

Module 2: Greed: Gambling and "Sin Taxes"

Introduction

In this module we begin with a classic statement of liberty written by John Stuart Mill. Mill's position on liberty serves as a limitation on what the law should consider a crime. Although Mill is a utilitarian, his work on liberty is often supported by libertarians, and provides at least a nod towards moral virtues (despite rejecting the law's ability to promote virtues and criminalize vices on paternalistic grounds).

Part 1: John Stuart Mill and Liberty

John Stuart Mill: *On Liberty* (1859)

"If any one does an act hurtful to others, there is a prima facie case for punishing him, by law..."

This is Mill's conclusion for what the state may consider a crime. This in itself may sound obvious to us, but as we shall see, the real issue is in what Mill has left out by this statement of crime. Mill provides a robust view of liberty which serves to restrict what can be considered a crime. Mill's view of liberty, commonly referred to as the **harm principle**, can be seen in his opening statement:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. There are good reasons for remonstrating with him, or reasoning with him or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is

sovereign.

There is a lot going on in Mill's statement of liberty here.

- **First** , Mill is claiming that paternalism can never be a justification for criminalizing behavior.
- **Second** , Mill is giving a nod to Aristotle by holding that we have reasons to persuade people towards virtues and against vices, but he rejects Aristotle's contention that the law can be used to do this for paternalistic reasons.
- **Third** , Mill is setting out a requirement that any crime must be shown to cause or threaten harm (evil) to an identifiable person or persons; otherwise, it is no crime.
- **Fourth** , Mill is giving a nod to the libertarian principle of self-ownership by holding that we, to some extent, are our own independent sovereigns.

Yet, Mill does not grant this liberty to everyone. Who does Mill exclude from the above?

. . . this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as to that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.

Three areas of liberty that derive from Mill's harm principle are:

1. *" Liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects. . . 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 as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."*
2. *". . . liberty of tastes and pursuits; of framing the plan of our life to suit our own character: of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."*
3. *". . . the liberty within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived."*

Of these three liberties Mill says:

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. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. 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.

Mill allows that any behavior that adversely impacts the interests of others in society can be made a crime if doing so leads to greater utility than not doing so. This admits that some things may harm the interests of others, but that utility is best maximized by allowing moral pressures and individual actions to deter the behavior rather than the force of state criminalization. This will be key as it requires two things in order to justify criminalization of an action. **First**, the act must harm the interests of non-consenting parties. **Second**, the harms associated with state criminalization an action do not exceed the harms prevented by the action's criminalization. This two stage requirement for criminalization is held both by utilitarians such as Mill and also libertarians.

How does Mill support this view of liberty?

Mill seems to provide two independent methods of justifying the harm principle. The first, and primary justification, is found in the following statement:

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. 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. . . .

In other words, Mill supports the harm principle because by upholding this view of liberty we will achieve the utilitarian goal of promoting the greater happiness for everyone. A secondary support for the harm principle is found in Mill's nod to the libertarian notion of self-ownership. This secondary support, though not as prominent in Mill, may not sound controversial but the consequences of such a premise can be quite so. If I own me, then in terms of liberty I can do what I determine is right. The only limitation to this is that I cannot harm others. Self-ownership clearly limits paternalism because if I own me, then what right do you have to interfere with what is not yours (and is not harming you)? If you qualify for self-ownership, not only can we not interfere with actions that are not harming others, but you are also then responsible for your own health, actions, and well being. The individual is free to pursue a life of vice so long as it does not harm others. To recap, the two supports for the harm principle are:

1. A **utilitarian argument** that the harm principle is the most practical way to

achieve happiness because it prevents harm to others and enables each person to seek their own happiness.

2. Even if we reject the utilitarian argument, there is the principle of **self-ownership** in which rational adults are in charge of their own lives and therefore are free to act as they choose so long as they do not harm others.

Utilitarians can accept the first reason. Libertarians, and others, can accept the second. However, unlike libertarians, Mill's view of liberty is not **a right** because liberty is not an end in itself:

. . . I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. . .

This is where Mill departs from libertarians as they hold that liberty is a right or end in itself whereas Mill holds liberty is a means to happiness.

Thought Question: Mill vs. Libertarians

Mill further departs from libertarians by holding:

"There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his share in the common defense, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence such as saving a fellow creature's life, or interposing to protect the defenseless... whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for injury."

Mill contends that we can commit "crimes" by inaction as well as by action. However, Mill holds that we should not make inaction a crime when doing so causes more evils than it prevents. Libertarians would reject this as one is only responsible for not harming others, Mill is endorsing positive rights duties to assistance which libertarians oppose. One reason for their opposition is the fear that once some positive duties are accepted an inevitable slide towards socialism (and its massive acceptance through law of positive rights duties to assist) will occur. Mill here is endorsing positive rights something which libertarians explicitly reject.

Which view do you agree with more, Mill or the libertarians?

As mentioned above Mill's harm principle thus rules out paternalistic laws (which often focus on what are called "victimless crimes") because paternalism is not preventing harm to others but is preventing harm to self (which Mill thinks is none of society's business). Mill does think that we can always try to **persuade** someone to act differently, but that is the limit of what we can do for their own good. Where Aristotle thought the role of government was to promote the good or virtue in citizens, Mill takes a far different

approach. Mill views the role of the state as to protect the **liberty** of citizens and to protect citizens from being **harmed** against their will. By doing these two things, the state will enable each person to pursue their happiness without preventing others from pursuing theirs.

Thought Question: Mill and Utilitarianism

There is some tension here between Mill's harm principle and his utilitarianism. After all, if a paternalistic law intended to reduce vice would succeed in preventing suffering and promoting happiness it seems unlikely that a utilitarian would reject such a law. For example, Mill clearly states that we cannot force someone to do something for their own happiness; this would seem to contradict some utilitarian views. Mill thinks that the harm principle would be supported by **utilitarians** because it is the individual alone who is best qualified to determine their own happiness (not society or government). As such the harm principle's limitation on paternalism will, in the long run, maximize the **greatest happiness** for everyone as each person is free to seek their own happiness.

Is Mill's harm principle something a utilitarian would accept? Or would utilitarians allow for at least some paternalism? Recall that Aristotle only supported paternalistic laws when they were practical. Wouldn't a utilitarian agree with Aristotle?

Who can best determine happiness, the individual or the state/society? How we answer this question may depend upon how it is phrased. For instance, if I ask you, "Who can best determine your happiness, you or the United States government?" I'm fairly certain that you would say you are the best determiner of your happiness.

However, in fairness to Aristotle, we ought to phrase the question in such a way as to de-personalize it. After all, the fact that you are in college indicates that you are more rational, intelligent, and responsible than the average person (a scary thought indeed). Consider the whole of society including all those who are less responsible and intelligent than yourselves. Think of all the people who consistently make bad decisions for themselves financially, personally, or otherwise and ask: "Is the average person a better determiner of their own good than the collected wisdom and experience of society?"

Thought Question: Seat Belts?

In considering the above paragraph, the following situation should be resolved. Alf lives in a state with a seat belt law. He rejects the law and refuses to wear his seat belt on the grounds that a seat belt does not really keep him safe. Alf says that he is unlikely to be in an accident and if he is a seatbelt may prevent him from escaping a burning vehicle. However, the facts show that seatbelts save lives and that Alf is far more likely to be killed by not wearing his seatbelt than by his seatbelt trapping him in a burning vehicle. Suppose the statistics show that 50% of all persons will be in an accident during their lives in which a seatbelt may save them. Who can best determine what is right for Alf? Alf speaking only of his own driving experience or the U.S. government after an exhaustive scientific study concerning seatbelt safety?

Thought Question: Paternalistic laws?

Below is a short list of paternalistic laws taken from an email by John Stossel of ABC's 20/20. After considering these laws ask yourself three questions.

1. Is paternalism justified in any of these cases?
2. What might Aristotle say about paternalism in these instances?
3. Are laws like these a natural result of accepting any paternalism?

In Schaumburg , Illinois , kite flying is illegal (you might get electrocuted from power lines). It is illegal to play Bingo while drunk in Kern County , CA (you might lose more). You cannot pump your own gas in Oregon and New Jersey . The state governments there determined that pumping your own gas is "too dangerous!" and "a fire hazard" (even though the rest of the country manages to pump gas without blowing ourselves up).

Now that we have established the basics of Mill's view of liberty, we can explore a distinction commonly made by other philosophers as an easy way of understanding the harm principle.

Part 2: Self-Regarding vs. Other-Regarding Actions

... there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free voluntary and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself; and the objection which may be grounded on this contingency, will receive consideration in the sequel.

One other issue Mill incorporates into his harm principle is what to do about harms between consenting adults. Mill concludes that if rational adults consent to harm one another, this is not considered a harm to others. A harm to others would then mean a harm to some unconsenting party. For instance, if you, a rational adult, consent to box Mike Tyson, society has no right to interfere; and when Mike Tyson knocks you out, it does not constitute a harm to others (because you consented to it) and therefore society has no right to intervene.

Partly due to this incorporation of **consent** into the harm principle, philosophers since Mill have used the following distinction to help explain when society can justifiably interfere in our liberty and when it cannot. The distinction is between self-regarding and other-regarding actions.

Self-regarding actions are actions that only harm yourself or, if it also harms others (rational adults), it does so with their free, voluntary, and undeceived consent and participation.

Other-regarding actions are those that harm others who are not rational, free, undeceived, consenting adults.

Mill claims that we cannot interfere with self-regarding actions under **any** circumstances. Society can interfere with other-regarding actions if it chooses. Note: Mill does not suggest that we *must* interfere with other-regarding actions, only that we can be justified in doing so. For example, second-hand smoke is often an other-regarding action, but this only means we can interfere, not that we **must** prevent the harm.

The Big Question...

Okay, we get the idea of what Mill is saying, but what exactly qualifies a harm? This is the big question, and it is a tricky one, for Mill.

Let's start with what is **not** a harm. **Offense** is not a harm. This means that no matter how much my behavior and my words offend you, this offense does not qualify as a harm. In this sense Mill grants us a "right to offend others" without fear of punishment. Of course, this also means others have a right to offend us (and by offending them this becomes more likely).

What is clearly a harm? Physical assault, or damage to one's property (theft, vandalism,

etc.) are clear harms. Still, this does not give a precise determination of what a harm is. Unfortunately, Mill himself does not give us a precise determination. Beyond what I have said above, Mill provides **two** other general criteria for determining a harm.

1. A violation of someone's rights is a harm (though this only begs the question to what rights do we have).
2. Actions that prevent us from living up to our obligations towards others is a harm.

Objection: Hey, is anything really self-regarding?

How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them. If he injures his property, he does harm those who directly or indirectly derived support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow-creatures generally; perhaps becomes a burden on their affection or benevolence; and if such conduct were very frequent, hardly any offense that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead.

And even (it will be added) if the consequences of misconduct could be confined to the vicious or thoughtless individual, ought society to abandon to their own guidance those who are manifestly unfit for it? If protection against themselves is confessedly due to children and persons under age, is not society equally bound to afford it to "persons of mature years who are equally incapable of self-government?"

Why not make gambling, drunkenness, and other moral vices which lead to unhappiness criminal activities? Mill answers this question when he says:

No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. 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.

For instance, if I have two small children and I gamble away all of my money such that they are not fed or clothed, have I harmed them? Mill would say I have harmed them by failing to live up to my obligation towards them. This too begs the question of what obligations do I have to others. However, this does provide a roadmap to determine what is and what is not a harm.

Mill rejects the "Some people can't handle it and will harm others, therefore the action should be restricted for everyone" type of justification for a crime.

In further response to the above rejection, Mill says that when the harm to society in general (as opposed to a harm to a specific person) ". . . the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom." Society has already had absolute authority over each individual in their childhood. If that failed to bring them to live virtuously, then why would we think treating them as children now (by punishing them for the harms to themselves) would do any good? The natural consequences of their actions and moral disapproval of society is the best motivator here and not the force of law. Even if we tried law, there is the "they will do it anyway" claim, which purports to show that criminalization (and the harms that come with it) is causing more harm than good.

To argue from a position of majority moral authority is also flawed. If the majority of people are Muslim, does this mean that a law criminalizing the eating of pork is just? Or if the majority is Hindu, can we criminalize the eating of beef or killing of a cow? Mill argues that these actions are **offensive** and not **harmful**. To move beyond a harm principle to an enforcement of a maximal moral code (one that tells us how to live in all aspects of our lives) opens the door to wide interpretation, maximal oppression of individuality, and terrible consequences for happiness over time. Mill favors informing law with a minimal moral view based upon harms to persons. If Mill errs here, it is in being too minimal in his construal of harm.

Next, we will apply the Harm Principle to some cases to see how Mill's view resolves questions of liberty.

Part 3: Applying the Harm Principle

Mill discusses several cases of applying the harm principle. Each case brings up a special challenge for the harm principle. When examining these cases, students should be aware that there may exist a distinction between what actions the harm principle as stated would indicate and what Mill himself says. In this sense, we may interpret some of Mill's answers as backing away from the conclusions implied by the harm principle itself. This will become evident in Case #5.

Mill's Cases

Case #1: Polygamy

Mill defends polygamy between consenting adults. He finds it morally deficient, but legally permissible so long as it is based upon informed consent of rational adults. Do you agree?

Case #2: Bob the College Student

Bob, like many college students, likes to go drinking. Though drinking itself is not a harm to others, Bob ends up getting in regular bar fights after a night of drinking. Everyone around Bob (including the police and bartenders) is aware of his propensity to become violent when he drinks. Is there any justification for preventing Bob from drinking?

Mill would argue that it would then be appropriate for society to limit Bob's future drinking due to his past behavior. In other words, Mill thinks that an individual's protection from interference is forfeited when an otherwise self-regarding behavior (like drinking) continually leads to an other-regarding behavior (fighting when drunk). This means that society cannot prevent drinking (because not every drinker is like Bob), but society can prevent or limit anyone like Bob from drinking.

Case #3: Liquor Laws

The state decides to pass two new liquor laws: First, a law banning the sale of liquor on Sundays. Second, a law taxing liquor more than other goods in order to deter people from drinking because it is bad for them. Notice that these laws do not prevent drinking; they only make drinking more expensive and alcohol harder to obtain. Are either of these laws acceptable according to the harm principle?

Mill argues that they are not. Society is only justified in making a product more expensive or difficult to obtain if it were justified in banning the product all together. Mill then would oppose restricting the sale of liquor on Sunday and higher taxes on alcohol, if those taxes are imposed in order to make it harder to obtain.

Case #4: The Jogger and the Bridge

You are standing near a bridge that you know to be unsafe such that anyone crossing will likely fall to their death. For some reason there is no sign warning people of this (it was likely stolen as a prank). You see a jogger about to cross the bridge who is wearing headphones so they cannot hear your warning.

Are you justified in physically stopping the person from crossing the bridge in order to warn them? Mill claims that you are justified in stopping them and warning them of the dangerous bridge. This is because liberty is about doing what you want to do; and in this sort of case, we can assume that the person does not want to fall to their death. We are therefore justified in stopping them to inform them of the danger that they do not know about.

Case #5: Slavery

Suppose a rational adult decides to sell themselves into slavery. Does the harm principle prevent us from stopping this action? Taking the harm principle as written, we might conclude that a rational adult has the right to sell themselves into slavery. However, Mill says we can prevent this sale. Mill holds that the whole point of the harm principle is to preserve a person's liberty. As a result, if we allow someone to sell themselves into slavery we allow them to sacrifice all possibility of their future liberty. In this case Mill admits we ought prevent the sale even if it is a self-regarding action. Though this seems a rare case, it may have implications for questions of drug use and suicide.

Other Cases to Consider

Now that we have examined the cases that Mill discussed, here are some thought cases for you to consider:

Case #6: The Motorcycling Neighbor

You have a neighbor who has a large backyard with a 10-foot high, 4-foot thick brick wall. Only by peering out of the top of your attic window can you see what goes on in his backyard. Every Friday night from 6-8 pm he goes into his backyard, guzzles a bottle of Jack Daniels, strips buck naked, hops on his motorcycle, and zips around his backyard at high speed without a helmet. This is very dangerous behavior for your single neighbor. Do we have any justification for preventing this action according to the harm principle? What if your neighbor had ten of his friends (all rational consenting adults) over to drink and ride their motorcycles in the same fashion?

Exercising Liberty According to Mill's Harm Principle?

Case #7: Saturday Whips and Chains

On Saturday evening (after his Friday night cycle ride), your neighbor has a group of 20 rational consenting adults over to his house. They all go into his basement, break out their leather outfits, whips, and chains, and engage in a rough sex orgy. There is certain harm to others here (whips and chains do hurt), but do we have a justification to prevent this activity according to the harm principle? Would your answer change if some or all of the participants paid the host a fee to participate in the festivities? This would be only a step away from prostitution; would we have any grounds to prevent even this according to the harm principle?

Case #8: Homegrown and Pink Floyd

On Sunday, after an exhausting weekend, your neighbor decides to take it easy. He goes into his attic with a pizza and some Doritos, turns on his lava lamp and black lights, puts Pink Floyd's *Dark Side of the Moon* on the CD player, then goes over to his attic "garden" and rolls up some homegrown marijuana and spends the next six hours smoking, eating munchies, and giggling in his attic. He has a good ventilation system so there is no "second hand smoke" blowing into your yard.

Should we restrict his liberty in this case? How does your answer square with the law in this case? (We will be returning to the issue of drugs in the next module.)

Case #9: The Hanging Tree

On Monday evening you notice your neighbor is about to hang himself from a tree in his yard (you're always nosey and peek to see what he is up to). After a brief conversation you are convinced that he is rational, of sound mind, and fully aware of what he is about to do. He is also not under the influence of any drugs and has no wife or dependent children that he is obligated to support. He is certain he wants to commit suicide and is about to do so. Do you have any justification for stopping him according to the harm principle? How might Mill respond?

Thought Question: Mill on Discrimination?

We have a right, also, in various ways to act upon our unfavorable opinion of any one, not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates. We may give others a preference over him in optional good offices, except those which tend to his improvement. In these various modes a person may suffer very severe penalties at the hands of others, for faults which directly concern only himself; but he suffers these penalties only in so far as they are the natural, and as it were, the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment. A person who shows rashness obstinacy, self-conceit—who cannot live within moderate means—who cannot restrain himself from hurtful indulgences—who pursues animal pleasure at the expense of those of feelings and intellect—must expect to be lowered in the opinions of others, and to have a less share of their

*favorable
sentiments, but of this he has no right to complain, unless he has merited their favor by
special
excellence in his social relations, and has thus established a title to their good offices,
which is
not affected by his demerits towards himself.*

What is Mill suggesting about our ability to discriminate against those whom we find offensive or full of vice? Do you agree with him?

Part 4: Paternalism, Moral Feeling or Moral Reason

WEBLINK: [Click here](#) to read Gerald Dworkin's article on paternalism.

Mill's harm principle, Dworkin argues, is really two claims. The first is that harm to others is sometimes a reason to criminalize behavior. The second is that an individual's own good is **never** a reason to criminalize behavior. Dworkin accepts the first claim but questions the second, which is a rejection of paternalism.

Paternalism is the idea that we are justified in interfering in your liberty strictly for your own good. This interference may be by preventing you from undertaking a harmful or risky action (using drugs) or it may be compelling you by law to act in order to protect yourself (wearing a seat belt). Dworkin lists several paternalistic laws:

1. Requiring motorcycle helmets.
2. No swimming without lifeguards on duty.
3. Laws against suicide.
4. Restricting women and children from certain jobs.
5. Laws against homosexuality and other sexual conduct between consenting adults.
6. Drug laws-especially requiring a prescription for drugs which do not cause anti-social behavior.
7. Laws requiring a license to engage in the practice. (What does he mean? He doesn't mean doctors.)
8. Laws requiring retirement purchases. (Social Security)
9. Laws against gambling.
- 10.Regulation of interest rates.
- 11.Laws against dueling

In addition:

1. Laws regulating contracts (no selling yourself into slavery).
2. Laws restricting the assumption of risk as a defense when safety is ignored.
3. Not allowing consent of the victim as a defense for murder.
4. Civil commitment of the unwilling on grounds they might hurt themselves.

Interestingly enough Dworkin adds some further forms of paternalism, which at the time were not laws-and believe me-we never thought they would become laws.

1. Safety belts in automobiles (Dworkin in 1971 thought that this could be required by not allowing you to sue for damages if you didn't wear your seat belt. . . Behold Dworkin, the power of the fines!)
2. Ban sale of cigarettes (Hasn't happened yet, but we are well on our way such that the possibility isn't laughable like it used to be.)

From this list Dworkin makes a distinction between **pure** and **impure** cases of paternalism.

Pure Paternalism is where the class of persons whose liberty is restricted is identical to class of persons intended to benefit from that restriction. Examples: laws requiring seatbelts or laws against suicide.

Impure Paternalism is where the class of persons whose liberty is restricted is *not*

identical to class of persons intended to benefit from that restriction. Examples: banning the manufacture of cigarettes (or other goods) on the grounds that people may harm themselves by using them. Notice, this would not be the same as the requirement that you warn people of the danger of products. Instead, this would say even though everyone knows your product may be harmful, we are preventing you from selling it on the grounds that the buyer may misuse it and harm themselves. What other products might fit this model?

Thought Question: On Paternalism

Does one type of paternalism seem more plausible or are both equal?

Dworkin finds Mill's objection to paternalism to be out of step with his other writings. Mill categorically eliminates paternalism, holding that only self-protection allows us to interfere with the liberty of others. Yet compare this to Mill's view on lying and justice:

Yet that even this rule [against Lying], sacred as it is, admits of possible exception. . . where withholding of some fact. . . would save an individual. . . from great and unmerited evil.

Like all other obligations of justice already spoken of, this one is not regarded as absolute, but as capable of being overruled by a stronger obligation of justice on the other side.

In both cases Mill, as most utilitarians are known to do, supports exceptions. Dworkin wonders why Mill does not apply this to allow for paternalism as well? Dworkin says here that even Mill should have allowed for some paternalism when individuals clearly do not know their own interest (Like Alf's decision not to wear his seat belt for fear of burning to death). Mill did allow for paternalism in the case of selling into slavery; why as a utilitarian should all other forms be prohibited? The best that Dworkin thinks Mill can argue for on utilitarian grounds is that the burden is placed on the paternalist to justify a restriction on liberty rather than on the person who wants to make use of their liberty without paternalistic interference. Notice, Dworkin says nothing about libertarian justification for the harm principle and its prohibition on paternalism.

So when is paternalism justified according to Dworkin?

Strong Case. In *The Odyssey* Odysseus commands his men to tie him to the mast and refuse all orders to be set free, because he knows the power of the Sirens to enchant men with their songs. Since we know what Odysseus wants, we are simply applying it against what he feared (that he would be enchanted).

Justified paternalism is rarely like this as we do not get people to consent in advance to specific paternalistic measures. Instead, we might obtain people's consent to a system of government which will use paternalism in limited ways to ensure our safety.

We might make a claim here about choice. If you were offered a choice between a libertarian state (without paternalism) or a similar state (with limited paternalism), which would you consent to?

A system of paternalism that he is speaking of is a sort of *social insurance* against irrational, uninformed, or accidental behavior. For instance, you might even agree that

you should wear your seat belt but when left to your own devices you forget to put it on. However, with an occasional advertising campaign, "Seat Belt Enforcement Month: Click It or Ticket," and threat of an expensive fine, you suddenly find motive to wear your seat belt. Have you been deprived of your liberty or have we actually helped you do what you wanted to in the first place? Isn't preventing suicide like this? If we asked you most days, you would oppose ever killing yourself, but on one particular day you decide to try. Are we not protecting your liberty and upholding your desires by stopping you (at least temporarily) for a "cooling off period"? How many people years later conclude that you should have let them die?

Further, take smoking. Smokers might be:

- a. Unaware of the real risks.
- b. Be aware of the real risks, but lack the willpower to quit.
- c. Be aware of the risks but make an irrational calculation that they are not a big deal because they will take so long to occur.

In each of these situations, would not paternalism serve to correct irrational, ignorant, or undesired actions that lead to great harm? How would letting these people go on smoking enhance their liberty given the reasons for their actions?

Dworkin also wishes to limit paternalism by requiring it to balance the "reducing of high risk of serious injury" and the loss to the person restricted. For example, being compelled to wear a seat belt yields significant harm reduction with an insignificant cost to the person. Alternatively, banning mountain climbing may yield significant harm reduction (as many climbers die each year or have other injuries) but also poses a significant cost to the person by precluding their favored life's hobby or livelihood.

In the end, paternalism is justified on Dworkin's account but the burden of proof is high. As he says: "Better that two men ruin themselves than one man be unjustly deprived of liberty."

Part 5: Case Study: Liberty or Crime?

The following article is from ABCNews.com.

Dwarf-tossing, a party activity or bar-room contest, literally involves throwing a dwarf. (ABCNEWS.com)

Dwarf-Tossing

The Right to Make Money With Your Body

Commentary

By John Stossel

March 8—Dave Flood is angry, because he says his rights are being violated: "I'm a dwarf and I want to be tossed," he said. Tossed? Well, yes, it's actually done around the world, often in bars. Men compete to see who can throw dwarves the farthest.

The whole thing repulses me, and maybe you, too. But do *we* get to decide for *Flood*?

He said he can make money being tossed. He's already a showman in Tampa, Florida earning cash doing other seedy things like working as a referee in a strip bar, as women pretend to wrestle.

And he's a regular on a radio show that is fighting a Florida law banning dwarf-tossing.

Little People of America

Several years ago, Robert and Angela Van Ettan, members of a group called Little People of America, convinced Florida's legislators that dwarf-tossing should be illegal. The vote wasn't close. Dwarf-tossing is not a sport, they argued, and the dwarf is "objectified."

"Think of football," said Angela Van Ettan. "The dwarf actually is the ball. He's the object of the competitions. . . . Being objectified is dehumanized." And, they argued, it's dangerous.

"You're dealing with individuals who are tanked up on some alcohol," said Robert, "and when you're in this kind of activity you have a higher risk of paralysis or possibly even death."

But, asks Flood, why do the Little People of America and the politicians get to decide for him? Don't we own our own bodies? Don't adults have the right to use their bodies as we see fit?

"I'm a grown man. I'm 37 years old, I could protect myself," he said. "I don't need them to tell me what I should and shouldn't be able to do."

Making Money With Your Body

Flood just wants to use his body to make money. "I'm capitalizing on what I have. If I was

7 feet tall, I'd get paid to put a basketball through a hoop. I'm not 7 feet tall. I'm 3-feet-2 and a dwarf, so I'm capitalizing on getting tossed."

Lots of people make money with their bodies: Boxers, football players, fashion models. Plenty of actresses have enhanced their careers by having their breasts enlarged, and other surgeries. Is that less risky than being tossed?

"That is a little different," said Angela Van Ettan. She said dwarf-tossing could put all dwarves at risk.

Little people will be grabbed out of bars and thrown around? I asked.

"That has happened," said Angela. "But primarily, probably, it's more a threat and a fear which impacts on the way people live. . . it is the discrimination that results."

This *fear* justifies a ban? Why should the Little People of America decide for *all* dwarves? If activists get to decide for everyone, then the busybodies, in the name of perfect safety, will eventually take all our freedom.

Give me a break!

Thought Questions concerning the Dwarf Tossing case.

1. Does Dwarf tossing amount to a harm to others?
2. Is a law against dwarf tossing a violation of liberty? Why or Why not?
3. What role does the harm principle or paternalism play in your answer?

Part 6: Enforcement of Morals vs. Harm Principle

Patrick Devlin: Enforcement of Morals

Devlin is a British jurist who disagreed with Mill's harm principle. Instead he favored society's right to restrict even activities between consenting adults. We will not read Devlin's writings directly, but below is my synopsis of his argument.

Prostitution, homosexuality, sodomy, drugs, and gambling should be criminalized. Society requires a common morality. This entails the right to criminalize immoral conduct. Why would we place an artificial limit on society's right to criminalize immorality by saying some immoral actions are crimes and others are not? Without a commonly enforced morality, society will fall apart (as history shows). Mill would argue that a man getting drunk in the privacy of his own home only harms himself (yet may offend us). Suppose half of all people in our country got drunk in their own home every night. The economic results for all of us would be disastrous. At what point do we say society can restrict this behavior? Some sort of artificial percentage of the population?

Rather, Devlin argues, society should retain the right to criminalize even the first man as his action is immoral, even if only to himself. Society may not be able to make people be virtuous, but this does not mean we cannot punish vice. Adultery may involve consenting adults, but when it breaks up a marriage it is harmful to society. Even if the purpose of law is simply to protect society, then these behaviors must be restricted. By ignoring the morality of the individual we invite more immorality in society which in turn harms society.

The purpose of law is to uphold the public safety, good, and decency. Given this, there is no reason not to criminalize conduct that is deemed indecent (or immoral) by the vast majority of the populace. Devlin further points out that we cannot in good faith separate western law from Christian morality which informed so much of law. This is not to say that if the majority does not like something, we should criminalize it. Instead, the majority must really feel "reprobation" that something really wrong and potentially harmful has occurred.

Not every such immoral activity can be criminalized. Devlin finds that adultery, for instance, may be too difficult to enforce laws against it in all its forms, but we might at least have legal penalties for its most egregious harms. This might mean that we allow spouses significant legal advantages for obtaining majority property shares in divorces when adultery is the cause of divorce. Any such law (and there are states with laws of this type) would be informed by a moral judgment against the adulterer.

H. L. A. Hart: Immorality and Treason

Hart is often considered the most influential legal philosopher of the modern age. He took issue with Devlin's disagreement with Mill. We will not read Hart directly, but below is a brief synopsis of his critique of Devlin.

According to Hart, Devlin's argument is too focused on *feeling* that an action is immoral rather than on *reasoning* that something seriously immoral has occurred. As such, the

question is not how the vast majority feel, but can that majority provide reason to demonstrate an activity is sufficiently immoral as to justify criminalization? Can the case be made through reason that homosexuality is so immoral as to threaten the fabric of society and justify criminalization?

Supporting moral feeling rather than moral reason is risky. Once, in American history, we felt sufficiently morally threatened that we burned women at the stake for "witchcraft" without giving any reason whatsoever.

Morality does inform the law, but it should be a morality of reason and not feeling.

Part 7: "Sin Taxes"

Sin taxes are increased taxes imposed upon behaviors that are associated with a vice. We are most familiar with sin taxes on tobacco and alcohol, but there are many more. Nevada, for instance, has examined legalizing and heavily taxing marijuana use as well as a potential tax on prostitution (which is already legal in Nevada).

Two reasons are offered in support of sin taxes. First, raising the cost of the behavior will discourage citizens from engaging in that behavior. For instance, someone who smokes a pack of cigarettes at \$3 might stop smoking if costs suddenly increase to \$6 a pack. Second, sin taxes increase revenue for the government without as much opposition as higher sales, income, or property taxes create. It is interesting to note that the two reasons to support sin taxes are not necessarily compatible. If it is about raising money, then you should hope that people continue the behavior. Whereas if it is about discouraging behavior, then you should not expect to raise much money since people stop the activity.

Should the state be imposing sin taxes at all? We have already seen John Stuart Mill's take on this question when he argued that it is a violation of individual liberty/freedom to tax a behavior more heavily than other behaviors. To allow a state to impose sin taxes is to allow the state to de facto ban a behavior, thereby taking away our liberty to engage in it. Paternalists are more apt to support sin taxes on the grounds that they provide the proper incentive for people to stop behaviors that are harmful to themselves. Devlin would also favor them for the same reasons that Mill opposes them.

WEBLINK: Ponder these arguments as you read "The Sin Tax: Economic and Moral Considerations" [Click here to view the article.](#)

Part 8: Greed and Gambling

The vice of greed is one we are all familiar with. The obsessive desire for more wealth and possessions is a constant theme in the lives of many people. Though greed manifests itself through a variety of actions, one common display is gambling.

There are many reasons why someone might gamble, including for charity or entertainment, but greed is one of the most common. Gambling is seen by many people as an easy way to obtain more than they can earn on their own. This may be especially true in games where the jackpots far exceed the lifetime earnings of the ordinary worker. Gambling is symptomatic of the vice-related activities we will examine in this course that have been criminalized, legalized, supported, and opposed throughout the history of our society.

Even today there are battles over when gambling should be allowed and when it should be criminalized. What sets gambling apart from most of the other issues we will look at is that the same gambling which would be a vice and a crime for you to do is a government-sanctioned activity when run and promoted by the state. For you to run a "numbers" game would be a crime which many would declare was motivated by greed. Yet, when the state runs a numbers game (called a lotto), it is a legally protected activity. Yet, is not your game motivated by greed just as much as the state's? If gambling is a vice, should the state be promoting it by enticing people to gamble?

In considering these questions there are two sources of information to consult. First, an edited version of "Gambling in California " which offers a history of gambling in the United States (legal and illegal) as well as the economic and criminal impact of gambling. Second, a video entitled "The Numbers Racket" offers a more personal account of America 's illegal gambling rackets and the rise of state-sponsored gambling.

WEBLINK: "Gambling in California " [Click here to view the article.](#)

Should gambling be a crime? There are at least three reasons why we might think so.

1. Allowing and promoting gambling is to allow and promote vice. This is especially problematic when the state endorses and encourages gambling.
2. Legalized gambling increases poverty because the poor are the most likely to gamble away what little money they have. The impact of increased poverty affects both the gamblers and their children.
3. Legalized gambling attracts crime in two ways. First, the lure of big money attracts various criminal schemes to cheat or steal it. Second, gambling addicts commit crimes in order to pay debts or continue gambling.

In addition, there are at least three reasons why we might allow gambling.

1. Gambling creates jobs and lowers taxes. Lotteries raise money for governments which keeps taxes down. Casinos and other gambling businesses employ tens of thousands of people each year.
2. Criminalizing gambling does not stop gambling. As history has shown us,

criminalizing gambling does not stop it. The illegal game and lotto have thrived despite legal crackdowns or even legal competition. Criminalization does not work. Legalization allows some control and profit from an activity which people are going to do anyhow.

3. Criminalizing gambling is another assault upon our freedom. For most people gambling is not harmful to themselves or others. People should be allowed the choice to gamble or not gamble.

Assignments

Activities so far

As you proceeded through Module 2, you should have participated in the following online activities: discussion forum, poll questions, and readings.

If you have not, please make sure you go back and complete these before proceeding. Further activities for this unit are listed below.

- Poll Question: Do you agree with Mill's harm principle?
- WEBLINK READING : "Paternalism"
- Poll Question: Is Paternalism justifiable?
- Poll Question: Should dwarf-tossing be a crime?
- Poll Question: Do you agree with Hart or Devlin?
- WEBLINK READING : "The Six Tax: Economic and Moral Considerations"
- Poll Question: Should the state impose sin taxes on vice-related behaviors?
- WEBLINK READING : "Gambling in California "
- Poll Question: Is gambling a vice?
- Poll Question: Should gambling be a crime?

Discussion Exercise and Poll

Jones likes to gamble. On weekends he hosts a poker game at his home in which guests pony up hundreds of dollars to play, with the winner taking home a few thousand dollars. In addition, Jones bets on whatever sporting events are in season, plays the lotto/numbers regularly, and takes a yearly vacation to a gambling town (Vegas, Reno , Atlantic city , etc.). When asked why he gambles so much Jones replies, "It is fun, exciting, and I hope to strike it big." Due to his gambling Jones is chronically short on money and his children often go without new clothes, shoes, and other basic needs.

Using the case of Jones as an instance of the wider issue of gambling, answer the following questions and then post an explanation of your answers to the Module 2 Discussion Board. Be sure to engage the postings of your classmates.

1. Is gambling a vice?
2. Should gambling be a crime?
3. What action should society take, if any, against someone like Jones?
4. Should the state be in the business of running and promoting gambling?

Quizzes

Just a reminder, There are four quizzes in the course. Each quiz is worth 10 points. These quizzes are designed to ensure that you are keeping up with the reading assignments. The quizzes occur at the end of every even numbered module (2, 4, 6 and 8). Quiz questions are drawn from a random test bank, so it is unlikely any two students will encounter the same set of questions. You are free to use any materials you wish to aid you during the quiz however, quizzes are timed so you have only 20 minutes to complete and submit the quizzes. Quizzes are available 3 days prior to the due date giving you a total of 4 days in which to take the quiz.

The first quiz appears at the end of this module.