

# Hard Cases for the Harm Principle

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## 1. MORALS OFFENSES AND LEGAL MORALISM

Immoral conduct is no trivial thing, and we should hardly expect societies to tolerate it; yet if men are forced to refrain from immorality, their own choices will play very little role in what they do, so that they can hardly develop critical judgment and moral traits of a genuinely praiseworthy kind. Thus legal enforcement of morality seems to pose a dilemma. The problem does not arise if we assume that all immoral conduct is socially harmful, for immoral conduct will then be prohibited by law not just to punish sin or to "force men to be moral," but rather to prevent harm to others. If, however, there are forms of immorality that do not necessarily cause harm, "the problem of the enforcement of morality" becomes especially acute.

The central problem cases are those criminal actions generally called "morals offenses." Offenses against morality and decency have long constituted a category of crimes (as distinct from offenses against the person, offenses against property, and so on). These have included mainly sex offenses, such as adultery, fornication, sodomy, incest, and prostitution, but also a miscellany of nonsexual offenses, including cruelty to animals, desecration of the flag or other venerated symbols, and mistreatment of

corpses. In a useful article,<sup>1</sup> Louis B. Schwartz maintains that what sets these crimes off as a class is not their special relation to morality (murder is also an offense against morality, but it is not a "morals offense") but the lack of an essential connection between them and social harm. In particular, their suppression is not required by the public security. Some morals offenses may harm the perpetrators themselves, but the risk of harm of this sort has usually been consented to in advance by the actors. Offense to other parties, when it occurs, is usually a consequence of perpetration of the offenses (in public) and can be prevented by statutes against "open lewdness," or "solicitation" in public places. That still leaves "morals offenses" committed by consenting adults in private. Should they really be crimes?

In addition to the general presumption against coercion, other arguments against legislation prohibiting private and harmless sexual practices are drawn from the harm principle itself; laws governing private affairs are extremely awkward and expensive to enforce, and have side effects that are invariably harmful. Laws against homosexuality, for example, can only be occasionally and randomly enforced, and this leads to the inequities of selective enforcement and opportunities for blackmail and private vengeance. Moreover, "the pursuit of homosexuals involves policemen in degrading entrapment practices, and diverts attention and effort"<sup>2</sup> from more serious (harmful) crimes of aggression, fraud, and corruption.

These considerations have led some to argue against statutes that prohibit private immorality, but, not surprisingly, it has encouraged others to abandon their exclusive reliance on the harm and/or offense principles, at least in the case of morals offenses. The alternative principle of "legal moralism" has several forms. In its more moderate version it is commonly associated with the views of Patrick Devlin,<sup>3</sup> whose theory, as I understand it, is really an application of the public harm principle. The proper aim of criminal law, he agrees, is the prevention of harm, not merely to individuals, but also (and primarily) to society itself. A shared moral code, Devlin argues, is a necessary condition for the very existence of a community. Shared moral convictions function as "invisible bonds" tying individuals together into an orderly society. Moreover, the fundamental unifying morality (to switch the metaphor) is a kind of "seamless web";<sup>4</sup> to damage it

<sup>1</sup> Louis B. Schwartz, "Morals Offenses and the Model Penal Code," *Columbia Law Review*, LXIII (1963), 669 ff.

<sup>2</sup> Schwartz, "Morals Offenses and the Model Penal Code," 671.

<sup>3</sup> Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

<sup>4</sup> The phrase is not Devlin's but that of his critic, H.L.A. Hart, in *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), p. 51. In his rejoinder to Hart, Devlin writes: "Seamlessness preys the simile rather hard but apart from that, I should say that for most people morality is a web of beliefs rather than a number of unconnected ones." Devlin, *The Enforcement of Morals*, p. 115.

at one point is to weaken it throughout. Hence, society has as much right to protect its moral code by legal coercion as it does to protect its equally indispensable political institutions. The law cannot tolerate politically revolutionary activity, nor can it accept activity that rips assunder its moral fabric.<sup>5</sup> The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.<sup>5</sup>

H.L.A. Hart finds it plausible that some shared morality is necessary to the existence of a community, but criticizes Devlin's further contention "that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society."<sup>6</sup> Indeed, a moral critic might admit that we can't exist as a society without some morality, while insisting that we can perfectly well exist without *this* morality (if we put a better one in its place). Devlin seems to reply that the shared morality *can* be changed even though protected by law, and, when it does change, the emergent reformed morality in turn deserves its legal protection.<sup>7</sup> The law then functions to make moral reform difficult, but there is no preventing change where reforming zeal is fierce enough. How does one bring about a change in prevailing moral beliefs when they are enshrined in law? Presumably by advocating conduct which is in fact illegal, by putting into public practice what one preaches, and by demonstrating one's sincerity by marching proudly off to jail for one's convictions:

there is... a natural respect for opinions that are sincerely held. When such opinions accumulate enough weight, the law must either yield or it is broken. In a democratic society... there will be a strong tendency for it to yield—not to abandon all defenses so as to let in the horde, but to give ground to those who are prepared to fight for something that they prize. To fight may be to suffer. A willingness to suffer is the most convincing proof of sincerity. Without the law there would be no proof. The law is the anvil on which the hammer strikes.<sup>8</sup>

In this remarkable passage, Devlin has discovered another argument for enforcing "morality as such," and incidentally for principled civil disobedience as the main technique for initiating and regulating moral change. A similar argument, deriving from Samuel Johnson and applying mainly to changes in religious doctrine, was well known to Mill. According to this theory, religious innovators deserve to be persecuted, for persecution allows them to prove their mettle and demonstrate their disinterested good faith, while their teachings, insofar as they are true, cannot be hurt, since truth will always triumph in the end. Mill held this method of testing

<sup>5</sup> Devlin, *The Enforcement of Morality*, pp. 13–14.

<sup>6</sup> Hart, *Law, Liberty, and Morality*, p. 51.

<sup>7</sup> Devlin, *The Enforcement of Morality*, pp. 115 ff.

<sup>8</sup> Devlin, *The Enforcement of Morality*, p. 116.

truth, whether in science, religion, or morality, to be both uneconomical and ungenerous.<sup>9</sup> But if self-sacrificing civil disobedience is not the most efficient and humane remedy for the moral reformer, what instruments of moral change are available to him? This question is not only difficult to answer in its own right, it is also the rock that sinks Devlin's favorite analogy between "harmless" immorality and political subversion.

Consider the nature of subversion. Most modern law-governed countries have a constitution, a set of duly constituted authorities, and a body of statutes created and enforced by these authorities. The ways of changing these things will be well known, orderly, and permitted by the constitution. For example, constitutions are amended, legislators are elected, and new legislation is introduced. On the other hand, it is easy to conceive of various sorts of unpermitted and disorderly change—through assassination and violent revolution, or bribery and subornation, or the use of legitimately won power to extort and intimidate. Only these illegitimate methods of change can be called "subversion." But here the analogy between positive law and positive morality begins to break down. There is no "moral constitution," no well-known and orderly way of introducing moral legislation to duly constituted moral legislators, no clear convention of majority rule. Moral subversion, if there is such a thing, must consist in the employment of disallowed techniques of change instead of the officially permitted "constitutional" ones. It consists not simply of change as such, but of illegitimate change. Insofar as the notion of legitimately induced moral change remains obscure, illegitimate moral change is no better. Still, there is enough content to both notions to preserve some analogy to the political case. A citizen works *legitimately* to change public moral beliefs when he openly and forthrightly expresses his own dissent, when he attempts to argue, persuade, and offer reasons, and when he lives according to his own convictions with persuasive quiet and dignity, neither harming others nor offering counterpersuasive offense to tender sensibilities. A citizen attempts to change mores by *illegitimate* means when he abandons argument and example for force and fraud. If this is the basis of the distinction between legitimate and illegitimate techniques of moral change, then the use of state power to affect moral belief *one way or the other*, when harmfulness is not involved, is a clear example of illegitimacy. Government enforcement of the conventional code is not to be called "moral subversion," of course, because it is used on behalf of the status quo; but whether conservative or innovative, it is equally in defiance of our "moral constitution" (if anything is).

The second version of legal moralism is the pure version, not some other principle in disguise. Enforcement of morality as such and the attendant punishment of sin are not justified as means to some further social aim

<sup>9</sup> John Stuart Mill, *On Liberty* (New York: Liberal Arts Press, 1956) pp. 33–34.

(such as preservation of social cohesiveness) but are ends in themselves. Perhaps J. F. Stephen was expressing this pure moralism when he wrote that "there are acts of wickedness so gross and outrageous that... [protection of others apart], they must be prevented at any cost to the offender and punished if they occur with exemplary severity."<sup>10</sup> From his examples it is clear that Stephen had in mind the very acts that are called "morals offenses" in the law.

It is sometimes said in support of pure legal moralism that the world as a whole would be a better place without morally ugly, even "harmlessly immoral," conduct, and that our actual universe is intrinsically worse for having such conduct in it. The threat of punishment, the argument continues, deters such conduct. Actual instances of punishment not only back up the threat, and thus help keep future moral weeds out of the universe's garden, they also erase past evils from the universe's temporal record by "nullifying" them, or making it as if they never were. Thus punishment, it is said, contributes to the intrinsic value of the universe in two ways: by canceling out past sins and preventing future ones.<sup>11</sup>

There is some plausibility in this view when it is applied to ordinary harmful crimes, especially those involving duplicity or cruelty, which really do seem to "set the universe out of joint." It is natural enough to think of repentance, apology, or forgiveness as "setting things straight," and of punishment as a kind of "payment" or a wiping clean of the moral slate. But in cases where it is natural to resort to such analogies, there is not only a rule infraction, there is also a victim—some person or society of persons who have been harmed. Where there is no victim—and especially where there is no profit at the expense of another—"setting things straight" has no clear intuitive content.

Punishment may yet play its role in discouraging harmless private immoralities for the sake of "the universe's moral record." But if fear of punishment is to keep people from illicit intercourse (or from desecrating flags, or mistreating corpses) in the privacy of their own rooms, then morality shall have to be enforced with a fearsome efficiency that shows no respect for individual privacy. If private immoralities are to be deterred by threat of punishment, the detecting authorities must be able to look into the hidden chambers and locked rooms of anyone's private domicile. When we put this massive forfeiture of privacy into the balance along with the usual costs of coercion—loss of spontaneity, stunting of rational powers, anxiety, hypocrisy, and the rest—the price of securing mere outward conformity to the community's moral standards (for that is all that can be achieved by the penal law) is exorbitant.

<sup>10</sup> James Fitzjames Stephen, *Liberty, Equality, Fraternity* (London: 1873), p. 163.

<sup>11</sup> Cf. C. D. Broad, "Certain Features in Moore's Ethical Doctrines," in P. A. Schilpp, *The Philosophy of G. E. Moore* (Evanston, Ill.: Northwestern University Press, 1942), pp. 48 ff.

Perhaps the most interesting of the nonsexual morals offenses, and the most challenging case for application of liberty-limiting principles, is cruelty to animals. Suppose that John Doe is an intelligent, sensitive person with one very severe neurotic trait—he loves to see living things suffer pain. Fortunately, he never has occasion to torture human beings (he would genuinely regret that), for he can always find an animal for the purpose. For a period he locks himself in his room every night, draws the blind, and then beats and tortures a dog to death. The sounds of shrieks and moans, which are music to his ears, are nuisances to his neighbors, and when his landlady discovers what he has been doing she is so shocked she has to be hospitalized. Distressed that he has caused harm to human beings, Doe leaves the rooming house, buys a five hundred acre ranch, and moves into a house in the remote, unpopulated center of his own property. There, in the perfect privacy of his own home, he spends every evening maiming, torturing, and beating to death his own animals.

What are we to say of Doe's bizarre behavior? We have three alternatives. First we can say that it is perfectly permissible since it consists simply in a man's destruction of his own property. How a man disposes in private of his own property is no concern of anyone else providing he causes no nuisance such as loud noises and evil smells. Second, we can say that this behavior is patently immoral even though it causes no harm to the interests of anyone other than the actor; further, since it obviously should not be permitted by the law, this is a case where the harm principle is inadequate and must be supplemented by legal moralism. Third, we can extend the harm principle to animals, and argue that the law can interfere with the private enjoyment of property not to enforce "morality as such," but rather to prevent harm to the animals. The third alternative is the most inviting, but not without its difficulties. We *must* control animal movements, exploit animal labor, and, in many cases, deliberately slaughter animals. All these forms of treatment would be "harm" if inflicted on human beings, but cannot be allowed to count as harm to animals if the harm principle is to be extended to them in a realistic way. The best compromise is to recognize one supreme interest of animals, namely the interest in freedom from cruelly or wantonly inflicted pain, and to count as "harm" all and only invasions of that interest. ↖ (up and

## 2. OBSCENITY AND THE OFFENSE PRINCIPLE

Up to this point we have considered the harm and offense principles together in order to determine whether between them they are sufficient to regulate conventional immoralities, or whether they need help from a further independent principle, legal moralism. Morals offenses were treated as essentially private so that the offense principle could not be stretched to apply to them. (Obscene literature and pornographic displays)

would appear to be quite different in this respect. Both are materials deliberately published for the eyes of others, and their existence can bring partisans of the unsupplemented harm principle into direct conflict with those who endorse *both* the harm and offense principles.

In its untechnical, prelegal sense, the word "obscenity" refers to material dealing with nudity, sex, or excretion in an offensive manner. Such material becomes obscene in the legal sense when, because of its offensiveness or for some other reason [this question had best be left open in the definition], it is or ought to be without legal protection. The legal definition then incorporates the everyday sense, and essential to both is the requirement that the material be *offensive*. An item may offend one person and not another. "Obscenity," if it is to avoid this subjective relativity, must involve an interpersonal objective sense of "offensive." Material must be offensive by prevailing community standards that are public and well known, or be such that it is apt to offend virtually everyone.

Not all material that is generally offensive need also be harmful in any sense recognized by the harm principle. It is partly an empirical question whether reading or witnessing obscene material causes social harm; reliable evidence, even of a statistical kind, of causal connections between obscenity and antisocial behavior is extremely hard to find.<sup>12</sup> In the absence of clear and decisive evidence of harmfulness, the American Civil Liberties Union insists that the offensiveness of obscene material cannot be a sufficient ground for its repression:

... the question in a case involving obscenity, just as in every case involving an attempted restriction upon free speech, is whether the words or pictures are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantial evil that the state has a right to prevent. . . . We believe that under the current state of knowledge, there is grossly insufficient evidence to show that obscenity brings about any substantive evil.<sup>13</sup>

The A.C.L.U. argument employs *only* the harm principle among liberty-limiting principles, and treats literature, drama, and painting as forms of expression subject to the same rules as expressions of opinion. In respect to both types of expression, "every act of deciding what should be barred carries with it a danger to the community."<sup>14</sup> The suppression itself is an evil to the author who is squelched. The power to censor and punish involves risks that socially valuable material will be repressed along with the "filth." The overall effect of suppression, the A.C.L.U. concludes, is

<sup>12</sup> There have been some studies made, but the results have been inconclusive. See the *Report of the Federal Commission on Obscenity and Pornography* (New York: Bantam Books, 1970), pp. 169-308.

<sup>13</sup> *Obscenity and Censorship* (Pamphlet published by the American Civil Liberties Union, New York, March, 1963), p. 7.

<sup>14</sup> *Obscenity and Censorship*, p. 4.

almost certainly to discourage nonconformist and eccentric expression generally. In order to override these serious risks, there must be in a given case an even more clear and present danger that the obscene material, if not squelched, will cause even greater harm; such countervailing evidence is never forthcoming. (If such evidence were to accumulate, the A.C.L.U. would be perfectly willing to change its position on obscenity.)

The A.C.L.U. stand on obscenity seems clearly to be the position dictated by the unsupplemented harm principle and its corollary, the clear and present danger test. Is there any reason at this point to introduce the offense principle into the discussion? Unhappily, we may be forced to if we are to do justice to all of our particular intuitions in the most harmonious way. Consider an example suggested by Professor Schwartz. By the provisions of the new Model Penal Code, he writes, "a rich homosexual may not use a billboard on Times Square to promulgate to the general populace the techniques and pleasures of sodomy."<sup>15</sup> If the notion of "harm" is restricted to its narrow sense, that is, contrasted with "offense," it will be hard to reconstruct a rationale for this prohibition based on the harm principle. There is unlikely to be evidence that a lurid and obscene public poster in Times Square would create a clear and present danger of injury to those who fail to avert their eyes in time as they come blinking out of the subway stations. Yet it will be surpassingly difficult for even the most dedicated liberal to advocate freedom of expression in a case of this kind. Hence, if we are to justify coercion in this case, we will likely be driven, however reluctantly, to the offense principle.

There is good reason to be "reluctant" to embrace the offense principle until driven to it by an example like the above. People take perfectly genuine offense at many socially useful or harmless activities, from commercial advertisements to inane chatter. Moreover, widespread irrational prejudices can lead people to be disgusted, shocked, even morally repelled by perfectly innocent activities, and we should be loath to permit their groundless repugnance to override the innocence. The offense principle, therefore, must be formulated very precisely and applied in accordance with carefully formulated standards so as not to open the door to wholesale and intuitively unwarranted repression. At the very least we should require that the prohibited conduct or material be of the sort apt to offend almost everybody, and not just some shifting majority or special interest group.

It is instructive to note that a strictly drawn offense principle would not only justify prohibition of conduct and pictured conduct that is in its inherent character repellent, but also conduct and pictured conduct that is inoffensive in itself but offensive in inappropriate circumstances. I have in mind so-called indecencies such as public nudity. One can imagine an

<sup>15</sup> Schwartz, "Morals Offenses and the Penal Code," 680.

advocate of the unsupplemented harm principle arguing against the public nudity prohibition on the grounds that the sight of a naked body does no one any harm, and the state has no right to impose standards of dress or undress on private citizens. How one chooses to dress, after all, is a form of self-expression. If we do not permit the state to bar clashing colors or bizarre hair styles, by what right does it prohibit total undress? Perhaps the sight of naked people could at first lead to riots or other forms of antisocial behavior, but that is precisely the sort of contingency for which we have police. If we don't take away a person's right of free speech for the reason that its exercise may lead others to misbehave, we cannot in consistency deny his right to dress or undress as he chooses for the same reason.

There may be no answering this challenge on its own ground, but the offense principle provides a ready rationale for the nudity prohibition. The sight of nude bodies in public places is for almost everyone acutely *embarrassing*. Part of the explanation no doubt rests on the fact that nudity has an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed. The conflict between these attracting and repressing forces is exciting, upsetting, and anxiety-producing. In some persons it will create at best a kind of painful turmoil, and at worst that experience of exposure to oneself of "peculiarly sensitive, intimate, vulnerable aspects of the self"<sup>16</sup> which is called *shame*. "One's feeling is involuntarily exposed openly in one's face; one is uncovered... taken by surprise... made a fool of."<sup>17</sup> The result is not mere "offense," but a kind of psychic jolt that in many normal people can be a painful wound. Even those of us who are better able to control our feelings might well resent *the nuisance* of having to do so.

If we are to accept the offense principle as a supplement to the harm principle, we must accept two corollaries which stand in relation to it similarly to the way in which the clear and present danger test stands to the harm principle. The first, the *standard of universality*, has already been touched upon. For the offensiveness (disgust, embarrassment, outraged sensibilities, or shame) to be sufficient to warrant coercion, it should be the reaction that could be expected from almost any person chosen at random from the nation as a whole, regardless of sect, faction, race, age, or sex. The second is the *standard of reasonable avoidability*. No one has a right to protection from the state against offensive experiences if he can effectively avoid those experiences with no unreasonable effort or inconvenience. If a nude person enters a public bus and takes a seat near the front, there may be no effective way for other patrons to avoid intensely shameful embarrassment (or other insupportable feelings) short of leaving

<sup>16</sup> Helen Merrill Lynd, *On Shame and the Search for Identity* (New York: Science Editions, Inc., 1961), p. 33.

<sup>17</sup> Lynd, *On Shame and the Search for Identity*, p. 32.

the bus, which would be an unreasonable inconvenience. Similarly, obscene remarks over a loudspeaker, homosexual billboards in Times Square, and pornographic handbills thrust into the hands of passing pedestrians all fail to be reasonably avoidable.

On the other hand, the offense principle properly qualified can give no warrant to the suppression of books on the grounds of obscenity. When printed words hide decorously behind covers of books sitting passively on bookstore shelves, their offensiveness is easily avoided. The contrary view is no doubt encouraged by the common comparison of obscenity with "smut," "filth," or "dirt." This in turn suggests an analogy to nuisance law, which governs cases where certain activities create loud noises or terrible odors offensive to neighbors, and "the courts must weigh the gravity of the nuisance [substitute "offense"] to the neighbors against the social utility [substitute "redeeming social value"] of the defendant's conduct."<sup>18</sup> There is, however, one vitiating disanalogy in this comparison. In the case of "dirty books" the offense is easily avoidable. There is nothing like the evil smell of rancid garbage oozing right out through the covers of a book. When an "obscene" book sits on a shelf, who is there to be offended? Those who want to read it for the sake of erotic stimulation presumably will not be offended (or else they wouldn't read it), and those who choose not to read it will have no experience by which to be offended. If its covers are too decorous, some innocents may browse through it by mistake and be offended by what they find, but they need only close the book to escape the offense. Even this offense, minimal as it is, could be completely avoided by prior consultation of trusted book reviewers. I conclude that there are no sufficient grounds derived either from the harm or offense principles for suppressing obscene literature, unless that ground be the protection of children; but I can think of no reason why restrictions on sales to children cannot work as well for printed materials as they do for cigarettes and whiskey.

### 3. LEGAL PATERNALISM\*

The liberty-limiting principle called legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme version, to guide them, whether they like it or not, toward their own good. Parents can be expected to justify interference in the lives of their children (e.g., telling them what they must eat and when they must sleep) on the ground that "daddy knows best." Legal paternalism seems to imply that, since the state

<sup>18</sup> William L. Prosser, *Handbook of the Law of Torts* (St. Paul: West Publishing Co., 1955), p. 411.

\* This section reprinted from my "Legal Paternalism" in Volume I, no. 1 of the *Canadian Journal of Philosophy* (1971), by permission of the Canadian Association for Publishing in Philosophy.

often perceives the interests of individual citizens better than do the citizens themselves, it stands as a permanent guardian of those interests *in loco parentis*. Put this bluntly, paternalism seems a preposterous doctrine. If adults are treated as children they will come in time to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision. Even children, after a certain point, had better not be "treated as children," or they will never acquire the outlook and capability of responsible adults.

Yet if we reject paternalism entirely, and deny that a person's own good is ever a valid ground for coercing him, we seem to fly in the face both of common sense and long-established customs and laws. In the criminal law, for example, a prospective victim's freely granted consent is no defense to the charge of mayhem or homicide. The state simply refuses to permit anyone to agree to his own disablement or killing. The law of contracts similarly refuses to recognize as valid contracts to sell oneself into slavery, or to become a mistress, or a second wife. Any ordinary citizen is legally justified in using reasonable force to prevent another from mutilating himself or committing suicide. No one is allowed to purchase certain drugs even for therapeutic purposes without a physician's prescription (doctor knows best). The use of other drugs, such as heroin, for mere pleasure is not permitted under any circumstances. It is hard to find any convincing rationale for all such restrictions apart from the argument that beatings, mutilations, death, concubinage, slavery, and bigamy are always bad for a person whether he or she knows it or not, and that antibiotics are too dangerous for any nonexpert, and narcotics for anyone at all, to take on his own initiative.

The trick is stopping short once one undertakes this path, unless we wish to ban whiskey, cigarettes, and fried foods, which tend to be bad for people, too. We must somehow reconcile our general repugnance for paternalism with the apparent necessity, or at least reasonableness, of some paternalistic regulations. The way to do this is to find mediating maxims or standards of application for the paternalistic principle which restrict its use in a way analogous to that in which the universality and reasonable avoidance tests delimit the offense principle. Let us begin by rejecting the views that the protection of a person from himself is always a valid ground for interference and that it is never a valid ground. It follows that it is a valid ground only under certain conditions, which we must now try to state.

It will be useful to make some preliminary distinctions. The first is between those cases in which a person directly produces harm to himself (where the harm is the certain and desired end of his conduct), and those cases in which a person simply creates a risk of harm to himself in the course of activities directed toward other ends. The man who knowingly swallows a lethal dose of arsenic will certainly die, and death must be imputed as his goal. Another man is offended by the sight of his left hand,

so he grasps an ax in his right hand and chops his left hand off. He does not thereby "endanger" his interest in the physical integrity of his limbs, or "risk" the loss of his hand; he brings about the loss directly and deliberately. On the other hand, to smoke cigarettes or to drive at excessive speeds is not to harm oneself directly, but rather to increase beyond a normal level the probability that harm to oneself will result.

The second distinction is that between reasonable and unreasonable risks. There is no form of activity (or inactivity, for that matter) that does not involve some risks. On some occasions we have a choice between more and less risky actions, and prudence dictates that we take the less risky course. However, what is called "prudence" is not always reasonable. Sometimes it is more reasonable to assume a great risk for a great gain than to play it safe and forfeit a unique opportunity. Thus, it is not necessarily more reasonable for a coronary patient to increase his life expectancy by living a life of quiet inactivity than to continue working hard at his career in the hope of achieving something important, even at the risk of a sudden fatal heart attack. Although there is no simple mathematical formula to guide one in making such decisions or for judging them "reasonable" or "unreasonable," there are some decisions that are manifestly unreasonable. It is unreasonable to drive at sixty miles an hour through a twenty mile an hour zone in order to arrive at a party on time, but it may be reasonable to drive fifty miles an hour to get a pregnant wife to the maternity ward. It is foolish to resist an armed robber in an effort to protect one's wallet, but it may be worth a desperate lunge to protect one's very life.

All of these cases involve a number of distinct considerations. If there is time to deliberate one should consider: (1) the degree of probability that harm to oneself will result from a given course of action, (2) the seriousness of the harm being risked, i.e., "the value or importance of that which is exposed to the risk," (3) the degree of probability that the goal inclining one to shoulder the risk will in fact result from the course of action, (4) the value or importance of achieving that goal, that is, just how worthwhile it is to one (this is the intimately personal factor, requiring a decision about one's own preferences, that makes it so difficult for the outsider to judge the reasonableness of a risk), and (5) the necessity of the risk, that is, the availability or absence of alternative, less risky, means to the desired goal.<sup>19</sup>

Certain judgments about the reasonableness of risk assumptions are quite uncontroversial. We can say, for example, that the greater are considerations 1 and 2, the less reasonable the risk, and the greater are considerations 3, 4, and 5, the more reasonable the risk. But in a given difficult case, even where questions of "probability" are meaningful and beyond dispute, and where all the relevant facts are known, the risk decision may defy objective

<sup>19</sup> The distinctions in this paragraph have been borrowed from Henry T. Terry, "Negligence," *Harvard Law Review*, XXIX (1915), pp. 40-50.

assessment because of its component personal value judgments. In any case, if the state is to be given the right to prevent a person from risking harm to himself (and only himself), it must not be on the ground that the prohibited action is risky, or even extremely risky, but rather that the risk is extreme and, in respect to its objectively assessable components, manifestly unreasonable. There are sometimes very good reasons for regarding even a person's judgment of personal worthwhileness (consideration 4) to be "manifestly unreasonable," but it remains to be seen whether (or when) that kind of unreasonableness can be sufficient grounds for interference.

The third and final distinction is between fully voluntary and not fully voluntary assumptions of a risk. One assumes a risk in a fully voluntary way when one shoulders it while informed of all relevant facts and contingencies, and in the absence of all coercive pressure or compulsion. To whatever extent there is neurotic compulsion, misinformation, excitement or impetuosity, clouded judgment (as, e.g., from alcohol), or immature or defective faculties of reasoning, the choice falls short of perfect voluntariness.<sup>20</sup> Voluntariness, then, is a matter of degree. One's "choice" is completely involuntary when it is no choice at all, properly speaking—when one lacks all muscular control of one's movements, or is knocked down or sent reeling by a blow or an explosion—or when, through ignorance, one chooses something other than what one means to choose, as when one thinks the arsenic powder is table salt and sprinkles it on one's scrambled eggs. Most harmful choices, as most choices generally, fall somewhere between the extremes of perfect voluntariness and complete involuntariness.

The central thesis of Mill and other individualists about paternalism is that the fully voluntary choice or consent (to another's doing) of a mature and rational human being concerning matters that directly affect only his own interests is so precious that no one else (especially the state) has a right to interfere with it simply for the person's "own good." No doubt this thesis was also meant to apply to almost-but-not-quite fully voluntary choices as well, and probably even to some substantially nonvoluntary ones (e.g., a neurotic person's choice of a wife who will satisfy his neurotic needs, but only at the price of great unhappiness, eventual divorce, and exacerbated guilt). However, it is not probable that the individualist thesis was meant to apply to choices near the bottom of the voluntariness scale, and Mill himself left no doubt that he did not intend it to apply to completely involuntary "choices." Neither should we expect antipaternalistic individualism to deny protection to a person from his own nonvoluntary choices, for insofar as the choices are not voluntary they are just as alien to him as the choices of someone else.

<sup>20</sup> My usage of the term "voluntary" differs from that of Aristotle in his famous analysis in Book III of the *Nicomachean Ethics*, but corresponds closely to what Aristotle called "deliberate choice."

Thus Mill would permit the state to protect a man from his own ignorance, at least in circumstances that create a strong presumption that his uninformed or misinformed choice would not correspond to his eventual enlightened one.

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.<sup>21</sup>

Of course, for all the public officer may know, the man on the bridge does desire to fall into the river, or to take the risk of falling for other purposes. Then, Mill argues, if the person is fully warned of the danger and wishes to proceed anyway, that is his business alone, despite the advance presumption that most people do not wish to run such risks. Hence the officer was justified, Mill would argue, in his original interference.

On other occasions a person may need to be protected from some other condition that may render his informed choice substantially less than voluntary. He may be "a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty."<sup>22</sup> Mill would not permit any such person to cross an objectively unsafe bridge. On the other hand, there is no reason why a child, or an excited person, or a drunkard, or a mentally ill person should not be allowed to proceed on his way home across a perfectly safe thoroughfare. Even substantially nonvoluntary choices deserve protection unless there is good reason to judge them dangerous.

For all we can know, the behavior of a drunk or an emotionally upset person would be exactly the same even if he were sober and calm. But when the behavior seems patently self-damaging and is of a sort in which most calm and normal persons would not engage, then there are strong grounds, if only of a statistical sort, for inferring the opposite; these grounds, on Mill's principle, would justify interference. It may be that there is no kind of action of which it can be said, "No mentally competent adult in a calm, attentive mood, fully informed, and so on, would ever choose (or consent to) that." Nevertheless, there are some actions that create a powerful presumption that an actor in his right mind would not choose them. The point of calling this hypothesis a "presumption" is to require that it be completely overridden before legal permission be given to a person who has already been interfered with to go on as before. For example, if a policeman (or anyone else) sees John Doe about to chop off his hand with an ax, he is perfectly justified in using force to prevent him, because of the presumption that no one could voluntarily choose to do such a thing. The presumption, however, should always be taken as rebuttable in

<sup>21</sup> Mill, *On Liberty*, p. 117.

<sup>22</sup> Mill, *On Liberty*, p. 117.

principle; it will be up to Doe to prove before an official tribunal that he is calm, competent, and free, and still wishes to chop off his hand. Perhaps this is too great a burden to expect Doe himself to "prove," but the tribunal should require that the presumption against voluntariness be overturned by evidence from some source or other. The existence of the presumption should require that an objective determination be made, whether by the usual adversary procedures of law courts, or simply by a collective investigation by the tribunal into the available facts. The greater the presumption to be overridden, the more elaborate and fastidious should be the legal paraphernalia required, and the stricter the standards of evidence. The point of the procedure would not be to evaluate the wisdom or worthiness of a person's choice, but rather to determine whether the choice really is his.

This seems to lead us to a form of paternalism so weak and innocuous that it could be accepted even by Mill, namely, that the state has the right to prevent self-regarding harmful conduct only when it is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not. A strong presumption that no normal person would voluntarily choose or consent to the kind of conduct in question should be a proper ground for detaining the person until the voluntary character of his choice can be established. We can use the phrase "the standard of voluntariness" as a label for considerations that mediate application of the principle that a person can be protected from his own folly.

Consider a typical hard case for the application of the voluntariness standard, the problem of harmful drugs. Suppose that Richard Roe requests a prescription of drug *X* from Dr. Doe, and the following discussion ensues:

DR. DOE: I cannot prescribe drug *X* to you because it will do you physical harm.  
MR. ROE: But you are mistaken. It will not cause me physical harm.

In a case like this, the state, of course, backs the doctor, since it deems medical questions to be technical matters subject to expert opinions. If a layman disagrees with a physician on a question of medical fact, the layman is presumed wrong, and if he nevertheless chooses to act on his factually mistaken belief, his action will be substantially less than fully voluntary. That is, the action of ingesting a substance which will in fact harm him is not the action he voluntarily chooses to do (because he does not believe that it is harmful). Hence the state intervenes to protect him not from his own free and voluntary choices, but from his own ignorance.

Suppose however that the exchange goes as follows:

DR. DOE: I cannot prescribe drug *X* to you because it will do you physical harm.  
MR. ROE: Exactly. That's just what I want. I want to harm myself.

In this case Roe is properly apprised of the facts; he suffers from no delusions or misconceptions. Yet his choice is so odd that there exists a reasonable presumption that he has been deprived of the "full use of his reflecting faculty." It is because we know that the overwhelming majority of choices to inflict injury for its own sake on oneself are not fully voluntary that we are entitled to presume that the present choice is not fully voluntary. If no further evidence of derangement, illness, severe depression, or unsettling excitation can be discovered, however, and the patient can convince an objective panel that his choice is voluntary (unlikely event!), then our "voluntariness standard" would permit no further state constraint.

Now consider the third possibility:

DR. DOE: I cannot prescribe drug *X* to you because it is very likely to do you physical harm.  
MR. ROE: I don't care if it causes me physical harm. I'll get a lot of pleasure first, so much pleasure, in fact, that it is well worth running the risk of physical harm. If I must pay a price for my pleasure I am willing to do so.

This is perhaps the most troublesome case. Roe's choice is not patently irrational on its face. A well thought-out philosophical hedonism may be one of his profoundest convictions, involving a fundamental decision of principle to commit himself to the intensely pleasurable, even if brief, life. If no third party interests are directly involved, the state can hardly be permitted to declare his philosophical convictions unsound or "sick" and prevent him from practicing them, without assuming powers that it will inevitably misuse.

On the other hand, this case may be quite similar to the preceding one, depending on what the exact facts are. If the drug is known to give only an hour's mild euphoria and then cause an immediate, violently painful death, then the risks appear so unreasonable as to create a powerful presumption of nonvoluntariness. The desire to commit suicide must always be presumed to be both nonvoluntary and harmful to others until shown otherwise. (Of course, in some cases it can be shown otherwise.) Alternatively, drug *X* may be harmful in the way nicotine is now known to be harmful; twenty or thirty years of heavy use may create a grave risk of lung cancer or heart disease. Using the drug for pleasure when the risks are of this kind may be to run unreasonable risks, but that is no strong evidence of nonvoluntariness. Many perfectly normal, rational persons voluntarily choose to run precisely these risks for whatever pleasures they find in smoking. To assure itself that such practices are truly voluntary, the state should continually confront smokers with the ugly medical facts so that there is no escaping the knowledge of the exact medical risks to health. Constant reminders of the hazards should be at every hand, with no softening of the gory details. The state might even be justified in using its taxing, regulatory, and persuasive powers to make smoking (and similar



drug usage) more difficult or less attractive; but to prohibit it outright would be to tell the voluntary risk-taker that his informed judgments of what is worthwhile are less reasonable than those of the state, and therefore he may not act on them. This is paternalism of the strong kind, unmediated by the voluntariness standard. As a principle of public policy it has an acrid moral flavor, and creates serious risks of governmental tyranny.

#### 4. COLLECTIVE GOODS AND COLLECTIVE ACTION

Despite the presumptive case for liberty, there seem to be numerous examples in which the modern state has no choice but to force (usually by compulsory taxation) both willing and unwilling citizens to support public projects that are clearly in the public interest. In many of these cases those who do not benefit directly from a public service are made to pay as much in its support as those who do, or even more. Thus non-drivers are taxed to support highways and nonparents to support schools. This has the appearance of injustice, and the justification of unhappy necessity. Often the alternative to mandatory taxation—a system of purely voluntary support requiring only users to pay fees—is subject to a fatal defect that forces us to choose between universal compulsory support for the public facility or no facility at all.

Consider, for example, public municipal parks. Suppose the town of Metropolis decides to create a large public park with gardens, woods, trails, and playgrounds. John Doe appreciates living in an attractive community but has no direct personal need for such a park, since he already has a ten acre yard with gardens, picnic tables, tennis courts, and the like. Why, he asks, should he be forced to support something he doesn't need and doesn't want strongly enough to pay for? Suppose, however, that the city charges only those who wish to use the park, and that this group constitutes 90 percent of the population. The richest 10 percent opt out, thus raising the average costs to the remainder. That rise, in turn, forces some of the 90 percent to withdraw, thus raising the cost to the others, forcing still more to drop out, and so on. This process will continue until either a very expensive equilibrium is reached, or, what is more likely, the whole project collapses (as in the case of some voluntary public medical and insurance plans).

It is avoidance of this characteristic escalation effect, rather than paternalism, that provides the rationale for compulsory social security and medicare programs. Here it is important to apply the various principles of liberty distribution not to individual cases, such as the compulsory taxation of John Doe, but to rules and general financing schemes. Compulsory rather than voluntary schemes are justified when the social good

in question cannot be secured in any other way. Whether compulsion on this ground accords with the harm principle depends on whether loss of the good would be classified as a social harm or the mere withholding of a benefit (see pp. 29-31). Where the good is security, medical care, or education, there is little doubt that its loss would properly be called a "harm" to those who incur it.

In cases of the sort we have been considering, some people who don't want a given public service are forced to pay for it because there is no other practical way of supporting it, and its loss would be a harm to those who do want it. In a more interesting and troublesome kind of case, all of the members of a community or group want some good which is in fact in the interests of each individual equally, and yet it is in no individual's interest to contribute toward the goal unless all are *made* to do so. This paradoxical state of affairs has attracted considerable attention from economists who have noticed its similarity to the condition of a company in an industry that enjoys "perfect competition." So long as the price of a manufactured product on the free market exceeds the marginal cost of production, it will be in the interest of each company to increase its output and thus maximize its profit. But the consequence of increased output will be lower prices, so in the end all companies will be worse off for "maximizing profits" than they might otherwise have been. If any single firm, anticipating this unhappy result, were to restrict its own output unilaterally, it would be in still more trouble, for its restriction of output in a large industry would not prevent the fall of prices, and it would suffer lower sales in addition to lower prices. It is in the interest of each firm that *all the others* restrict output, but, in a purely competitive situation, none of the others dare do that. Where there is no coercion, we have the paradoxical result that it is "rational" for each firm to pursue policies that will destroy its interests in the end. It is more rational still to prefer general coercion.

Problems like that raised by "perfect competition" tend to occur wherever large organizations have come into existence to advance the interests of their members. A great many such organizations, from consumer societies and labor unions to (as many have claimed) the political state itself, exist primarily to advance some common interest in virtue of which the members can be supposed to have banded together in the first place. Now, some of the collective aims to which large organizations are devoted have a very special character. They are directed at goods which, if they are made available to any one member of the group, cannot feasibly be withheld from any other member. Examples of such generalized and indivisible goods are supported prices for companies in the same industry in a not-so-competitive market, the power of collective bargaining for members of a union, and certain goods provided for its citizens by the state, such as police protec-

public goods

tion, courts of law, armies, navies, and public health agencies. Perhaps it would be technically possible to "sell" these goods only to those willing to pay for them, but it would hardly be "feasible." It is not clear, for example, how an organization, private or public, could eliminate air pollution only for those willing to pay. Nonpayers would breathe the expensively purified air, and there would be no way of preventing this "freeloading" short of banishment or capital punishment. In such cases, it is in each member's interest to let the others pay the bill and then share in consumption of the indivisible benefit; since each member knows that every member knows this as well as he, each has reason to think that he may be taken advantage of if he voluntarily pays his share. Yet if each member, following his own self-interest, refuses to pay, the collective good for which they are united cannot be achieved. Voluntarily submitting to a coercion understood by each to apply to all seems the only way out.

It is in virtue of such considerations that compulsory taxation, at least in support of collective goods and indivisible services of an essential kind, can be justified by the harm principle. That principle would not justify compulsory taxation in support of benefits to private groups, or even of public benefits of the sort whose loss would not constitute a serious harm, but that does not mean that the friends of public libraries, museums, and parks need be driven to embrace the welfare principle (supra, p. 33). When persons and groups are deprived of what they *need*, they are harmed; it may not be implausible to insist that the country as a whole, in this and future generations (including people who have no present desire for culture, history, nature, or beauty), *needs* large national parks, wilderness areas, enormous libraries, museums, atomic accelerators for physical research, huge telescopes, and so on. To argue that we need these things is to claim that we cannot in the end get along very well without them. That is the kind of case that must be made if we are to justify compulsion, on liberal principles, to the reluctant taxpayer.