

Author(s): John Chamberlin

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PubPol 580: Reading Notes for Class 17 & 18 (November 5 & 10, 2009)

Next we take up another central moral concept—liberty—and consider public policies that restrict individual liberty in various ways. One approach to restricting an individual's liberty is to do it for his/her own good. This practice is known as paternalism. But there are other ways to justify restrictions—like for the good of others. Governments frequently restrict individual liberty and it is therefore important that you understand your own commitments in this area. The reading for next time features a variety of current policy debates that I hope will generate some disagreement among you. Since governments spend a lot of time restricting liberty, it's important for you to be able to analyze these issues coherently.

General Introduction to the Topic of Restricting Liberty

A short list of policies that involve restrictions includes those concerning:

- automobile seat belts and air bags
- recreational drugs
- motorcycle helmets
- prostitution
- hunters' orange
- pornography
- workplace safety requirements
- gambling
- FDA certification of drugs
- smoking
- mountain climbing, bungi jumping
- bigamy
- requiring a doctor's signature for prescription drugs
- mandatory participation in social security
- forbidden types of contracts (usury, slavery, selling organs,...)
- product safety requirements (e.g., lawnmowers, cribs, various auto requirements...)
- fluoride treatment of drinking water

Because individual liberty is a central value, often THE central value, for many Americans, it is important that you be able to articulate justifications for restricting liberty when you believe this is appropriate.

This arena is the home turf of libertarians, who often point for justification of their position to the words of John Stuart Mill (who was a utilitarian, remember).

“The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of

action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a 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 opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. “ (JS Mill, On Liberty)

Mill points to a crucial distinction--between acts that affect others and acts that affect only the actor. In the former sphere (other-regarding action), the “harm principle” applies--a utilitarian judgment is made that balances the effects of the action on all affected parties (or at least that’s what Mill advocates). In the latter sphere (self-regarding actions), no restrictions are justified (according to Mill) since each individual knows best what maximizes his/her own utility.

Mill’s commitment to liberty when it comes to self-regarding actions has several roots: (1) individuals are likely to know better than the government what is in their own interests and (2) the development of human faculties involving in exercising our liberties is a vital source of human development.

One can also argue for liberty from a rights perspective, in which each individual has the right to make decisions about matters that affect only him/herself (such a right can include the right to make mistakes). Arguments that lean heavily on individual autonomy are usually grounded in such a right.

Freedom of expression issues occupy a middle ground. Expression does have effects on others, and some of the effects (say, of pornography) may be harms. But in Mill’s view this isn’t sufficient to open up expression to regulation on consequentialist grounds. In addition to the second argument just listed, there is the marketplace of ideas argument, that we learn what’s true and false (or right and wrong, or just and unjust) by having competing notions confront one another in public discourse. This turf is so completely owned by first-amendment jurisprudence in this country that I’d rather focus our attention on other issues.

The readings include one philosophical article on paternalism and a whole bunch of newspaper articles on examples.

The challenge in the next several classes is to arrive at a principled account of when (and why) we are justified in restricting an individual’s liberty when it comes to self-regarding actions. Just how much of a paternalist (or a libertarian) are you prepared to be, and why?

1. One way is to argue that Mill is wrong that individuals always know what's best for them (or that some necessary precondition to autonomy is missing). Thus, some authors concentrate on involuntariness, encumbered judgment, and irrationality as justifications for intervention. Restrictions regarding children fall in this area. Does such an approach resolve many of the instances listed to your satisfaction?

2. Another way is argue that the action isn't really self-regarding, that others are affected in ways that call for shifting the action from the class that should be left up to the individual to the other-regarding category. One version of this claims: "when you engage in activity X, which seems to affect only you (say, solo mountain climbing or riding a motorcycle without a helmet), you are imposing an expected cost on taxpayers (or on your fellow premium-payers in your health insurance plan), so the harm principle ought to apply." Such an argument, particularly in a country with a decent social welfare/health safety net, seems to drag a great deal (probably too much) behavior from the self-regarding sphere to the other-regarding sphere. Is it appropriate to use it to regulate peoples' personal lifestyle choices whenever there is any chance that bad choices might result in higher costs to society as a whole? Can a "harm" argument be appropriately constructed for what you consider to be appropriate test cases, or does this line of argument involve a slippery slope that permits restrictions on liberty whenever a measure can receive majority support in a legislature? In this regard you might think about the "attack" on tobacco in recent years and the justifications that are offered for it. And think about obesity taxes.

3. Another way is to frame regulation as "self-paternalism", whereby citizens agree to regulate their own behavior. Some of Nudge can be interpreted this way. This approach seeks to avoid the asymmetry ("I know what's best for you") that accompanies paternalistic judgments and can easily give offense to those being restricted. Think about instances in which your self-regarding acts are regulated and it doesn't bother you in the least (in fact, you're glad the regulations are there since they lift a potentially heavy burden of being informed and making decisions from your shoulders). Do you find this approach convincing? For what restrictions? How would you respond to someone who says "That's fine. You can regulate yourselves, but I want an exemption because I don't want to be part of this self-paternalistic regime."?

[If I were the executive director of the American Association for Con Artists and Scammers, I'd have that quote of Mill's emblazoned on the wall inside the entrance to our offices. A lot of sleazy actions are said to be justified by respecting each individual's right to choose and the proposition that an individual knows better than the government what's good for her. All you need is for this not to be true for a small fraction of the people and you can turn a tidy profit on these few (e.g., pick your favorite internet spamming scam). There is a lot of empirical evidence that this proposition is only true some of the time. Choices are often driven by inattention, habit, and misinformation. The task for regulators is to figure out how to deal with this without running afoul of the compelling side of the argument, that human freedom matters and it connected with human development, autonomy, and the promotion of human welfare.]

There is a range of regulatory responses that can be adopted in most instances. They range from laissez-faire at one end to coercion/prohibition (and even criminalization) at the other. Intermediate responses, including some nudge-like strategies, include:

- provision of information
- requirements concerning truth in advertising
- attempts at persuasion (e.g., campaigns against smoking)
- testing/licensing
- mandatory counseling
- differential pricing
- offering inducements (tax breaks, rewards)
- taxation
- regulation (time, place, inconvenience)
- changes in liability laws

The choice of a policy response should be guided by the nature of the challenge at hand, so it is useful to think about what kinds of problems each of these responses (and others you might think of) is appropriate to.

So here's the plan for the next couple of classes. First, we'll shuffle the membership of the two groups starting Thursday. We'll send around the new lineup.

Thursday: Read the Dworkin article and the articles about smoking bans and think about justifications for seat belt laws. We'll begin with the presentation on seat belts. There is a pretty solid consensus that these are justified so the task is to state as clearly as possible the ethical rationale for them. Which means being prepared not to waffle about reasons and being prepared for questions like "So wouldn't that rationale also permit _____?" where the blank is filled in by something that's more controversial. The second presentation will focus on restrictions on smoking. U-M is going to implement a smoking ban on the entire campus next year, so that's a natural topic. Others include: smoking bans for bars and restaurants or smoking bans in public housing.

Next Tuesday: restrictions on texting while driving and proposals for taxing fast foods, soft drinks, and other avenues to addressing concerns about obesity.