

**‘Dying for Assistance’ - Euthanasia according to Mill**

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The term ‘liberty’ is open to several different interpretations. In a legal context it means freedom from restraint, i.e. the freedom to make choices for one’s self without unwelcome interference. Many people crave it, wars have been fought over it, yet today it would appear there is no universal agreement on what acts the individual should be ‘free’ to carry out, and on those which should be controlled or even prohibited altogether. Liberty itself, is controlled largely by society, made up of both the public and government. Rightly or wrongly society exercises a high degree of control over all individuals whom live within its parameters. It is not disputed that society requires governance to provide stability and protection to individuals and their rights, this has been proven throughout history. That said, one is left wondering what the appropriate limit on this governance should be. One interesting theory was introduced by the work of John Stuart Mill, a British Philosopher in the 19<sup>th</sup> century. Mill is regarded as one of the most influential thinkers in the history of liberalism.<sup>1</sup> In actual fact, Mill’s principle would appear particularly relevant at present, that is, today’s society works to promote freedom of expression, individuality and freedom of choice whilst at the same time, it prohibits acts which many, would assert, individuals should be free to perform. Faced with these facts, one cannot help but ask the all-important question which Mill himself once asked... “What, then, is the rightful limit to the sovereignty of the individual over himself?”

**John Stuart Mill ‘On Liberty’**

Back in the 19<sup>th</sup> Century John Stuart Mill wrote a famous essay ‘On Liberty’ which has become very influential throughout the years, receiving both appraisal and critique from many different sources. It is remarkable to note, that St. Thomas Aquinas, came up with this idea almost 600 years before Mill himself,<sup>2</sup> highlighting the relevance and agelessness of the liberty principle. The essay put forward by Mill focuses on what Mill himself described as “a very simple principle”<sup>3</sup> which overtime has become known as the ‘harm principle.’ In simple terms, Mill believed that each individual should be able to live their lives freely, independent from control

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<sup>1</sup> Michael Freeman FBA, *Lloyd’s Introduction to Jurisprudence* (9<sup>th</sup> edn, Sweet & Maxwell 2014) 1368

<sup>2</sup> Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

<sup>3</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 17

and interference from society, so long as the acts they were carrying out did not ‘harm’ another.<sup>4</sup> Mill believed that all individuals should enjoy freedom of both speech and action, in order to promote diversity in society and allow for social flourishing.<sup>5</sup>

Further to this, Mill believed all actions could be condensed into two categories, the first category consisted of what Mill labeled ‘self-regarding actions.’ Actions such as these consist of any act carried out by an individual which effect only himself. The second category consisted of what Mill titled ‘other regarding actions,’ i.e. those which ‘effect’ and bring ‘harm’ to another person. According to Mill, the latter category would warrant appropriate interference from society, and the individual would be subject to either social or legal punishment.<sup>6</sup> To quote Mill directly “...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.”<sup>7</sup> In other words, if no harm befalls anyone other than the individual himself, interference from society is completely unjustifiable, and the independence of the individual remains absolute.<sup>8</sup>

### **A Critical Account of the ‘Harm Principle’**

The ‘harm principle’ has been the subject of much criticism, for example, Bollinger has dismissed Mill’s theory as “Pollyannaish,”<sup>9</sup> yet equally, there are many who see great value in his work. For example, Luke Harris has described Mill’s theory as a “brilliant and seminal essay,”<sup>10</sup> whilst John Morley has stated that ‘On Liberty’ was “one of the most aristocratic books ever written.”<sup>11</sup> In actual fact, as society develops his theory becomes ever more relevant. In today’s society, it would appear to be particularly relevant, as Mill himself predicted it would be... “a question seldom asked and hardly ever discussed, ...and is likely soon to make itself recognized in the vital question of the future.”<sup>12</sup>

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<sup>4</sup> *ibid* 17

<sup>5</sup> *ibid* 84

<sup>6</sup> *ibid*

<sup>7</sup> Michael Freeman FBA, *Lloyd’s Introduction to Jurisprudence* (9<sup>th</sup> edn, Sweet & Maxwell 2014) 1368

<sup>8</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 18

<sup>9</sup> Wrag, *Mill’s dead dogma: The value of truth to free speech jurisprudence* (2013) Public Law 363-385

<sup>10</sup> Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

<sup>11</sup> R.J. Halliday, *John Stuart Mill* (George Allen & Unwin Publishers Ltd, 1976) 114

<sup>12</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 1

The principle itself appears rather simple and one would assume, is quite easy to apply, however, upon closer inspection, issues tend to arise. For example, Mill himself asserted that no individual is a completely isolated being.<sup>13</sup> This admission somewhat confuses people, after all, if no one is truly separate from another, how would it be possible to carry out what Mill has labeled a ‘self-regarding act’ i.e. an act performed without touching anyone else? This begs the question, is there any such act which would not at least in part, have this effect? Another main issue with Mill’s theory is his lack of clarity, for example, to quote Stephen C. Mavroghenis, “what does Mill mean by harm” or more broadly... “what is harm?”<sup>14</sup> For example, could it be argued that emotional distress falls within Mill’s scope of harm, thus legitimatising social or government intervention?<sup>15</sup> What about financial harm in an indirect sense? Suppose a man were to try and end his life at home, the emergency services and hospital treatment he may require could certainly consume NHS time and resources, thus indirectly effecting the individual tax payer. If the examples provided were to be included within the definition, would there be a severity threshold that must be met for it to constitute ‘harm’ according to Mill? If clear answers to the questions raised above were provided, it would allow for a better understanding of the principle and could even see it work in practice.

Mill’s view on liberty can be contrasted with those of Aristotle and Plato, whom both held the view that the law should control actions of the individual and should also decide which things are “noble and good.”<sup>16</sup> Plato held the belief that men who enjoyed “unbridled liberty in a democratic society” would in turn, become “enslaved by their unrestrained and undisciplined desires.”<sup>17</sup> Plato’s opinion may be valid, however, Mill does not state that ‘all acts’ should be free from restraint, merely those which have no harmful effect on another. Therefore, Plato’s theory would appear to offer little assistance in this context.

Criticism of the principle does not end here. Mill adhered to the doctrine of utilitarianism, which some philosophers believe contradicts his liberty principle,<sup>18</sup> as the principle itself focuses on the rights of the individual. This is a valid point and one which is difficult to dispute. Nonetheless, according to John Gray, Mill “did not suppose utility or happiness to be as distinct

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<sup>13</sup> *ibid* 150

<sup>14</sup> Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> John Gray, *Mill on Liberty, A Defence* (2nd ed, Routledge 1996) 57

from liberty” as some suppose it to be.<sup>19</sup> Mill himself explains that the utility he speaks of is “in the largest sense, grounded on the permanent interests of man as a progressive being.”<sup>20</sup> Despite Mill’s attempt at self-defence, many would still hold that this contradiction betrays his liberty principle. Conversely, one might argue that although the principle itself focuses on individuality, viewed on a wider scale, it would provide benefits to everyone.

Mill himself stated that his liberty principle is a “very simple principle”<sup>21</sup> yet it would appear on closer inspection this ceases to be the case. Rather, in the face of any criticism the principle is pushed to its limit, leading to what many would dub, unsatisfactory answers.<sup>22</sup>

Although Luke Harris has referred to Mill’s work as ‘brilliant’ he himself has held it is notoriously difficult to understand.<sup>23</sup> This being said, perhaps too much is expected of Mill, surely there is a level of genius and common sense in this theory. After all, ‘On Liberty’ was published in the 19<sup>th</sup> century and remains the focal point of many journal articles and legal writings to this day. It could be said that many criticisms of his theory come from a misconception that Mill himself was seeking to define ‘harm,’ however, this is clearly not the case. Mill’s ‘harm principle’ is based around the idea of ‘harm’ just as many legal writings are based on ‘justice.’ The issue here is that both ‘harm’ and ‘justice’ are open to subjective interpretations, thus, there is no definitive definition available which might be applied. The principle may find successful application by applying a common-sense approach, by making decisions on a case by case basis as Mill himself suggests.<sup>24</sup>

### **A Defence - According to Rees**

The criticism raised previously cannot be ignored, that is, the principle cannot be properly applied until it is fully understood. That being said, all is not lost. Assistance comes via a paper written by Rees, in ‘A re-reading of Mill on Liberty.’<sup>25</sup> Rees extends a sort of olive branch to Mill’s theory, stating that “it is acts that affect others’ interests, rather than simply acts affecting other individuals, that are the subject-matter of Mill’s principle.”<sup>26</sup> At first glance this may

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<sup>19</sup> *ibid* 5

<sup>20</sup> *ibid* 6

<sup>21</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 17

<sup>22</sup> Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

<sup>23</sup> *ibid*

<sup>24</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 101

<sup>25</sup> Rees, ‘A re-reading of Mill on liberty’ (1960) 8 Political Studies 8 115-129

<sup>26</sup> Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

appear just as confusing as Mill's principle itself, however, after examining it more closely one finds a degree of clarity in his idea. Rees seeks to make an important distinction between normative and positive actions. For example, there are positive actions which can be seen to 'factually' affect another person.<sup>27</sup> Meanwhile, in the normative sense, Rees explains that an action must be seen in terms of its interests, which means that it is these interests not their effects which are of central importance.<sup>28</sup>

Thus according to Rees, it is not enough to merely bring 'harm' to another, the action in question must effect a person's interest before it can be classified as being harmful, and thus warrant protection from society.<sup>29</sup> Rees explains that it will be the value society places upon such interests which will determine whether they are affected or not.<sup>30</sup> Decisions such as these would be made by applying certain standards or values, and judging whether according to these values, another's interest has been 'harmed.'<sup>31</sup> If this input is applied to Mill's theory, it produces a yardstick by which society can successfully 'measure' harm, resulting in a better application of Mill's principle. Therefore, it would be for society to ask, what type of harm would it be willing to accept for the benefits that liberty can provide i.e. where to draw the line between having an 'effect' on someone and 'harming' them. Once the decision was made, Mill's principle would be ready for application. This may be described as a significant step towards certainty and ease of application, most criticism of Mill's 'harm principle' centers at his lack of clarity, thus, if Rees's work is to be given any weight at all, it would see Mill's principle become much stronger.

### **Assisted Suicide and Euthanasia**

Most individuals comply with the law throughout their lives, in consequence they forfeit much of their personal liberty to a higher power i.e. the government. Although there is common sense in this approach, as it provides for a certain degree of self-protection and order in society, many wonder if this 'higher power' has taken on too significant a role. One must ask, has society taken from the individual too much personal freedom? A person likely to answer yes is Noel

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<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

Conway, a 67-year-old retired lecturer whom suffers from motor neurons disease.<sup>32</sup> Mr. Conway recently launched a right to die campaign as he “fears being entombed in his body”<sup>33</sup> and has been left with no alternative but to consider assisted dying. Mr. Conway’s recent interview with the BBC has left many wondering if a change in the law is necessary, and whether or not his case will be the one to bring about this change.

Currently, under the Suicide Act 1961 for England and Wales, assisted suicide i.e. encouraging or assisting someone to end their own life, is punishable by up to 14 year's imprisonment.<sup>34</sup> There have of course been many challenges brought to the courts in recent years, all of which have failed, with the courts stating that any new changes to UK law must go through Parliament.<sup>35</sup> These cases led to a debate within Parliament itself, with the proposal being rejected by the House of Commons in September 2015 by 118 to 330 votes.<sup>36</sup>

It is clear that assisted dying and euthanasia remain very controversial, with each individual holding their own personal belief on the subject. There are many people whom believe that it is immoral to allow a person to suffer needlessly when an alternative option is available. For example, according to the campaign group ‘Dignity in Dying’ a recent study showed that 82% of the public support the choice of assisted dying for terminally ill adults.<sup>37</sup> Alternatively, there are many whom disagree, whether for personal or religious reasons, many categorise acts such as this as unjustifiable. Pope Francis has stated that euthanasia is always wrong, however, according to recent figures this does not reflect the belief of all religious people, recent statistics show that 79% of religious people support the idea of assisted dying legislation.<sup>38</sup>

These figures evidence that the majority of people would welcome a change in the law, even if there are others whom would disagree. With any ‘taboo’ subject you will find those who support it and those who oppose it completely. Judgements already mentioned can be

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<sup>32</sup> Walsh F, ‘Terminally ill man in right-to-die fight’ (17 July 2017) <<http://www.bbc.co.uk/news/health-40615778>> accessed 8 December 2017

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> *ibid*

<sup>36</sup> Papadopoulou N, ‘Assisted dying laws are progressing some places - the UK isn’t one of them’ (15 April 2017) <<http://www.independent.co.uk/news/health/assisted-dying-laws-are-progressing-in-some-places-the-uk-isn-t-one-of-them-a7679846.html>> accessed 24 December

<sup>37</sup> *ibid*

<sup>38</sup> ‘Campaign for Dignity in Dying’ <<https://www.dignityindying.org.uk/assisted-dying/international-examples/>> accessed 16 December

contrasted with those people hold on many other 'taboo' subjects, for example, take into consideration the views on smoking. For instance, it is a well-known fact that smoking drastically increases a person's chance of developing many different health complications, but nonetheless it remains legal. It is accepted that this is a decision for the individual to make, society provides everyone with the freedom to weigh up the risks and live with any consequences. When one makes a contrast such as this, it seems difficult to draw a distinction between the harmful acts permitted and those which are prohibited, one wonders what justification there is for dictating which decisions the individual should be 'free' to make himself, and which should be restrained altogether.

Although the UK refuses to legalize assisted dying and euthanasia, the same cannot be said for all other jurisdictions. For example, there are other countries whom permit these acts by offering assistance to their residents and any international citizens able to travel overseas. Suicide tourism continues to become more popular, for example, in 2008-2012 one fifth of visitors to Swiss assisted dying clinics were British residents.<sup>39</sup> Currently there are six US states and four countries in Europe which have legalised some form of assisted dying<sup>40</sup> with developments being made across the world. In 2016 Canada made history by being the first Commonwealth country to legalise assisted dying.<sup>41</sup> The result came after an historic legal case named *Carter v Canada*,<sup>42</sup> in which the Supreme Court of Canada struck down the long-standing ban on assisted dying. Recently, Australia followed suit by legalising assisted dying in one state for its residents.<sup>43</sup>

Essentially, there is an option available, but only to the limited few who have sufficient means to travel. The former Lord Chancellor Charles Falconer previously stated, the current situation "leaves the rich able to go to Switzerland, the majority reliant on amateur assistance and the

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<sup>39</sup> Siddique H, 'One in five visitors to Swiss assisted-dying clinics from Britain' (20 August 2014) <<https://www.theguardian.com/society/2014/aug/20/one-in-five-visitors-swiss-suicide-clinics-britain-uk-germany>> accessed 19 December

<sup>40</sup> Papadopoulou N, 'Assisted-Dying laws are progressing in some places – the UK isn't one of them' (15 April 2017) <<http://www.independent.co.uk/news/health/assisted-dying-laws-are-progressing-in-some-places-the-uk-isn-t-one-of-them-a7679846.html>> accessed 7 December

<sup>41</sup> 'Campaign for Dignity in Dying' <<https://www.dignityindying.org.uk/assisted-dying/international-examples/>> accessed 16 December

<sup>42</sup> *Carter v Canada* *Carter v Canada* (AG), 2015 SCC 5

<sup>43</sup> Davey M, 'Victoria becomes first state to legalise assisted dying as Parliament passes bill' (29 November 2017) <<https://www.theguardian.com/society/2017/nov/29/victoria-becomes-first-state-to-legalise-assisted-dying-as-parliament-passes-bill>> accessed 12 December

compassionate treated like criminals."<sup>44</sup> It seems unlikely that suffering individuals will stop attempting suicide, many believe it is a task better carried out in a controlled environment, rather than one having to be reliant on what Charles Falconer referred to as 'amateur assistance.' It appears clear that developments are being made at a quicker rate than ever before, mainly on the grounds of human rights violations. That being said, Mr Conway has not been as lucky. In October of this year, judges rejected his argument that the Suicide Act of 1961 violated his human rights, Articles 8 and 14 specifically.<sup>45</sup>

This judgement came as a devastating blow to many, but to Peter Saunders from the 'Care Not Killing Alliance,' the decision was a relief.<sup>46</sup> Peter stated that the decision was right "because of the concern that vulnerable people might be exploited or abused by those who have a financial or emotional interest".<sup>47</sup> This is perhaps the strongest argument for those who oppose such a shift in the law, fears of misuse and abuse are plausible. Others may argue that fears such as this may be eased by the use of appropriate safeguards. For example, assisted dying may appear more attractive if it were to be judged on a case by case basis, offered only to those who are terminally ill with capacity to make the decision on their own, free from any pressure. It could be said that fears such as this, although relevant, should not rule out the principle altogether.

### **Applying Mill**

The act of assisted suicide is, most obviously, an act carried out by the patient or rather, the individual wishing to end his own life. In practice, drugs are supplied by a medical professional to that individual for them to administer at their convenience.<sup>48</sup> As the act is being carried out by the individual himself, one could see logic in categorizing these types of acts as 'self-regarding acts.' Applying Mill's harm principle in the context of assisted suicide, it would seem plausible to suggest that as long as taking one's own life does not 'harm' another individual, the state has no legitimate power to interfere. It is true that people would be free to speak with

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<sup>44</sup> *ibid*

<sup>45</sup> Walsh F, 'Terminally ill man in right-to-die fight' (17 July 2017) <<http://www.bbc.co.uk/news/health-40615778>> accessed 18 December 2017

<sup>46</sup> *ibid*

<sup>47</sup> *ibid*

<sup>48</sup> NHS UK, 'Euthanasia and assisted suicide' <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 21 December



him, offer advice and convey their disapproval<sup>49</sup> but according to Mill, society should refrain from using either law or moral condemnation to prevent their actions and pattern of behaviour. After all, “restrictions on individual liberty based on harm to others has remained a more acceptable basis for intervention than the risk of harm to self.”<sup>50</sup>

James Fitzjames Stephen has stated that Mill’s views on liberty were a “too favorable view of human nature.”<sup>51</sup> It is true that Mill’s principle could be described as ‘idealistic,’ yet one could argue that Mill merely defends that which others would themselves wish to have protected, i.e. the liberty to make important decisions for themselves. It is not disputed that assisted dying may cause emotional upset for other people i.e. friends and family, yet according to both Mill and Rees, this is a factor that society would have to ‘measure’ according to the standards and values it finds most worthy. Therefore, Parliament might legitimately ban assisted suicide on these grounds but to do so for any other reason i.e. a personal dislike of the act, according to Mill, is an illegitimate use and abuse of power.

Assisted dying can be contrasted with euthanasia, as here, one might be inclined to argue the opposite. Many would state the inclusion of another person has the effect of taking the act outside of what is known as ‘self-regarding actions’ and into the realm of ‘other regarding actions.’ Here, euthanasia, requires a doctor to physically administer the lethal dose,<sup>52</sup> which clearly muddies the water when applying Mill’s ‘harm principle.’ The whole justification for such acts is that harm only befalls the person carrying out the act, yet here this is not the case, as the person acting is not the one being ‘harmed.’ This distinction leads to two opposing arguments, on the one hand you could argue that this is completely unjustifiable and that permitting euthanasia into the category of ‘self-regarding actions’ is a total misuse of the principle and betrays its intended purpose, i.e. the protection of individuals from acts of another.

At the other end of the scale you could go beyond the principle itself to explore the purpose behind it in further detail. Mill created the principle with an intention to prevent harm to

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<sup>49</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 18

<sup>50</sup> Flynn & Arstein-Kerslake, ‘State intervention in the lives of people with disabilities: the case for a disability-neutral framework’ (2017) 13(1) *International Journal of Law in Context* 39-57

<sup>51</sup> R. J. Halliday, *John Stuart Mill* (George Allen & Unwin Publishers Ltd, 1976) 144

<sup>52</sup> NHS UK, ‘Euthanasia and assisted suicide’ <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 30 December 2017

befalling ‘innocent’ individuals, yet here, it is those very individuals who are requesting assistance in the first place. Any assistance they receive is carried out on a voluntary basis by an informed medical expert, merely acting as an advocate for those unable to perform the act themselves.<sup>53</sup> Both arguments are strong, yet it would appear more likely that euthanasia, at least for the moment, pushes the boundaries of ‘self-regarding’ actions to a place many would find uncomfortable. That being said, to limit the application of the principle to assisted dying, would see many individuals whom are unable to act for themselves left to suffer in awful conditions based purely on a technicality.

### **Conclusion**

After applying Mill’s ‘harm principle’ in the context of assisted suicide it would appear likely, that according to Mill, the act should be permitted and that any interference from society would be unwarrantable. Whether the same could be said for euthanasia remains unclear, this would be something for society to evaluate based on the values it finds most important, as Rees suggests. Mill first introduced the harm principle in the 19<sup>th</sup> Century, in a time when it was thought impractical to educate women or when homosexual relationships were the subject of legal discrimination. It would appear unrealistic to expect a society such as this to permit the changes which the principle would call for. Today however, individuality is celebrated across the world, society has developed at a rapid rate since Mill’s theory was first presented. Surely in an advanced society such is the one we have today, one would welcome the principle and show respect for individual freedoms, especially in the context of health. As Mill himself asserted, “each is the proper guardian of his own health,”<sup>54</sup> and “he himself is the final judge.”<sup>55</sup>

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<sup>53</sup> BBC news, ‘Forms of euthanasia’ <<http://www.bbc.co.uk/ethics/euthanasia/overview/forms.shtml>> accessed 30 December

<sup>54</sup> John Stuart Mill, *On Liberty* (2<sup>nd</sup> edn, John W. Parker & Son, 1859) 23

<sup>55</sup> *ibid* 145