― LETTERS ON LIBERTY

BEYOND THE HARM PRINCIPLE

Rob Lyons

LETTERS
on LIBERTY

Welcome to *Letters on Liberty* from the Academy of Ideas. *Letters on Liberty* is a modest attempt to reinvigorate the public sphere and argue for a freer society.

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Since its foundation in 2000, the Academy of Ideas has hosted thousands of public debates, festivals, forums and salons where people from all walks of life come together to debate often-controversial topics and to challenge contemporary knee-jerk orthodoxies. We always hold on to one defining principle: free speech allowed.

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What are Letters on Liberty?

It's not always easy to defend freedom. Public life may have been locked down recently, but it has been in bad health for some time.

Open debate has been suffocated by today's censorious climate and there is little cultural support for freedom as a foundational value. What we need is rowdy, good-natured disagreement and people prepared to experiment with what freedom might mean today.

We stand on the shoulders of giants, but we shouldn't be complacent. We can't simply rely on the thinkers of the past to work out what liberty means today, and how to argue for it.

Drawing on the tradition of radical pamphlets from the seventeenth century onwards - designed to be argued over in the pub as much as parliament - *Letters on Liberty* promises to make you think twice. Each *Letter* stakes a claim for how to forge a freer society in the here and now.

We hope that, armed with these *Letters*, you take on the challenge of fighting for liberty.

Academy of Ideas team

BEYOND THE HARM PRINCIPLE

'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. 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... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.'

- John Stuart Mill, *On Liberty*

Mill's 'harm principle' is frequently cited as the quintessential defence of personal autonomy. The state should not be able to interfere in our private choices, even if it might be widely agreed that such choices are harmful to ourselves, unless they cause harm to others. For example, if I want to smoke cigarettes, drink alcohol or engage in other risky behaviours, that should be down to me - and me alone. If I want to express a controversial view, I should be free to do so. If I want to drive a car or take a flight, regardless of claims about what this might do to the planet, these are matters for me alone.

Although Mill's statement of the idea is most commonly cited, it was not entirely new. In 1789, in revolutionary France, the Declaration of the Rights of Man and of the Citizen stated:

> *'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.'*

But the meddlesome opponents of freedom, from nanny-state obsessives to free-speech restricters, have found that by expanding the notion of harm and undermining tolerance, the 'harm principle' can be used as an argument *against* freedom.

In fact, that problem was always there in Mill's harm principle - or, at least, in the simple version set out early in *On Liberty*. Logically, the harm principle soon descends into a tit-for-tat of whose claimed harm is worst. As Bernard E Harcourt observed in a valuable paper written in 1999, what we are left with is 'a harm free-for-all: a cacophony of competing harm arguments without any way to resolve them':

> *As we approach the end of the twentieth century, we are witnessing a remarkable development in the debate over the legal enforcement of morality. The harm principle is effectively*

collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate. Today, the issue is no longer whether a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent. This is a radical departure from the liberal theoretic, progressive discourse of the 1960s.[i]

How should those who still believe in freedom respond?

What is harm?

Lots of things could be said to be harmful. Physical injury is obvious, but most people would recognise that other things, like financial costs or damage to reputation, are also harmful. 'Harm' could include winning out in a competitive process, like applying for a lucrative job. The successful applicant enjoys a good salary and prospects while those who missed out must continue to live on a lower salary (or no salary at all). They are worse off and could be said to have suffered harm. But unless something fraudulent has gone on, we would widely accept that employers have the right

to pick and choose who works for them. The only likely victims of any fraud are the employers - who could be hiring a useless employee - not those who didn't get the job.

The notion of harm keeps expanding and the willingness to be tolerant seems to be shrinking.

We live in societies made up of millions of people. It is inevitable that we will encounter things that annoy us and even offend us. What is the threshold at which my personal annoyance becomes harm, in a way that might be relevant to the harm principle?

I dislike other people playing their music too loud. But if it's in a car driving past, the annoyance will be brief. On the other hand, my neighbour playing loud music at 3am will affect my sleep. Once in a blue moon this might still be 'annoying', and we might decide to put up with the disruption. But were it to happen every night, it would be downright harmful if I am exhausted all the time as a result. Then, I think, it is reasonable to pop round and ask my noisy neighbours to turn the music off, and even to call in the authorities to prevent it from happening if a polite request is refused.

A key idea that helps deal with such challenges is tolerance. Living in cities, in particular, has many advantages. But it does demand that we tolerate the actions of others to a considerable extent. Otherwise, life would be unbearable. We simply wouldn't be able to live freely, we would be constantly worried that some action or another - having a barbecue, owning dogs that bark - would provoke a negative response. But the notion of harm keeps expanding and the willingness to be tolerant seems to be shrinking.

> *When it comes to health, reinterpreting the notion of 'harm' has been baleful to the defence of freedom.*

For example, a ban on smoking in 'public' places - some of which, like pubs, are open to the public but are actually private places - was introduced across the UK in 2006 and 2007. Arguments about personal choice, both of smokers and pub landlords, were dismissed on the grounds that smoking - specifically 'second-hand' smoke - causes harm to others. Indeed, the lobbying by anti-smoking groups included new and extraordinary claims, based on research, that passive smoking may be killing 11,000 people per year in the UK. (Clue: no, it wasn't.[ii])

As a result, the choice of whether to allow smoking in pubs and even private clubs, where ordinary members

of the public are not routinely allowed, was taken out of the hands of those making that choice and granted to the state. To allow smoking in these 'public' places would be, in effect, beyond reasonable tolerance - simply too dangerous to permit.

More broadly, when it comes to health, reinterpreting the notion of 'harm' has been baleful to the defence of freedom. Even when the choice to smoke is not directly harmful to others, the consequences of smoking may be portrayed as harmful. A frequent tactic in the UK for those who wish to limit personal lifestyle choices is to ask about the National Health Service (NHS). Since people who engage in risky behaviours are, on average, likely to become sick and die at an earlier age than others who prefer clean living, those who want to restrict our choices argue that such risky behaviours must be restricted to prevent the NHS from being overwhelmed. Selfish smokers, drinkers and fat people are behaving to the detriment of everyone who relies on state-funded healthcare and must be stopped.[iii]

As it goes, this argument is almost invariably specious. Those who die earlier actually cost the state less than those who live a longer life. For example, if it is true, as claimed, that smokers die on average 10 years earlier than never-smokers, that is a decade of pension payments and other support for older people that

need never be paid out. And that's not taking into account all the tax these wrong 'uns are paying, which more than covers any additional expense.[iv] Nonetheless, the argument has considerable traction.

> *The expansion of the notion of 'harm' is like Kryptonite to the liberal intentions behind the harm principle.*

Many claims about health risks also tend to throw in elements that are private, rather than public, harms. If I have time off work because I am ill, and lose money as a result, that is negative both to me and to my family. But the reality is that my job will, sooner or later, be done by someone else. There is little or no harm to wider society, only to me. One report for the UK Cabinet Office even threw in a monetary value, dubiously calculated, for the 'emotional impact cost' of alcohol-related crime.[v] Health campaigns have played on the idea that losing a parent to a premature death is harmful, too, both for the person who dies and for his or her family. But are such private harms the business of the state? The logic would be ever-greater interference in private, family choices.

This 'think of the children' argument is often cynical, a way of using guilt to alter behaviour. It is particularly common when it is used in relation to climate change,

the impacts of which, we are told, will become most severe decades from now.

Indeed, the policing of harms against children is being written into UK legislation via the Online Safety Bill. Through its focus on protecting children from 'harmful' content - covering pornography, suicide, hateful messages and more - the Bill effectively opens the door to censorship of what adults can access online. What is framed as simply a process of child protection has the consequence of making state interventions into the internet more authoritarian.

> *The person best placed to understand my welfare, in the broadest sense, is most likely to be me.*

Perhaps the most notable exponent of the 'think of the children' argument is Swedish climate activist Greta Thunberg, who famously told world leaders at a UN conference: 'You have stolen my dreams and my childhood with your empty words.'[vi] But rather than speaking personally, in many ways, Thunberg has been merely a mouthpiece for others who want to impose eco-austerity on the rest of us.

Here we come to the problem of competing harms. When we talk about 'saving the planet' for the sake of the children, we should also ask what harm is being

done to children around the world by ballooning prices for energy, restrictions on mobility and all the rest. Billions of children live in what is, by Western standards, dire poverty. The development of the societies they live in will demand, until something better comes along, the use of fossil fuels. But campaigners are all too often one-sided in what they consider to be harmful. Indeed, if any political debate is reduced to which harm is the worst, there is an incentive to exaggerate harms.

And when we look at policies designed to reduce harm, we must look at the question in the round. I would consider it harmful to be denied things that bring me pleasure. That enjoyment is the reason I splash the cash on booze and tasty food. The person best placed to understand my welfare, in the broadest sense, is most likely to be me.

The expansion of the notion of 'harm' is like Kryptonite to the liberal intentions behind the harm principle. This is particularly true today when it comes to the issue of free speech.

The harm principle vs free speech

A paper published in September 2020 argues:

> *'Current research uncovers the tangible harms individuals suffer directly from bigoted speech, as well as the indirect harms generated by the systemic oppression and epistemic injustice that bigoted speech constructs and reinforces. Using Mill's ethical framework with an updated notion of harm, we can conclude that social coercion is not justified to restrict any harmless speech, no matter how offensive. Yet certain forms of speech, such as bigoted insults, are both harmful and fail to express a genuine opinion, and so do not deserve free-speech protection.'*[vii]

The notion that words are equivalent to violence is becoming commonplace. There is no doubt that words can be hurtful or enraging. As a result, we normally strive to avoid offending people without good cause. But if we accept the notion that displeasure or offence are equivalent to physical injury, we lose perspective and open up the possibility that nothing is sayable - not even a calm, reasoned argument - if it upsets someone. (One might retort to someone who believes words really are dangerous: 'Let's step outside. You come at me with the meanest words you can think of, I'll come at you with a baseball bat, and we'll see who wins.')

The spectacle that took place at the University of Oxford in May this year is a perfect example of this. Before a discussion with the philosopher and gender-critical academic Professor Kathleen Stock could take place, a trans activist wearing a t-shirt that said 'no more dead trans kids' glued themselves to the floor in protest. On Twitter, the activist explained that the 'consequences' of Stock's 'dangerous and hateful' speech must be considered, including the potential for 'dead' trans youth. Stock is not the first public figure to be threatened with censorship on campus. From no-platform policies to bans on speakers, much of the opposition to free speech at UK universities uses the narratives of preventing 'harm'.

> *There is no need for speech to be banned simply because we don't like the content of it.*

The claim that words can be harmful in themselves raises all the old questions around free speech. Who decides what is 'bigoted' and what is 'harmful'? Is simply being offended a form of harm? One category of speech that is often separated out is incitement to violence - surely that is an exception to any free-speech protection? But the problem with incitement is not the words, it is the ensuing violence (if any). Even restrictions on incitement require careful consideration.

If we take the notion of harm to its extremes, almost anything we don't like could be described as harmful. But if we want to live in a free society, we have to tolerate things we don't like.

Rescuing the harm principle?

Perhaps there is a way we *could* rescue the harm principle: we should be free to do what we want as long as it does not harm others *where they cannot avoid that harm*. Whether smoking is allowed in a pub should be a matter for the landlord since there is no right to drink in a particular pub. Restricting smoking on public transport, which is often a necessity for many people, is fine. Better still, we create spaces where people can smoke if they choose to - as has been commonplace in Europe but not in the UK. For example, European airports often have well-ventilated smoking booths to allow smokers to light up. Why not smoking areas in pubs?

If we are offended by certain words or ideas, we can usually walk away or switch off. Better still, we can engage with those ideas with reasoned argument. There is no need for speech to be banned simply because we don't like the content of it.

We also need to be serious about what harm means. The expression of opinions inevitably means annoying, even offending others. Many of us are all too familiar with the debates that rage today, particularly on social media, on issues from abortion to gender, racism to climate change, and much more. Passions run high. Who decides what is acceptable speech in such circumstances? The freedom to express a view and tolerate those views we disagree with is crucial if society is to progress.

Demanding tolerance

The trouble with trying to rescue the harm principle, by trying to find a more modest and reasonable version of it, is that reasonableness seems to be in short supply. Things have got even worse since Harcourt was writing, over two decades ago. When the notion of harm is sprouting arms and legs, when any verbal slight can be transformed into deep psychological injury or a whiff of cigarette smoke is deemed to be airborne poison, we cannot rely on the harm principle to defend our freedoms.

We must demand that we have a right to do things that might annoy or offend others, within limits. We must get away from the utilitarianism-lite of the harm

principle and assert *values*. Where others may demand that their right to *safety* from experiencing harm - often understood in excessively broad terms - we should assert the value of *freedom*. To do otherwise is to sacrifice our ability to choose how we wish to live and debate to the whim of the most sensitive souls. It is notable that we no longer talk simply about 'harm', but 'psychological harm' - a new concept creep that encapsulates the move to police our innermost thoughts and feelings.

This is not merely about the state versus the rest of us, though those who wish to expand the notion of harm are all too often demanding that newly invented 'harm doers' face the power of the law. It is about a general sense of how we live together as a society. When our freedoms are being called into question, we need to stop apologising for wanting to live freely.

Of course, what is merely irritating and what is genuinely harmful will always be tricky to negotiate. But for those of us who want greater freedom, it is time to demand greater tolerance of our choices. If you don't like the rough and tumble of the city, bugger off to the countryside - no doubt you'll find plenty to annoy you there, too. If you don't like a particular idea or debate, switch it off or argue back, don't try to shut it down.

Mill's harm principle, as originally intended, sounds like a decent basis to make the case for freedom. But thanks to the way that the notion of harm has been expanded beyond all recognition, it's not good enough today. If we want to enjoy freedom, we need to demand the right to offend the sensibilities of those who loudly want to deny us that freedom.

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