Dudley Knowles

POLITICAL PHILOSOPHY

Fundamentals of Philosophy
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arise for one who believes that one does no wrong who sits at the front of buses or on park benches designated for others. Exactly the same issue arises with respect to areas of sexual conduct. Homosexuals, for example, will protest that it is an error (and worse) to regard permissive legislation as tolerance since they do no wrong.

In other areas of conduct, again, it may be mistaken to speak of tolerance, with the clear implication that the permitted behaviour is wrong. The point here may not be that one can confidently deny the immorality of the actions some would prescribe, but that the moral issues are not clear. If one can see two sides to a question, as may happen where one accepts that the moot behaviour is often wrong but may sometimes be justified, we may have instances of doubt inhibiting firm moral judgement. For many people, the rights and wrongs of abortion are clouded in just this fashion. If one does not believe firmly that such activities are wrong across the board, one's hesitancy may lead one to deny that toleration is at issue. This is especially true where the complexities of the circumstances afford a privileged perspective on the immediate circumstances to the agent who proposes to behave in the controversial manner. In judging that it is best to leave the decision on how to act up to the agents concerned, since they are in the best position to work out the implications of what they are doing, again one is claiming that tolerance is not an issue here.

Finally, and cases of this sort are akin to those where paternalism is an issue, there may be issues where the rights and wrongs of the matter just are a matter of personal decision. It is not a matter now of modesty, of leaving a decision to the person who can best decide the question. Rather the point is that the individual agent who is faced with the choice is the *only* person who can settle the matter. It is not easy to find examples which are not tainted by extraneous considerations (or marked by the tracks of some other philosophical agenda), but perhaps suicide and voluntary euthanasia are like that. Although in some cultures marriages are arranged, the liberal is likely to believe no wrong is done by the obstinate child who will not accept her parents' directions, since at bottom the right marriage partner is the one who is accepted or selected by the aspirant bride. If we distinguish, in the manner of Strawson, social morality and the individual ideal, we may be

prepared to admit conflicting judgements with respect to conduct which may be endorsed and criticized from the perspective of different ideals. This may be an important site for identifying both the legitimacy of some degree of moral relativism and a correponding requirement of a measure of toleration.

Does this leave any cases of clear, generally acknowledged, wrong-doing which agents should be permitted to perpetrate? I am inclined to think, putting aside questions of moral duty to oneself and the issue of paternalism, that the only cases will be those where, as Mill insisted, proscription is too costly, where regimes which impose sanctions would be too intrusive. This is evidently true where the coercive regime is that of the state, less obviously so where the interference envisaged are social mechanisms of disapproval, disrespect or ostracism.

To conclude, we can see that modern nation-states exhibit striking differences of view concerning the acceptability or immorality of a range of practices. This is the reality of multiculturalism in all its dimensions. In the face of these differences and our knowledge of how easily they generate severe and historically long-lasting conflicts, modern democratic citizens should be modest in their claims to the sort of moral knowledge that may underpin the persecution of one community of persons by another. We should not be relativists about ethics of the stripe that insists that right and wrong generally is simply a function of the given practices of the communities of which different citizens find themselves members. This exacerbates rather than solves the problem of conflict wherever the parochial 'morality' makes claim to universal applicability. Far better that we be fallibilists when we recognize the fact of deep differences. Personal or societal humility in the face of a range of divergent prescriptions on how to live best is the strongest constraint on democratic majorities.

Free states and free citizens

Thus far, I have examined a number of different theories or analyses of the nature of freedom and discussed several different accounts of what gives freedom its value or explains its appeal. In the rest of this chapter, I shall draw these strands together in a

complex account of the institutional framework which freedom requires. I shall organize this material around the insights of Rousseau. His account assembles the core materials of the theory I advocate, though we shall range beyond these sources in our exposition.

In the state of nature, Rousseau tells us, our freedom derives from our free will, our capacity to resist the desires which press us, together with our status as independent creatures, neither subject to the demands of others nor dependent on them to get what we want. We shall, as contractors, be satisfied with nothing less than that social state which best approximates to this natural condition. Natural freedom is lost, but the thought of it gives us a moral benchmark by which we can appraise (and, inevitably, on Rousseau's pessimistic account, criticize) the institutions of contemporary society. In society, a measure of freedom can be recovered along three dimensions: moral freedom we have already discussed, democratic freedom and civil freedom remain to be examined. I shall outline these in turn, departing from their source in Rousseau's work without scruple. We shall be systematizing many of the insights concerning freedom which have been unearthed in our previous discussions.

Democratic freedom

Since I shall have more to say about democracy later, I shall limit my discussion of it here. The essence of the case for democracy as a dimension of freedom is simple: democracy affords its citizens the opportunity to participate in making the decisions which, as laws, will govern their conduct. For Kant, autonomous action consists in living in accordance with the laws which one has determined for oneself as possible for each agent to follow. Democracy represents a rough political analogue of this model: freedom consists in living in accordance with laws one has created (alongside other voters) as applicable to all citizens, oneself included.

Berlin, as we have seen, argued that democracy is a very different ideal to liberty – majority decisions can threaten liberty, as J.S. Mill argued. It is a mistake to view this consideration, plausible though it may be, as decisive.[45]

The most obvious reason for rejecting it has the force of a *tu quoque* objection. Any system other than democracy will deny citizens the opportunity to engage in an activity that many regard as valuable. We know that many citizens are apathetic to the opportunity of voting, but in a mature democracy many others are keen to participate. They join political parties, paying an annual subscription where necessary, they go along to meetings of their local active group, they distribute leaflets and canvass support during elections. This may or may not be in pursuit of an ambition to hold office in a representative system. Either way, this is a respectable use of one's leisure time. Others may opt for a less onerous measure of political activity – voting at elections or referenda may suffice. Some may have no interest at all in political affairs, but for those who have, voting, minimally, and the life of a professional politician, maximally, represent opportunities best made available in a democratic system. The strictest negative theorist recognizes that laws which prevent the expression of political opinions are limitations on liberty, as are laws which forbid religious worship or group meetings. It is hard to see why one cannot draw the same conclusion in respect of constitutional arrangements which deny citizens the opportunity of acting in ways characteristic of the democratic participant. Just as soon as we focus on the kind of things politically motivated citizens wish to do, we see that Berlin's two questions find the same answer: political arrangements should permit the exercise of political power by citizens who desire to take an active part in the control of their state. They are free for two reasons: they engage in the activities which are decisive in respect of how they are governed, which opportunities are granted and secured by law.

It has often been pointed out that the analogy between self-control and the exercise of political power by participant voters is weak in a modern democracy. Rousseau accepted that the degree of political power exercised by participating citizens is in inverse proportion to the size of the participant community. Modern commentators have gleefully noted that this power may be effectively nil.[46] No single vote has been decisive in a British parliamentary election this century.

Citizens who vote in large-scale elections may be wiser than these observers. Even in the most attenuated representative

systems some chance of a little power is available for those who pursue it – someone has to be President or Prime Minister, after all – but for most voters something other than a deluded ambition for power motivates their visit to the polling booth. Voting offers participant citizens the opportunity to endorse both the system for taking political decisions and the decisions which are the outcome of the operation of that system. If the democracy is representative in form, where enough other people wish to do so, they are free to change the representatives and the government which they compose. Equally, the opportunity to abstain or spoil a paper offers one the opportunity to protest the system and its works. In the same way, however much a rigmarole the application of the Categorical Imperative may be for Kant's moral agent, its exercise is an insistence that putative moral principles must be subjected to her own rational legitimation and cannot be the imposition of some external authority. In the political sphere, as in the moral, there is no shortage of claimants to this sort of authority. Democratic activity gives us the chance to assert that we are free of them. Democracy may be necessary to freedom, but it carries its own distinctive threats. Can these threats be disarmed?

Civil liberty

So it is important that we tackle directly the question that concerned John Stuart Mill so strongly – to the point where he published *On Liberty*: What are the limits that may be placed upon citizens who would interfere with the activities of their fellows, most perspicuously by their legislative activities, but most powerfully perhaps by the social pressures which lead to conformity? The account of liberty that I have given seems to place citizens at the mercy of majorities which operate with a limited or controversial conception of the public good and which are activist in its pursuit.

It is really important here to sort out the philosophical issues from the practical problem. So far as the philosophical issues are concerned, I am on the side of Rousseau. Citizens who value liberty and express this through their participation in democratic institutions which liberty requires will, in all consistency, be

reluctant to interfere in the lives of their fellows, whether by law or less formal mechanisms. Their deep concern to establish institutions which empower everyone will make them cautious about introducing measures which constrain individual choice. Accepting the necessity of democratic institutions and their associated freedoms, valuing strongly the opportunities these afford for citizens to embody their various conceptions of the good life in constitutional and prescriptive laws, they will be hesitant to constrain their own pursuit of these values. What makes it necessary for them to countenance restrictions on their own law-making powers?

Nothing less than the thought that the values and sentiments which they endorse may be insufficient to accomplish the ends they seek. To the rational man, it is a miserable thought that others may defy the canons of rationality. Second-best rules may be called for which mimic the rules of reason in the ends they produce. So we ask claimants who cannot agree on the most reasonable rule of precedence to toss a coin – and produce some semblance of fairness. The political philosopher, likewise, has to accommodate embarassing facts which suggest that the highest standards of reflective conduct may not be endorsed by the community to which her arguments are addressed. Again this calls for an articulation of the second-best solution. Just as we are prepared to approve external constraints on our own decision-making, recognizing our vulnerability to temptation, so, too, must we be prepared to adopt institutions which guard against the worst of human folly. This is the place of the harm principle and other limitations on the societal weaknesses which democracies may reflect and amplify.

Mill's harm principle

In practice, liberty requires that law-making institutions, together with a society's informal but effective coercive powers, respect some limits of principle. The 'one very simple principle' which John Stuart Mill recommended reads as follows:

> 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 civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[47]

An alternative principle requires institutions to respect the *rights* of their citizens. This block on institutional powers may be embedded in constitutions, as that of the United States, and the guardianship of this check on the executive and various legislative powers – from the President and Congress to mayors and town meetings – is vested in an independent judiciary with powers to review and strike down offending acts. I shall examine this proposal later.

Let us return to Mill's harm principle. We can see how it works; it expresses a *necessary* condition on the legitimacy of proposed interference, i.e. it details a test that proposals must satisfy. The burden of proof is thus placed on those who would limit our liberty; they must show that the putatively illegitimate conduct causes harm to others. It is a necessary but not sufficient condition on the justification of interference, Mill insists. He envisages plenty of cases where actions of a given type may cause harm to others, yet interference would be unwise. The costs of policing a general law against breaking promises, for example, would be excessive. Or perhaps the harmful conduct is of a type that promises incidental benefit. Business practices which make competitors bankrupt may be necessary elements of a system that is beneficial overall.

Mill's condition has been widely criticized from the moment of first publication. We shall examine some of the leading criticisms in due course. He made one indisputable error however, notably his claim that the principle is a 'very simple' one. Simple it is not. In the first place, we need a more careful analysis of harm than Mill himself provides. Recent literature supports two very different proposals. Judith Jarvis Thomson[48] defends a narrow conception of harm which identifies as core cases bodily and psychological impairment and physical disfigurement. Distress – feelings of pain and nausea, for example – is not harm, though it can cause harm, psychological harm, notably. On this account, Jim is not harmed if

his car is stolen or the money under his mattress is burnt. By contrast, Joel Feinberg analyses harm in a much more capacious fashion.[49] Harm, as the term is employed in the harm principle, is a setback or invasion of a person's interest and the most characteristic interests are what he calls 'welfare interests', construed as 'the basic requisites of a man's well-being'.[50] There is perhaps no real dispute here; Feinberg's notion of harm is constructed with the defence of a harm principle in view, Thomson's is not. The implication is clear, though; if the harm principle is to operate as a *sharp* constraint on legitimate government interference, the concept of harm which is employed should permit disputes to be settled concerning whether action is harmless or not. Feinberg shows that this task is not easy. As ever, common sense needs sensitive articulation and careful defence. Let us assume this task of clarification can be accomplished – and move on.

Perhaps the most serious objection to the application of the principle to the purpose it is required to serve concerns the ubiquity of harm. Any act, it is observed, does or may cause harm to others.[51] This claim is either wrong or misguided. Since there are plenty of harmless actions (including, hopefully, my typing this sentence) the burden of the objection falls on the thought that any act *may* cause harm to others. If this were true, in the spirit of the objection, then the harm principle would fail to achieve its purpose of demarcating, on the one hand, a legitimate area of social interference and, on the other, a domain of personal decision beyond the legitimate reach of coercive agencies. All activities would be in principle liable to intervention and regulation.

What does the objector have in mind? Presumably, we are invited to take an example of an ostensibly harmless action and then show that circumstances may be described in which an action of that type causes indisputable harm. Thus, as a rule no harm is done by one's throwing a stone in a pond, but is easy to imagine cases where clear harm follows. The stone hits a diver who is just emerging from the water or it causes the water to rise to the critical level where the next flood will cause it to break its bank and flood the village or . . . The possibilities are endless. And so they are for any candidate harmless action. We are invited to conclude that actions of the type described are all possible objects of legislation.

The argument, as put, embodies a serious type–token confusion.

(We talk about *types* in generalizations, thus 'The corncrake is a noisy creature, rarely seen nowadays though common last century' describes a type of bird. 'Theft goes rarely undiscovered' describes a type of activity. We speak of *tokens* when we speak of particulars, say e.g. 'The corncrake in the hay-field has raised three chicks' or 'The theft of my car was distressing'.) Actions are proscribed, by law or positive moralities which have coercive power, as types, not as tokens. Laws, and by implication, conditions which constrain their legitimacy such as the harm principle, address types of action rather than tokens, and so the issue to be considered by any court Sally has to face will be: Was her action of such a type as is proscribed by law? In the sort of cases described above, where harm *is* caused, the questions to be asked by the legislative and judicial institutions which review the details are, in the legislative context: Should we prohibit stone-throwing into ponds or should we rely on catch-all legislation covering negligence and putting others at risk? In the judicial context, it would be surprising if questions were raised concerning anything other than direct infliction of injury (perhaps the pond is a training area for divers) or, again, negligence. In all cases, questions about the agent's knowledge of the likely effects and her consequent intentions will be relevant.

So we shouldn't see the harm principle as the bluntest of blunt instruments. We should see it as operating, in the clearest case, as a constraint on the sort of action descriptions which can feature in legal or quasi-legal proscriptions. 'Assault and battery' is an obvious example of an action-type, tokens of which necessarily cause harm. 'Throwing stones into ponds' does not have this property. Obviously there are all kinds of action where the issue concerns the likely incidence or probability of token actions causing harm – too high, I assume, in the case of driving while drunk or at 50m.p.h. in a built-up area. Where probabilities or threshold effects are relevant, we encounter a grey area which no philosophical judgement can illuminate. Legislators and the sort of opinion-formers who guide the application of unofficial sanctions will have to debate and negotiate a trade-off between liberty and the prevention of some incidence of harm. The liberal, by instinct, counsels against panic measures. The timid press anxiety into legislative service. Both do right when they focus on the facts of the matter

concerning harm and the risk of harm – and this is what the harm principle requires.[52]

One final objection to the harm principle hypothesizes the possibility of harmless actions in respect of which there can be no doubt that proscriptions and sanctions are appropriate. Gordon Graham discusses a series of examples which he believes show that the harm principle cannot work as the sole necessary condition.[53] My variation on his theme is the case of the Dirty Dentist – a familiar figure from the Sunday tabloids of my adolescence, devoured in those days as the most explicit media of sex education. The Dirty Dentist used to fondle the genitalia of patients whilst they were under general anaesthetic for a filling, there being no requirement that a nurse or assistant be in the room during the treatment. On recovery, we presume, they were all ignorant of the Dentist's assault. Were the patients harmed by their service to the dentist? Does the Peeping Tom harm the blithe and blissful objects of his smutty attentions? Graham thinks not – but is in no doubt that these activities should be prohibited. In which case we have to find grounds other than the harm principle for doing so. In which case, the principle is neither a necessary nor sufficient condition on the legitimacy of interference. Graham's solution is to advocate a principle of individual rights. When the dentist fondles his patients, he invades their rights – to bodily integrity or privacy. That is the substance of the case for making his conduct illegal, not the false claim that he harms them.

I see three ways forward here. First, one might substitute the Rights Condition for the harm principle as necessary to justify intervention. To be legitimate, legislation which interferes with citizens' agency must prevent them violating the rights of others. Second, one might supplement the harm principle, insisting that justifiable legislation *either* prevent harm to others *or* protect individuals' rights. (This is Graham's proposal.) Third, the harm principle may be defended – in which case some argument will need to be devised which establishes that harm is caused after all in the cases discussed. My preferred solution would be the last, but the argument will have to take a devious route. In brief, and to anticipate the conclusions of Chapter 4, I believe the ascription of rights requires that we describe the interests of individuals which rights claims typically protect. But since the violation of rights claims *ex*

hypothesi invades specifiable interests, and since the invasion or setback of an interest constitutes harm, rights violations will generally be harmful – in the relaxed sense that actions of this type will tend to cause harm. The hard task in cases like those of the Dirty Dentist or Peeping Tom will be that of vindicating the right which is violated. Most readers, I suspect, will believe that this can be accomplished, but philosophers should not take for granted the success of the enterprise. There is work to be done, but when it is done I think two jobs will have been done at the same time. Not only shall we have justified the right which underpins the legitimacy of the proposed interference, we shall have described clearly and fully the harm such interference prevents.

Supplementary principles

If the theorist who accepts some version of the harm principle cannot accept all cases of rights violation as species of harm, the principle will need supplementation in the way we have seen. Are there any other principles which have been found appropriate to justify the range of governmental and unofficial interference?[54] If there are, these will operate as just-about-sufficient conditions, discounting the cost of legislation and enforcement. As described they may or may not include the class of harmful actions, so they may operate, if successfully defended, as a supplement to the harm principle, working as conditions which are disjunctively necessary, i.e. a full account of the necessary conditions for interference to be legitimate will specify as proper cases that either harm is caused or . . ., as the conditions are introduced. Three well-known candidates include moralism, an offence principle and paternalism.

Legal moralism

The legal moralist claims that interference is justified if it prevents immoral or wrongful acts. If this principle were acceptable, we should note straight away that it would incorporate the harm principle as I have explained it, since the harms which may be legitimately prohibited are those types of harm which it would be morally wrong to inflict on others. Clearly, in order to evaluate

such a principle as a supplement (or alternative) to the harm principle, we need to find a class of actions which are morally wrong yet do not involve harm or the risk of harm to others. It is notoriously hard to find any such class which can be demarcated with confidence.

Two sorts of case have been described. The first concerns actions the wrongfulness of which derives from self-harm or the agent's failure to comply with some duty that she holds to herself. I shall discuss this later under the heading of paternalism. The second sort has most often involved sexual behaviour, solitary or consensual, which is somehow not respectable. Unmarried or extra-marital sex, sex with contraceptives, homosexual relationships, sex with prostitutes, sado-masochism: the list of types of sexual behaviour which have been deemed immoral, and impermissible by implication, is as endless as the varieties of expressing human sexuality seem to be. If the behaviour is fully informed and consensual, I take it that it is either harmless or a type of harm to self. The thought that some sex is rational, all else irrational, strikes me as ludicrous, unless the rationality is strictly means–end and the end specified is such as the propagation of believers in the true faith or heirs to the throne – as good examples as any of rationality in the service of dangerous or cruel masters.

The only philosophical point at the bottom of all such suspicious prohibitions is the claim that communities are right to prohibit deviant (but, *ex hypothesi*, harmless) behaviour on the grounds that conformity to standard practice is either necessary for the survival of the community or integral to the very idea of community itself. Thank God (he says, letting slip his liberal credentials), both arguments can be strongly challenged.

The positive (actual) morality of any community comes all of a piece, Devlin tells us.[55] A 'seamless web', as his most prominent critic put it, though Devlin gently demurred. It is a structure of belief and practice which must remain intact if any society is to succeed in its collective goals. If particular moral beliefs are challenged or specific practices undermined, the community can respond by refuting the challenge or supporting the practice or, if the challenge is successful, it can disintegrate. The stakes are high. So high as to justify legislation which supports the practices of common morality. Principles governing the acceptability of

sexual behaviour will be among the components of this web – in which case it will be otiose to ask what harm is or would be done by any particular practice. It is enough to know that it is deemed immoral.

Devlin's position was effectively refuted by H.L.A. Hart,[56] at least to my satisfaction. In the first place, he pointed out that Devlin's argument may be taken as an *a priori* claim that a society is constituted by its morality. If the morality of a society changes, so, *a fortiori*, does that society. We now have a different society. But that definitional claim is insufficient to ground the claim that a society may protect itself against *change* by the use of legal and social sanctions. The newborn society, constituted by its altered positive morality, may be an improvement on its predecessor. Unless Devlin's argument is underpinned by an (indefensible) claim that all change is for the worse, the demise of the old and the birth of the new may be cause for celebration rather than regret.

If, on the other hand, Devlin's claim is substantial rather than definitional, again it is open to challenge. At first inspection, it looks like an application rather than a refutation of the harm principle. It works as a high-level empirical claim, a generalization to the effect that the consequences of challenges to established moral practices are invariably harmful. If this is true, it is something the harm theorist can willingly take into account. Indeed it would comprise just the sort of information that must be taken into account when assessing the harmfulness of practices. So the next question is obvious. Do all changes in moral beliefs and practices cause harm to the point where immorality in general may be proscribed? No sooner is the question put than we can see how silly it is. Everyone is at liberty to select a firmly held, deeply entrenched moral belief which was integral to the operation of a specific society, yet which was clearly wrong (as well as damaging, both to individuals and the society as a whole). 'Some humans are natural slaves' is a good example. Hence the thesis, taken in full generality, falls. The specific proposals for change which were the occasion of Devlin's lecture – reform of the law concerning homosexuality and prostitution, as recommended by the Wolfenden Committee of 1957[57] – clearly require inspection in point of the respective merits of the status quo and the suggested reforms. And as Hart pointed out, we have to be willing to take evidence. We

can't defend restrictions on homosexual practices by citing Justinian's belief that homosexuality is the cause of earthquakes. And when we review the evidence, it will not be relevant to quote opinion polls recounting the population's beliefs in respect of the immorality of the conduct to be permitted. The apt questions concern whether the practice which is up for assessment causes harm.

The practical problem is perennial – Devlin's views were published as a contribution to the debate provoked by the proposals of the Wolfenden Committee and the courts themselves throw up cases for decision with undiminished regularity. In 1986, the United States Supreme Court upheld the law of the state of Georgia which criminalized sodomy.[58] In a recent UK case, the House of Lords upheld the convictions for causing bodily harm of men engaged in consensual sadistic practices. But the Hart–Devlin debate had been, to my mind, a rare example of a philosophical question decisively settled. I should have known better. Devlin's thesis has re-emerged recently in more fashionable dress – that of the communitarian.

One strand of modern communitarianism has been the claim that the identity of the moral agent is constituted by social institutions of the community of which she is a member.[59] The contours of the good life are drawn by the specific pattern of proscriptions and prescriptions which are embedded in such institutional frameworks and the virtues and dispositions of character that are inculcated in citizens. A member cannot disengage from her community without a serious loss of self; she cannot step back from the principles which mark her community as an historically conditioned entity and appraise them from some other-worldly stance. For the most part, our citizen is stuck with what she believes to be right since the cost of independence of spirit is too great for humans to bear. It follows that each community will be optimally regulated by that set of rules and attitudes which members endorse as distinctive of their way of living well. Some of these rules – perhaps the most important to the ongoing life of the community thus constituted – will be embodied in legislation. Other rules, perhaps equally important but not judged suitable for legislative enactment, supposing that this carries with it the burdens of the criminal law (police, courts and prisons), will be enforced by

unofficial communal instruments. The implication of this position (which, as Hart saw, elevates positive morality to the status of optimal critical morality) is that a society may give practical legislative effect to whatever rules of conduct identify its distinctiveness, not on the basis that this distinctiveness is worth preserving – from what stance could this be adjudicated? – but rather on the grounds that its members can endorse no other.

Far be it from me to deny that humans can think in this fashion about how their communities should be regulated. It is enough for the purposes of this argument to note one odd feature of the scenario. It supposes that citizens are so integrated[60] into the lives of their communities that they cannot but endorse the moral rules which define its collective (and their individual) identity. It therefore assumes an ethical homogeneity that is not to be found in modern nation-states. Patently, some citizens' identities are not defined by the moral rules underpinning the legislation which they are campaigning to reform. Telling people they must obey a law is one thing – the telling may carry authority. Telling people wherein their moral identity consists, against their explicit disavowal, is quite another. In some communities, we are voluntary recruits; in others, the family and the nation-state notably, we find ourselves members willy-nilly. But no community has the ethical authority to conscript us as moral team players in the face of our explicit dissent. Dissenters and bloody-minded protesters can get things wrong. The principles they advocate may be as evil or dotty as any. But if we believe so, such descriptions will serve; we don't need to locate their error in a mistaken sense of their moral identity which is witnessed in the mere fact that their principles differ from ours.

In 'Liberal Community', Dworkin parodies the communitarian challenge in his claim that those who subsume sexual behaviour as a collective interest of the political community must suppose 'that the political community also has a communal sex life . . . that the sexual activities of individual citizens somehow combine into a national sex life in the way in which the performances of individual musicians combine into an orchestral performance . . '.[61] Maybe ridicule is as good a weapon as any against those who believe they have a legitimate interest in their neighbours' sex lives (as against being good old gossipy Nosey-Parkers). Still, there are difficult cases. I will mention one.

In the wake of a massacre of schoolchildren in Scotland, legislation was introduced against the possession of hand-guns in the UK. To many, the most impressive reason in favour of such legislation was that it marked a moral stand against an encroaching ethos of permissible private use of deadly weapons. Of course, that ethos is explicit in the defence of the culture of personal weapons in the USA and is exported in the films and TV programmes which display (and sometimes glorify) their casual use. What there is of such an ethos in the UK takes the form of an admiration for military exploits. Soldiers of the SAS protecting Queen and Country are a more recognizable model in Britain than the homesteader guarding the family ranch against rustlers and Red Indians. Politicians as well as private citizens were impatient of the pleas of members of private gun clubs that their hobby could be so regulated as to effectively limit the risk of sporting weapons being ill-used. Legislation which amounted to an absolute prohibition was claimed to be the only counter to an encroaching gun culture.

I confess I am disturbed by the thought that this amounts to legislation which is driven by moral sentiments quite independently of the question of whether the forms of hand-gun use to be banned are harmful. That much seemed to be explicit in the terms in which some of the debates were conducted. 'Cowboy morality must stop somewhere in the Atlantic.' 'The ideals of the pioneer and the frontiersman which seem entrenched in the American suburbs must be kept out.' This looks like morals legislation to me. The rhetoric reads as a defence of traditional community hostility to the use of personal firearms being shored up in the face of insidious threats. If so, the liberal who advocates the test of harm should not be sympathetic to it.

I find I am as susceptible to this rhetoric as most of my compatriots have been – but am equivocal as to the reasons for it. After all, the same exotic and alien morality is celebrated by the more colourful variety of Country and Western fans who wear cowboy uniforms, adopt curious nom-de-plumes (Hobo Harry, the Hombre from Huddersfield) and hold fast-draw competitions. Children can buy pistols and even imitation automatic weapons – to be filled with water. Everyone can see John Ford's Westerns on the television set. Few complain about these innocent pastimes as the incursion of an alien morality and demand prohibition. The difference

seems to be that legislation to ban hand-guns has some connection with the distribution and use of dangerous weapons and some possible incidence of their harmful use. It cannot represent, *simpliciter*, a communal response to an alien ethos. But I leave readers to think through these issues for themselves.

Offence

If we were to judge straight off that one is harmed who is offended, offensive conduct could be considered for prohibition along the lines suggested by the harm principle. How harmful is the offending behaviour? Does it harm few, many or most people? Remembering that the harm principle is not proposed as a sufficent condition on legitimate interference, we should consider if the harm which is consequent upon the offence is offset by any countervailing benefit, or if the costs of interference would in any case be too high. If there is a difficulty in determining particular cases or in evaluating proposals for interference, the difficulty will be cognitive rather than philosophical. It may be that the evidence germane to these practical questions is hard to assess.

There is a philosophical problem here (for the proponent of a harm principle) only if one believes that the offensiveness of behaviour is a ground for restrictions independently of the harm that it may cause. To examine this we need to take examples of conduct which it is agreed is offensive and either harmless or harmful in some attenuated fashion that would not generally serve as a good reason for restricting liberty. Feinberg accepts that Louis B. Schwartz has found an example.[62] Consider a law whereby 'a rich homosexual may not not use a billboard on Times Square to promulgate to the general populace the techniques and pleasures of sodomy'. I cannot believe that the harm done by such a billboard is of a trivial kind, though the description of it may require a delicate and imaginative exercise. The nuisance of the distraction, the embarassment of the unavoidable encounter with feelings of shame and perhaps guilt, the shock of unanticipated self-exposure – all these on the way to work – may be reckoned harmful enough and assumed to be sufficiently universal to justify prohibition. The burden of proof of harm which is placed on those who would

intervene is not onerous in such a case. When questions concerning the censorship of pornographic films, TV programmes, books or plays are raised, readers may recognize the relevance of voluntary subscription. Those questions are not raised here.

As Feinberg insists, we should be *reluctant* to admit offence as a defensible reason for interfering with the conduct of others, supplementary to the harm principle. And we should be careful of applying the harm principle indiscriminately for its prevention. I suggest that we think two ways on this issue. In the first place, offence is important to us. It is perhaps the most familiar way in which we are wronged. Many philosophers have developed the Kantian blunderbusses of respect for persons and recognition of others' autonomy – treat others as ends and not as means, merely – into sophisticated instruments of normative ethics. They capture core features of an individualistic ethics which is the legacy of Protestantism and the moral philosophy of the seventeenth and eighteenth centuries. And these ethical notions in turn capture a modern concern with the dignity of the individual, a dignity just about all moral agents educated in this tradition will assert freely. The arena in which these calls for respect are most readily made and most frequently affronted is that of commonplace personal interaction. Here, respect is a matter of courtesy and politeness; disrespect is easily recognized. The barman who retorts to the rude customer: 'What do you think I am – a f***ing vending machine?', perhaps breaks a rule of good business, but expresses clearly and directly a universal concern not to be treated as a means merely. Jack is, or demands to be, as good as his master nowadays and hierarchical honour codes have been flattened out. You're due courtesy even in the pawnbroker's shop, my father used to insist. So everyone, quite rightly, is sensitive to affront, bristles in the face of patronization, is quick to protect her dignity. So life becomes difficult where conceptions of what is and what is not respectable conduct change rapidly. Who will be offended by what in which circumstances in the way of bad language? Offence is easily given and readily taken. Rudeness is a moral wrong; it is not the sort of breach of etiquette committed by the ignoramus who picks up the wrong knife, though as the example of bad language shows, the boundary between the immoral and the infelicitous can be tricky and quickly shifting. But if we wish to live a comfortable

life in a gracious society we had all better be connoisseurs of such distinctions. Of course, prevention of the sort of offence I have been discussing is not easily legislated for, and generally is better not, but this is a matter of practicalities. It is not because offence is a trivial or unimportant wrong.

On the other hand, offensiveness may serve important ethical and political purposes. In a moving defence of the rights of Salman Rushdie, when still under *fatwa* for the publication of *The Satanic Verses*, Jeremy Waldron insists that 'the great themes of religion matter too much to be closeted by the sensitivity of those who are to be counted as the pious'.[63] Who is a proper party to the debate as well as what counts as good manners may in themselves be points at issue. I'll quote Waldron at length; the issue merits his eloquence:

> The religions of the world make their claims, tell their stories, and consecrate their symbols, and all that goes out into the world too, as public property, as part of the cultural and psychological furniture which we cannot respectfully tiptoe around in our endeavour to make sense of our being. . . . Things that seem sacred to some will in the hands of others be played with, joked about, taken seriously, taken lightly, sworn at, fantasized upon, juggled, dreamed about backward, sung about, and mixed up with all sorts of stuff. This is what happens in *The Satanic Verses*. . . . Like all modern literature, it is a way of making sense of human experience.[64]

Three cheers for this. In a multicultural society, as in a multicultural world, offensiveness cannot be avoided. We are stuck between the rock of respect and appropriate courtesy and the hard place of polemical ridicule. We strive to protect our dignity as persons and then lampoon in literature and cartoons those whose values we challenge. We don't thereby violate our own ground-rules of debate. Where the ground-rules themselves are the question at issue, offence is ineliminable.

Paternalism again

This covers the second ideal of positive liberty canvassed earlier, embracing the idea that agents are liberated when the control of others is substituted for the self-control they cannot manage. Mill's harm principle explicitly excludes activities whereby individuals harm themselves from the range of acceptable social interference. He states that the agent's

> 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 opinion of others, to do so would be wise, or even right.[65]

Later in *On Liberty*, following Mill's introduction of a distinction between self- and other-regarding actions, cases in which the only harm that the agent causes is to himself are firmly placed in the category of the self-regarding, and the interference of others, whether by means of law or other coercive social agencies, is severely proscribed. This restriction is not universal. Uncontroversially, Mill insists that he is not speaking of children. More generally, 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'. Notoriously, this disclaimer includes barbarians stuck in 'those backward states of society in which the race itself may be considered in its nonage'.[66] An example or two of appropriate paternalism towards uncivilized members of barbaric societies would help explain the point, but I am flummoxed. Just what practices of ignorant self-harm does he want to stop? Consensual *suttee* as practised in India is a possible candidate. Bear in mind, as some critics have not, that he is not anticipating the dubious claim of twentieth-century tyrants that freedom of speech, for example, limits the growth of gross national product.

To focus enquiry, let us list the leading characteristics of paternalistic interference and then give some examples. First, it will be coercive, exacting penalties in case of non-compliance. Hortatory messages of the sort put out by Ministers of Health (Take daily exercise!) may be paternalistic in spirit but they do not count for

the purposes of this discussion since they do not amount to compulsion and control, to echo Mill. If governments could brainwash their citizens into looking after themselves better, that would count as paternalism, as does any policy which is intended to force all citizens to ameliorate their condition. Fluoridization of the water supply, as a strategy to improve *everyone's* (not just children's) teeth, would be an example. Second, the *main purpose* of the interference must be to prevent citizens harming themselves. If the intention of seat-belt legislation is to cut the costs of hospital treatment following road accidents, it is not paternalistic. If the desired effects of restrictions on smoking concern the comfort and good health of non-smokers, again the interference is not paternalistic.

Something like the law of double effect will be operating here, since in cases of this sort, those who are made to wear their seatbelts or limit their smoking reduce to some degree the likelihood of harm to themselves. And mention of the law of double effect should alert liberals to the possibility of hypocrisy. There are whole armies of folk desperate that others improve themselves and unconcerned that the objects of their sympathetic attention may balk at their mission. If, in the pursuit of their goal they can sneak their favoured proposals into the category of legitimate interference by the back-door citation of any small probability of harm to others, they will leap on the evidence to whitewash the coercion they believe to be warranted in any case.

Mill's instincts were sound; if the effects to be prevented can be inhibited by some other means less intrusive on the citizen's freedom, if drivers, for example, could be got to pay a premium on their insurance policies to cover the additional costs their choice of not wearing a seat-belt might impose on others (and if this option could be effectively enforced), one who goes down the route of universal coercion is acting in a paternalistic fashion. All too often, the intentions of would-be interferers is occult. Those who would manipulate our conduct willy-nilly are not likely to restrain their manipulation of the terms of the debate. Although paternalism is a characterization of the intentions or purposes of the interferer, those who oppose paternalism, as Mill did, have to identify it solely in terms of the likely effects of proposed policies, and the readiness of the proposers to consider alternatives. In any policy