expectation. Mill states that the distinction between perfect and imperfect obligations "coincides with that which exists between justice and other obligations of morality."⁵⁶ Mill does not discuss any other imperfect obligations in Chapter V of *Utilitarianism*, and there is little indication here of how much charity is obligatory, and how much is supererogatory. In *Auguste Comte and Positivism*, Mill also discusses the expectation that all people meet standards of charity: "There is a standard of altruism to which all should be required to come up, and a degree beyond it which is not obligatory, but meritorious."⁵⁷ But in this essay, Mill makes the further point that in an progressing society, the degree of charity that is obligatory is always increasing.

"Through this principle, the domain of moral duty, in an improving society, is always widening. When what once was uncommon virtue becomes common virtue, it comes to be numbered among obligations, while a degree exceeding what has grown common, remains simply meritorious."⁵⁸

These passage helps clarify how Mill avoids the error of Comte and Calvinism, that of "merging all of morality into justice".⁵⁹ Some level of charity and beneficence is morally obligatory, albeit imperfectly so, giving each discretion with how they meet these

⁵⁶ Mill, "On Liberty", p. 247.

⁵⁷ Mill, *Auguste Comte and Positivism*, p. 337.

⁵⁸ Mill, *Auguste Comte and Positivism*, p. 338.

⁵⁹ Mill, *Utilitarianism*, p. 247.

expectations. Whereas the perfect obligations of justice provide no discretion: individuals must respect the moral rights of everyone else.

The central role of punishment in Mill's moral theory has been long since recognized, but has still spawned several interpretations of Mill's moral theory, most recently by Dale Miller.⁶⁰ Miller argues against D.G. Brown, and defends David Lyons' sentimentalist interpretations of Mill's moral theory. Lyons takes the position that wrongfulness is the appropriateness of guilt, whereas Brown roots wrongfulness in the appropriateness of external punishment. After considering some private correspondences, Miller constructs an interpretation of Mill's theory that is very close to Lyon's, which enables Miller to explain Lyon's contention that some acts may be punishable, but not morally wrong. He has in mind specifically some aspects of commercial and property law. Miller and Brown are both correct to stress the centrality of punishment, but the ultimate source of moral wrongfulness can only be the enlightened, or modified desire to punish an action, and not the appropriateness of some particular punishment. The desire to punish must be modified because it is subordinated to the social sympathies, i.e. the desire to punish must be in response to threat to everyone's interests, considered impartially. For Mill, impartiality is not only the "first of judicial virtues" for fulfilling the obligations of justice, it is also the source of the enlightenment for the modified desire to punish.⁶¹ The specific punishment – whether appropriate guilt alone, or guilt combined with some external punishment - is a product of a utilitarian costs-benefits analysis, but the moral judgement itself is the product of this modified desire to punish in other people. Even though, the modified desire to punish is aroused when an established norm of behaviour is violated, it cannot be the violation itself that determines moral wrongfulness. Mill recognizes that there are times when violating a norm of behaviour would and should not arouse the modified desire to punish.

⁶⁰ Dale E. Miller "Brown on Mill's Moral Theory: A critical response, *Politics, Philosophy and Economics*, vol. 9, (1), 2010.

⁶¹ Mill describes the "ideal perfection of utilitarian morality" as the Golden Rule of Jesus Christ: "To do as one would be done by, and to love one's neighbour as oneself" See Mill, "Utilitarianism", p. 218. This standard is of course very difficult to meet, which is why Mill's life-long doctrine of reform was dedicated to reforming social institutions to foster this deep sense of sympathy, so as to "establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole" (Ibid.).

[P]articular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. In such cases, as we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case. By this useful accommodation of language, the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice.⁶²

Neither the desire to punish alone, nor the violation of a behavioural norm is sufficient to establish moral wrongfulness. Only the modified desire to punish can serve this purpose because it connects to formal aspect of wrongfulness (the desire to punish) with the substantive expectations of behaviour that comprise justice and morality.⁶³

Worthiness of Punishment and Illegality

The concepts of morality, justice and law are closely related, in that a violation of each elicits the desire to punish. Moral wrongfulness warrants the moral disapprobation of others and a guilty conscience, as do all violations of justice. In order for the full force of the criminal justice system to be justified, the benefit of punishing the offence must outweigh the costs. The concept of justice had always been closely associated with that of law, but Mill notes that the Ancient Greeks and Romans, came to realize that laws, being made by men, might sometimes be bad laws.

"And hence the sentiment of injustice came to be attached, not to all violations of law, but only to violations of such laws as *ought* to exist, including such as ought to exist but do not; and to laws themselves, if supposed to be contrary to what ought to be the law."⁶⁴

⁶² Mill, "Utilitarianism", p. 259.

⁶³ There is a further question as to what exactly are the non-justice obligations of morality. This question is a difficult one that has spawned several competing interpretations. For example see David Lyons, *Rights Welfare and Mill's Moral Theory*, New York: Oxford University Press, 1994, p. 140; or Fred Berger, *Happiness Justice and Freedom*, Berkeley: University of California Press, 1984, p. 224.

⁶⁴ Mill, "Utilitarianism" p. 245.

Justice refers to what ought to be law, but for various reasons is not codified. In some cases historical or political reasons prevent a law's existence, and moral people would lament this state of affairs. But there may also be prudential reasons not to establish such a law. Violations of justice require punishment, but the consequent punishment need be at the hands of the state. Mill clarifies:

"Nobody desires that laws should interfere with the whole detail of private life; yet every one allows that in all daily conduct a person may and does show himself to be either just or unjust. But even here, the idea of the breach of what ought to be law, still lingers in a *modified shape*. It would always give us pleasure, and chime in with our feelings of fitness, that acts which we deem unjust should be punished, though we do not always think it expedient that this should be done by the tribunals."⁶⁵ (emphasis added)

This passage reveals the important notion that the area of positive law established by the state is smaller than the area of justice. Though illegal actions are unjust, there are some unjust actions that nonetheless go unpunished by the state, even if it would seem appropriate for some misfortune to befall the offender. Therein lays the hypothetical nature of justice – that we would like to see evil met with evil, but not necessarily by the state. In these instances, where the action is morally wrong but the offence is not grave enough to warrant legal prohibition, society falls back upon the moral condemnation of the unjust offender, and ideally her own guilty conscious reproaches her as well.

The appropriateness of state-sanctioned, coercive punishment can only be determined by a utilitarian calculation of costs and benefits. Ideally, this moral calculation is institutionalized in positive law. The codification of the offences and the prescription of punishment reflect society's empirical determination of the actions that threaten security the most. Some behaviour might be more costly to prohibit than maintaining a general ethos of moral disapprobation. For example, cheating at tennis might be an unjust and immoral practice, but to hold the cheater legally responsible, and then to bring the full force of the criminal justice system against them would be absurd. It would be impossible and, more importantly, undesirable to have positive law regulate all

⁶⁵ Ibid.

aspects of everyday life, and to give the police sufficient power and resources to enforce such totalitarian law. Physical coercion is only applicable when guilt and moral condemnation would be insufficient to punish the wrongful action. These punishments would still apply, but additionally the state would be justified in imposing its own as well.

To recap, an action that is other-regarding, harmful, and wrongful necessarily warrants punishment. Whereas we can accept empirical conceptions of the first two criteria, accepting whatever people take to be other regarding and harmful, the third criterion of wrongfulness is properly normative. Wrongfulness is an aspect of an action that indicates that it deviates from an established pattern of expected behaviour. These behaviours fulfil the obligations of justice in every area of life, which promotes the primary and universal interest of security. In addition to this type of behaviour promoting utility, the *expectations* that people behave as such are also so important that their disappointment arouses a unique sentiment the human mind – the modified desire to punish. As society evolves, these expectations eventually are institutionalized in moral rights, and the most important expectations are codified in law. Whereas moral condemnation and guilt are the appropriate responses to any violation of a moral right, physical coercion is only appropriate for the disappointment of the most important expectations, which ideally will be codified in law.

IV Applications, Revisited

Now that the four criteria have been articulated, we can make sense of some of the confusion surrounding the legitimacy of coercion. To begin with, the self-regarding sphere is the minimum area of individual liberty. By no means, is it the full area because nothing rides on this aspect of an action in itself. Many actions that affect other people will still be permitted. For example, speech and expression, as forms of communication, are certainly other-regarding. Some forms of speech might even be harmful. Nonetheless, all of these forms of speech would still be protected by the Principle of Liberty. However, Mill makes clear that the circumstances of speech can render it a wrongful harm, as when an excited mob is spurred to illegal activity, "even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a

positive instigation to mischievous act."⁶⁶ The question is whether the content of speech can ever constitute a wrongful harm. The logic of Mill's arguments in Chapter II of *On Liberty* would seem to suggest not, but by distinguishing between the three criteria of coercion, we can accept that some forms of speech will at the least be harmful. And by deriving the criterion of wrongfulness from the modified desire to punish, we are committed to the position that some forms of expression could violate justice. Explicit contracts can be violated by the disclosure of secret information, and intrusive gossip might violate a moral or positive right to privacy, as Riley argues.⁶⁷ The content of such expressions necessarily harm other people, and would violate established expectations that such information remain private. In these cases, the wrongfulness of such expressions is derived from the damage of the disclosure of the information, and from the deviation from the patterned expectation. By recognizing that the circumstances of expression can threaten security, Mill must accept that where the content threatens security, the strong interest in full freedom of thought and expression must be similarly outweighed. There are no utilitarian reasons why one threat to security can place limits on the freedom, but not others. But again, conceding the possibility of wrongful expression, does not commit Mill to allowing punishment beyond moral condemnation. It may still be the case that such state censorship is never justified.

The question as to whether Mill holds a wide or narrow conception of harm need not be addressed by this interpretation of Mill's theory. As an empirically informed principle, it must accept harm as a set-backs to a person's interests, whatever one takes those to be. The theory can accept that individuals suffer all sorts of harms that are tragic, unfortunate, as opposed to being morally wrong. As far as the legitimacy of punishment is concerned, however, only the latter harms are significant. For example, interaction in the market is certainly other-regarding, by any definition. And as Mill implies, competition in the market place does produce harm, which is the only way to describe the negative effects of economic failure at the hands of others. However, the harm that competition produces cannot be said to be wrongful because history has shown that it is expedient, on balance, for society not to punish such market harms, even when

⁶⁶ Mill, "On Liberty", p. 260.

⁶⁷ Riley, FIND CITATION

intentional. Not only is failure (or rather, the fear of failure) an important motivator and stimulant of the market, but there would also be huge utilitarian costs to providing such protection.⁶⁸ We can therefore lament the harm produced by failure in the market, without conceding that the harm is wrongful, and hence eligible for punishment. However, market failures that are produced by duplicity or fraud would appropriately arouse the modified desire to punish. The toleration of market harms, does not commit us to a narrow conception of harm. This interpretation accepts any empirical conception of harm, because nothing turns on this criterion alone.

Those passages where Mill seems to be employing a very broad conception of harm is really a misunderstanding of the nature of the wrongful harm. The wrongfulness of theft is obvious, from a utilitarian standpoint, but Mill also considers the failure to raise children properly a "moral crime". The wrongfulness of this offence is not derived from wasted potential of the child's suboptimal life, as this would indeed foist upon Mill a very broad conception of harm entailing counter-factual standards. Instead, the wrongfulness is derived from the denial of a "fair prospect" in life to the child, because this expectation is one of the most essential to humans and to all animals.⁶⁹ Mill also considered having multiple children in an overpopulated country a "serious offence" against the manual labour market. Here, Mill displays the progressive and future-regarding orientation of his thought. He was deeply influenced by the Malthusian concern for population and its effects on the welfare of society.⁷⁰ He really does seem to consider multiple children in such a society a harm to its labour market that should not be tolerated by society. Even though few countries recognize this wrongful harm, Mill thinks that there should be moral condemnation of this practice. It is one of the "misplaced notions of liberty" that society should not permit, even though most do. But even though neglecting one's children or having too many of them (in certain circumstances) is a wrongful harm, Mill is not committed to the legal prohibition of these practices. Laws against these offences might be too costly to enforce, if even possible at all. He merely

⁶⁸ Of course, the welfare system does, in theory, protect a right not to be completely desolate, probably for utilitarian reasons.

⁶⁹ Mill, "On Liberty", p. 302.

⁷⁰ Mill, "Principles of Political Economy", p. 154.

argues that such practices should be the proper subjects of “reprobation, and social stigma”.⁷¹

Taking seriously Mill’s statements about the only legitimate reasons for coercively punishing someone, it is incumbent on this interpretation identify the wrongful harm, in those cases where Mill seems willing to punish non-harmful activity. In order to sustain the legitimacy of compelling individuals to testify in court, saving a drowning person, or refraining from indecent behaviour, it will be necessary to see how such actions disappoint legitimate expectations. Despite rejecting a social contract to establish original political obligation to a sovereign, Mill employs contracts to justify many obligations placed on individuals, beyond the non-interference with each other’s liberty.⁷²

He who accepts benefits, and denies a return of them when needed, inflicts a real hurt, by disappointing one of the most natural and reasonable of expectations, and one which he must at least tacitly have encouraged, otherwise the benefits would seldom have been conferred. The important rank, among human evils and wrongs, of the disappointment of expectation, is shown in the fact that it constitutes the principal criminality of two such highly immoral acts as a breach of friendship and a breach of promise. Few hurts which human beings can sustain are greater, and none wound more, than when that on which they habitually and with full assurance relied, fails them in the hour of need; and few wrongs are greater than this mere withholding of good; none excite more resentment, either in the person suffering, or in a sympathizing spectator.”⁷³

To be clear, the offences that disappoint certain important expectations are not just wrong because of the consequences of the action, but also because of the disappointment of the expectation itself. Highlighting the central role of contracts in society, we see that Brown and Lyons’ interpretations of the Principle of Liberty are really not as far apart as once seemed. If living in society does place contractual obligations on individuals, then we can see that the legitimacy of coercion does indeed turn on preventing harm to others or self defence, and not harm in general. The wrongful harm of not maintain one’s fair share of the burdens necessary to maintain society is a serious disappointment of legitimate

⁷¹ Mill, “On Liberty”, p. 304.

⁷² Mill, On Liberty, p. 225, 276. Mill, Auguste Comte and Positivism, p. 338.

⁷³ Mill, On Liberty, p. 256.

expectations, and thus would amount to a definite and “calculated evil” to society. In the introduction to *On Liberty*, Mill states that his principle is sensitive to fact that inaction can be legitimately punished, just as harmful actions can. Highlighting the contractual obligations of social living makes clear that though the punishment of not performing certain beneficent acts might be rare, society legitimately can punish those who fail to maintain their fair share burdens.

The final issue to address is Mill willingness to punish indecent behaviour in public, despite not being “directly” harmful to others. The context of the passage on indecency is in the wider discussion of the “obvious limitations of the maxim, that purely self-regarding misconduct cannot be properly meddled with in the way of prevention or punishment.”⁷⁴ This discussion dovetails Mill’s previous discussion of the circumstances of some self-regarding behaviour rendering it a public offence. The drunkenness of a person prone to violence when drunk is itself such a violation, just as the idleness of person receiving public support is. But in the next paragraph, Mill briefly cites public indecency as a punishable offence. Mill appears to be continuing the discussion of limitations to the maxim, because it is the public circumstances of the indecency that he objects to, and not the indecency in itself. Mill reveals by his use of the term “obvious limitation” that the expectation that people refrain from indecent behaviour in public is legitimate concern of security, despite not harming other people. It is simply a legitimate expectation that everyone act decently in public, and the harm is of disappointing *this* expectation, not of witnessing the shocking behaviour itself. Despite many attempts to incorporate this passage into contemporary interpretations of Mill’s Principle, the only explanation is that the legitimacy of this expectation is rooted in the Victorian culture that Mill so vigorously attacks. The passage, like many others reveals the he is very much a product of his culture, despite attacking it.⁷⁵ His willingness to punish indecency is not necessarily at odds with his defence of eating pork. Despite the outrage experienced by Muslims in a predominantly Muslim country, Mill clearly states that it would be wrong to prohibit the consumption of pork. However what he does not specify, is whether he is referring to its outright prohibition, or only to the prohibition of the private consumption

⁷⁴ Mill, *On Liberty*, p. 295.

⁷⁵ Mills discussion of the higher pleasures, and his discussion of the priority of domestic labor for women are two such examples.

of pork. Following the logic of the punishability of indecency, Mill must allow its public prohibition in Muslim countries, provided its private consumption was allowed. Every society is justified in protecting its people from significant shock and dismay in public, as part of maintaining security.

V Conclusion

With the three criteria of moral wrongness articulated, plus the additional criterion of illegality, we can make sense of the puzzling applications of the Principle Mill describes in *On Liberty*. Harm must entail perceptible damage directly to the interests of other people. Beyond security, what these interests are will vary, and ultimately be an empirical question. Finally, and most importantly, the harm must be wrongful. Wrongfulness is indicated by the modified desire to punish, and is aroused to threats against security, which are actualized by the expectations of just behaviour. People during the course pursuing their individuality will inevitably cause some harm to others, such as when competing in the free market, or expressing shocking opinions. Mill concedes that history has shown that *some* harms must be tolerated in order for society to promote utility, hence these harms are therefore not wrongful. Wrongful harms entail the violation of moral rights, which warrant moral condemnation and guilt. When a harm violates a moral right that society has concluded warrants legal prohibition, then the full force of the criminal justice system is brought to bear and physical (or financial) punishment is appropriate. This interpretation highlights the role of legitimate expectations in Mill's moral theory. It differs from other prominent interpretations by providing a more natural way of understanding the legitimacy of punishment that goes further in explaining some the puzzling applications of punishment.