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Beyond the Harm Principle*

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In *On Liberty*, just a few sentences after he introduces his famous “harm principle,” John Stuart Mill writes “The only part of the conduct of anyone, for which he is answerable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign.” My aim is to argue that a commitment to individual sovereignty and a sphere of action in which you are answerable only to yourself requires that we abandon the harm principle.

This may seem surprising. The harm principle is often thought to be the centerpiece of liberal thinking about the criminal law. Non-liberal régimes regard the criminal law as an instrument to be used for broader moral purposes, whenever it can be used to make (some) people's lives go better; liberal defenders of the harm principle insist that the only legitimate occasion for using the criminal law to limit liberty is to protect people from each other. The liberal commitments of the harm principle go even deeper, because the presumption in favour of liberty and the idea of protecting people from each other combine to generate a presumption in favour of responsibility – aside from narrow exceptions for incitement to crime, one person cannot be prohibited from doing something just because it will lead her or someone else to do something prohibited. So even if it could be shown that the avoidance of vice will lead to a reduction in other crime, that would not be sufficient reason for criminalizing it. On the strong

* I am grateful to Ernest Weinrib for comments on an earlier draft of this paper. A still earlier oral version was presented at a conference at the University of Toronto commemorating the bicentennial of Kant’s death. I am grateful to members of the audience for their comments and questions.

understanding of the harm principle, only acts that harm or pose a genuine danger of harm to others can be prohibited. Many liberals are also dubious about claims that people of poor moral character are more likely to harm others, and of many claims about what is sinful or demeaning of character. The implausibility of these non-liberal claims is just a distraction from the core structure of the ideas underlying the harm principle. This is clear in the case of setting a bad example. As Mill's own development of the harm principle through the example of freedom of expression makes clear, influencing other people, whether by setting an example for them or convincing them to do something is not grounds for criminal sanction. Despite these credentials, I want to argue that the harm principle provides the wrong way of thinking about the legitimate reach of a liberal criminal law.

The only way to unseat a time honoured principle is to provide a superior alternative. Following the sentence of Mill just quoted, I will call the alternative “the sovereignty principle.” Liberalism is fundamentally a doctrine about the legitimate uses of state power, and the sovereignty principle articulates the basis for those limits in terms of ideas of individuality and independence. It provides a narrow rationale for the legitimate use of state power, and precludes other proposed bases. I will explain why its conception of freedom is not subject to certain familiar objections, ones that have historically driven some to embrace the harm principle.¹ Before doing so, I will show that narrowly construed, the harm principle fails to account for a significant and familiar class of wrongs that most liberals would agree merit prohibition. I begin in this way for three

¹ The greatest defenders of the harm principle in each of the 19th and 20th centuries were drawn to the sovereignty principle. Mill himself expresses its core idea, and in an early paper, called "Are There Any Natural Rights?" H.L.A. Hart articulates something close to it. The most forceful expression of it is found not in Mill or Hart, but in Kant's political philosophy. In explicating the principle, I will draw on Kant's ideas, although I will try to avoid his vocabulary.

reasons. First, considering this type of case shows that the distinction between other-regarding and self-regarding acts is not equivalent to the distinction between acts that harm others and those that do not. Second, I will use it to explain why wrongdoing cannot be reduced to harm. Third, I will explain why the harm principle has so much difficulty with this type of example, tracing the problem to supplementary constraints that are required to prevent it from collapsing into an empty formula. In introducing the example, I will depend on its intuitive force. When I go on to develop the sovereignty principle, I will vindicate the intuitions that underwrite the example. Mill is right to insist that there is a sphere in which the individual is sovereign “as a matter of right”, but wrong to suppose that it can be identified with the prevention of harm.

The sovereignty principle does not require supplementary principles to avoid collapse into an empty formula. As a result, it does better at each of the things that the harm principle purports to do. Most notably, it provides a systematic explanation of *why* harm matters. It might be thought that the harm principle is rightly satisfied to simply accept *that* harm matters, and be sceptical of any attempt to explain that in terms of anything more basic. But no defender of the harm principle has ever supposed that harm is always a presumptive reason for prohibition, let alone a sufficient one. Most prominently, the harm a person visits on him or herself is usually thought to be beyond the reach of the criminal law. Harm at the hands of others also falls outside it, provided that it is voluntarily undertaken or risked. So does harm resulting from a fair contest, including market competition, even if the contest was not voluntarily undertaken in any straightforward or self-conscious sense. These exceptions either rest on supplementary principles, or on the claim that certain benefits “outweigh” the harms they inevitably

cause. I will show that the sovereignty principle explains the exceptions in a more powerful way.

Harmless wrongdoing: an example.

Suppose that, as you are reading this in your office or of the library, I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic and lint-free pyjamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent. By an ordinary understanding of what counts as harm, I do you no harm. If I had the same effects on your home in some other way, nobody would suppose you had a grievance against me, let alone that you should be able to call the law to your aid. Your objection is to my deed, my trespass against your home, not just to its effects.

The harm principle cannot provide an adequate account of either the wrong I commit against you or the grounds for criminalizing it. Before defending this claim in detail, let me clear away a few side issues. First, non-liberal critics of the harm principle sometimes contend that the criminal law must be concerned above all with character.² Such a critic might suggest that my action must be prohibited because of the attitude of disrespect or a bad character it reveals. It certainly reveals all of these things, but that is not why it should be prohibited. I could show the same meanness of character and lack of respect by *preparing* to nap in your bed while you are out, but get lost on my way to your home, and fail to get started on my deed. Or I might arrive at your home, but fail to get the locks open. If so, I will have *attempted* to get into your home to take a nap, but failed. If I attempt and fail, my conduct may fall within the purview of the criminal law,

² Cite to Duff, Gardner, Devlin, various neoThomists.

but it also seems less serious than the central case, in which I actually lie in your bed.

When I take the nap, I do not merely reveal a lack of respect for you. I *do* something to you.³

Second, it won't work to claim that I do harm you by upsetting you when you learn of my deed, or by leading to fears that people will do this sort of thing to others. As a liberal principle, the harm principle cannot allow this move. If my act itself is harmless, then your fear that I will do it cannot bootstrap it into a harm, any more than your fear that I will corrupt your character can count as a harm for purposes of criminalization. Too many illiberal consequences would follow if harms could be manufactured out of nothing in this way.

The third side issue concerns the possibility that I harm you by depriving you of an opportunity. It is not easy to see what opportunity I am depriving you of. You still had the opportunity to exclude me from your home, which you could have done by posting guards at your doors. That is an opportunity that you failed to seize, not one that I deprived you of. In the same way, I did not deprive you of the opportunity to charge me rent for the use of your bed, both because you probably weren't interested in any such arrangement, and because you could have posted a toll collector.⁴ Nor have I harmed

³ The way that the standard criminal law distinctions between preparation, attempt, and completed crime apply in this example suggests that familiar puzzles about the moral difference between attempted and completed crimes that grow out of the role of chance in producing different amounts of harm, rest on a flawed conceptualization of the issues. The difference between what I do to you and what I have only attempted to do applies to this example, despite the fact that attempt and completed crime are equally harmless.

⁴ The more technical economic sense of opportunity does not help with the example either. In economic terms, someone has an opportunity if they are in a position to exploit it, and they choose to do so. An opportunity that you could have seized, but failed to, is an opportunity that you missed not one that anybody else deprived you of. Suppose that I admire the flowers in your garden each day as I walk past your garden. I do not ask for permission to view them, or pay you for my pleasures. I do not deprive you of an opportunity to charge me, because you could charge me for them if you wanted to, perhaps by building a higher fence, and posting a guard at the door to charge admission for viewing. This may not cross your mind. Or it may strike you as excessive, because the cost of preventing me from viewing the flowers is

you simply because I did something that you didn't want me to do. Your interest in being free of uninvited though harmless guests can no more be manufactured into a harm than your fear of them can.

Despite the obvious differences between these three side issues, they share a common theme. The basic case in which the criminal law legitimately takes an interest is the case in which I actually do something to you, not the ones in which I want to do it, or you fear that I will do it, or object to my doing it. Intentions, fears and objections get their significance from their objects: my intention to do something to you, or your fear that I will do it, are only significant if my actually doing it is significant. And your objection to my doing it is only significant if my doing it was itself significant. Part of the motivation behind the harm principle is to focus on what people do to each other.

Indirect Strategies

Most defenders of the harm principle will likely agree that the side issues fail to capture what is wrong with my nap. They are more likely to appeal to a different kind of strategy, focussing on the harm that can be prevented by prohibiting people from entering other people's homes without their permission. Even if I don't harm you in this case, it is plausible to suppose that a general rule giving people rights to exclude others from their property, especially their homes, prevents people from visiting harms on each other.

probably higher than you could ever hope to get me to pay for them. In economic terms, you have passed up an opportunity, because the transaction costs involved in taking advantage of it are too high. This is a perfectly rational course of action, but for that very reason, you cannot call upon the law to stop me from admiring your flowers.

Cast in terms of opportunities, our example has the identical structure: you could have charged admission, or rent, to those who wanted to nap in your bed, but you chose not to do so. Perhaps you chose not to do so because you invested as much as you thought prudent in high-quality locks for your door. Or perhaps you did not want anyone to sleep in your bed, because you value the ability to exclude others more highly than you thought others would be willing to pay. Your "reserve bid" was higher than any bid you expected to receive, so you did not bother with a costly auction. If so, I did not deprive you of an opportunity. You simply declined to seize one, because you did not think it worth while to post a guard at your door to prevent me from entering. I have deprived you of nothing, and so done you no harm.

Your right to exclude me is enforceable as a special case of the more general right that is justified by its prevention of harm. My use of your property without your consent can be prohibited in order to prevent harm, even if in the peculiar case I have described, no harm was done. Although the token is harmless, the type is harmful.

I will now argue, however, that the claim that this type of act is harmful is ambiguous, and, once the ambiguity is resolved, fails to address our example or others like it. The challenge for this indirect strategy is to come up with the right way of articulating the harm that the prohibition is supposed to address. One possibility is that using someone else's property without their permission is likely to cause harm. There certainly are examples that fit this characterization. Dangerous driving is usually harmless. The ground for prohibiting it is nonetheless based on the possibility of causing harm. The only practicable way of reducing the harm caused by dangerous driving is to prohibit it outright, rather than waiting for harm to actually occur. The regulation of pollution has a similar structure: prohibiting pollution significantly reduces harm, even when any particular violation of pollution laws causes no measurable harm to anyone. In both of these examples, the only way to prevent harm conduct is to prohibit dangerous conduct, even in those cases where it does not in fact cause harm. Not only is it more effective to have the decision made in advance, but, just as importantly, letting particular people decide how likely their conduct is to cause harm will lead to still greater harm, as people miscalculate in self-serving ways. When dealing with conduct that can be prohibited on the grounds of the harm it causes or is likely to cause, the sensible course is to refuse to consider particular cases.

Unfortunately, these examples have a very different structure than ours. General rules may be necessary, but the harm principle gets its critical edge from its demand that *each* prohibition be justified in terms of the harm that *it* prevents. That is what is missing in our example. Driving at high speeds or while impaired is dangerous by nature, because it subjects the safety of others to factors that nobody can control, so that the non-occurrence of harm is purely a matter of chance. Nobody knows in advance which cases will or will not cause harm, so nobody is entitled to an exemption. Putting toxins into the environment is harmful in the aggregate, and the only way to prevent the harm is to prohibit it outright.⁵ Harmless trespasses are different. As a category, they are not dangerous, either in their direct or their aggregate effects. Some trespasses are in fact harmless but still dangerous – I might run blindfolded through a china shop and miraculously damage nothing. But the rationale for prohibiting it is that it is dangerous, not that it is a trespass. The harm principle must be indifferent to trespass, except when dangerous or harmful. Because danger and harm are already sufficient grounds for prohibition, trespass drops out of the picture. An otherwise harmless activity cannot be prohibited simply because an identifiable sub-class of its instances are dangerous. Drunk or reckless driving can be prohibited, but driving cannot be just because unsafe driving is a type of driving.⁶ If the harm principle is our guide, we cannot prohibit all trespasses just because unsafe trespasses are a type of trespass.

These difficulties are consequences of the constraints that give the harm principle its critical bite. It is supposed to determine whether rules merit enforcement. It is friendly

⁵ If nobody else has any inclination or incentive to pollute, the harm principle does not underwrite a prohibition.

⁶ Feinberg notes that alcoholic beverages have caused a great deal of harm, but that the appropriate response to such harm in a free society is to regulate or prohibit their dangerous use, not to prohibit them outright. (*Harm to Others*, Page 193).

to liberty precisely because it demands that a positive case be made for any limit on freedom. The flip side of this rigor is the requirement that every rule be justified in terms of the harm it prevents. These demands cannot be sidestepped by claiming that general rules are always bound to have exceptions, because the harm principle rightly asks for a justification of each general rule, and is unwilling to settle for an abstract justification of general rules as such. The strength of the harm principle is the source of its weakness in explaining our example.

The appeal to general rules can be developed in yet another way, on the grounds that my nap should be prohibited in order to protect property more generally. Allowing violations of the basic rules governing property will destabilize the institution of property. A related thought could be framed in terms of the Hobbesian idea of assurance: unless you are confident that others will forbear from using your property, you will not accept the burden of keeping your hands off theirs. Some practices have something like this structure: People won't sort their garbage for a recycling program unless they are confident that enough other people will do the same for their effort to provide the benefit it is supposed to. Unless counterfeiting is prohibited, people won't have sufficient confidence in paper money to accept it in exchanges. In these examples, prohibiting the violation of the rules of a practice is the only way to ensure its stability, even if a small number of violations will make no real difference. The only way to protect the practice is through general enforcement of its rules.

Many recent writers have supposed that property has a similar structure: it is a conventional social practice, adopted because of the benefits it provides, and enforced so as to sustain provision of those benefits. This view finds clear expression in Hume's

discussion of the emergence of property. Hume suggests that people naturally converge on a convention of “abstinence from the possession of others” because of the advantages it provides to all. Given the scarcity and limited benevolence that characterize the “circumstances of justice,” that convention requires enforcement if it is to provide benefits. Even if my nap itself causes no harm, prohibiting it protects against considerable harm.

Friends of freedom should be uncomfortable with the strategy for two reasons, one political, the other conceptual. The political reason for discomfort is that it is so easy to come up with parallel appeals to the vulnerability of beneficial practices. Religious conformity may be unstable without coercion. So too may the nuclear family. Perhaps Lord Devlin was right to contend that virtues of honesty, integrity or diligence depend on enforcing the right kind of moral climate. Although there may be dispute about the value of these practices, their vulnerability, or the likely effects of using force, sophisticated liberals should be wary of making their defense of liberty depend on any of these things.

The conceptual difficulty is that the appeal to vulnerable practices trades on an ambiguity between harming a practice and violating its rules, the very same issue that our initial example turned on. Some practices are vulnerable to things other than the violation of their rules. If William Godwin had convinced enough people that promising is evil, and promises should not be made, he might have harmed the practice without ever breaking a promise.⁷ Conversely, many people break promises without undermining the practice of promising.

⁷ Mill thought that the harms caused by people believing what others say speech are never sufficient reason for limiting speech. The present point doesn't concern prohibition, but rather the way a practice can be harmed, even if there are countervailing reasons against prohibiting the harmful conduct.

In the case of property, even if “abstinence” is the rule that makes up the practice, the harm principle demands a positive case be made to show that enforcing it is the only way to protect the practice. Rules always prohibit their own violation – that is what makes them rules – and rules that make up a practice will “call for” enforcement even in cases where the institution is not in danger. Whenever the rationale for enforcing the rules of chess or baseball, it is not that otherwise chess or baseball would be vulnerable to collapse. Violations do not inevitably lead to disintegration.⁸ Instead, the most that can be said about purely conventional practices such as games is that making the rules and prohibiting their violation comes down to the same thing. We do not need to look to the effects of violations, either in particular or in general, in order to recognize that the whole point of the rules is to create the game by prohibiting them.

This is not the place to examine the idea that institutions such as property are best analyzed on the model of a conventional game. My point is only that there appear to be only two models available for this idea, and neither is consistent with the harm principle. One model says that the rules must be enforced on pain of collapse of the practice. But that just reintroduces the distinction between harm and wrongdoing that created the difficulty about our example. If violations are harmless, or a class of violations is harmless to the practice, the harm principle cannot provide a rationale for prohibiting them. The other model says that the rules make up the practice. It makes no reference to the concept of harm, because it makes no reference to the effects of violations. So the

⁸ H.L.A. Hart constructs a parallel dilemma against Lord Devlin’s claim that immorality is harmful to society.

harm principle appears to have no way of engaging with the idea of a valuable social practice, and so cannot use it to explain why harmless wrongs should be prohibited.⁹

The idea of harm to a practice gets murkier still in cases in which the wrong has the same structure but no candidate practice is in sight. Humean abstinence excludes using other people's property even when no harm is done in a way that is parallel to the requirement of abstinence from the *person* of others. Even reputable newspapers sometimes carry shocking stories about medical experiments performed on unconscious patients. Usually these experiments are uncovered by accident, because they leave no trace and do no measurable harm to their victims. It seems desperate to claim in such cases that these acts should be prohibited in order to protect "our" "practice" of abstinence from other people's bodies. It is much more plausible to recognize them for what they are – wrongs against their victims. The obvious explanation of what is wrong with my nap is parallel – I wrong you by suing your home for a purpose that you didn't authorize.

The sense in which I wrong you points to more serious difficulty with any variant on the indirect strategies I have been canvassing. One and all, they fail to capture the sense in which *you* have a grievance against *me* for what I *did* to you.¹⁰ The core of the difficulty they reveal is, once again, both political and conceptual. As a political matter,

⁹ Short of claiming that any wrong is thereby a harm. Joseph Raz adopts a version this strategy when he claims that the person who fails to hire someone with a disability despite the existence of an antidiscrimination law requiring the hiring of people with disabilities harms the person he fails to hire. If the concept of harm is conclusory in this way, the harm principle loses its critical edge, because it displaces all of the difficult questions about the legitimate limits of the criminal law onto questions about the legitimate grounds of legislation without making any appeal to the concept of harm.

¹⁰ Your sense of grievance can perhaps be dismissed as an illusion, something you have been unwittingly socialized into. Or maybe your attitude is just a result of "possessive individualism," and you really should be delighted that I have found a use for your bed at no cost to you. Here as elsewhere, the only response to the suggestion that something is just a façade is to reveal the structure behind it. The sovereignty principle provides the structure.

liberals are right to view overly broad criminal prohibitions as the enemies of liberty. The ways to bring our example within the sweep of the harm principle run afoul of the liberal ideal of individual responsibility, which says that you cannot be prohibited from doing something that doesn't interfere with anybody else, simply because it is a bad example for me, or because prohibiting you from doing it makes you less likely to commit some other genuine crime. Absent very special circumstances, one person cannot be held criminally responsible for the acts of another. All of the harm-based responses to examples of harmless trespasses are in tension with this idea, because they all amount to the claim that conduct that is not objectionable in its own right can be prohibited as a cost-efficient way of prohibiting conduct that is, that a harmless vice can be prohibited where the prohibition will reduce harmful conduct.

The outline of the alternative is implicit in the supplementary principles that defenders of the harm principle use to limit its reach. The harm principle doesn't treat all harms as providing even a presumptive case for criminalization. Self-inflicted harms, both narrowly construed, and more broadly construed to include those the risk of which is voluntarily undertaken are excluded. So are the harms that are the result of what Joel Feinberg has referred to as "fair contests." If you build a better mousetrap, I may lose customers; if you close your hotel my neighbouring restaurant may suffer; if you show up before me, there may be no seats left on the bus or milk left at the store. None of these activities can be prohibited, despite the genuine harms they cause. Both self-inflicted harms and those that result from fair contests are genuine harms, and are just as bad as the same harms brought about in other ways. Some might contend that these harms are real but "outweighed" by the benefits brought by economic competition. The sovereignty

principle offers a more straightforward explanation. In so doing, it also provides an explanation of why harm would be relevant to freedom, rather than being something that must be balanced against it. The sovereignty principle says that if the contests really are fair, and the undertakings voluntary, any harms that ensue are not wrongs. They are the mirror image of my napping your bed, a wrong which is not harmful. In order to circumscribe the category of conduct that can be prohibited in a way that is consistent with freedom, we need an account of the relation between wrongdoing and freedom.

The sovereignty principle.

The sovereignty principle rests on a simple but powerful idea: individual freedom can only be restricted to protect each person's freedom from others. Limits to freedom are reciprocal: the vulnerabilities that must be protected against the acts of others are themselves the vulnerabilities of freedom.

The idea that freedom can be limited only for the sake of freedom has come in for a rough ride in recent times, to the point where it strikes many people as hopeless, because it falls to a devastating objection. I will introduce the sovereignty principle through a dialogue with this objection. In *A Theory of Justice*, John Rawls advocated a principle of "maximum equal liberty," but, in response to criticisms by H. L. A. Hart, conceded that his approach to justice lacked the theoretical resources to develop that idea. Other attempts to formulate liberty-based principles have fallen victim to other, equally familiar criticisms. Remarking that libertarianism is a poorly named doctrine, G. A. Cohen has argued that any set of rules protects some liberties at the expense of others. Cohen gives the example of the way in which property rights restrict freedom of movement. From another perspective, Ronald Dworkin has used the example of driving

the wrong way on a one-way street to illustrate the difficulty with liberty-based accounts of justice. Writing from yet another tradition, Charles Taylor has emphasized the differences between freedom of religion and the freedom to cross intersections unimpeded. These critics of the principle of equal freedom differ in many ways, but are united in supposing that we must assign weights to particular liberties. Both societies and theories of justice aspiring to guide them must decide which liberties count, and must balance them against other values, such as equality, or find a way to integrate them with those values, so that any presumption in favour of freedom must be limited by an independent concern about, most notably, preventing harm.¹¹

This objection was first put forward close to two centuries ago, by Samuel Taylor Coleridge. Like Cohen, he argues that property constitutes an external limit on freedom, rather than an internal one. Nearly a century later, the same line of argument can be found in Frederick Maitland, and Hart referred to both in introducing his own version of it.

Each of these arguments takes a particular understanding of freedom as its target, the conception that Isaiah Berlin referred to as “negative liberty” in his celebrated essay “Two Concepts of Liberty.” Berlin distinguished negative liberty, which he identified with the ability of people to do as they wish, free from legal regulation, from what he called “positive liberty,” which he explicated in terms of the idea of the free person is being true to his inner or genuine self. Berlin contended that the enthusiastic embrace of the idea of positive liberty by political movements has led, without exception, to disaster.

¹¹ These are only recent examples. Essentially the same argument is made by F. W. Maitland, in “Mr. Herbert Spencer’s Theory of Society” *Mind*, Vol. 8, No. 32. (Oct., 1883), pp. 506-524. Maitland in turn attributes its general thrust to Coleridge. Both Maitland and Coleridge argue that property requires a compromise of freedom in conditions of scarcity in which “not every many can get what he wants.”

Negative liberty, by contrast, has been the friend of familiar freedoms, for it rests on the assumption that each person is the best judge of how to use his or her freedom, and indeed of what counts as that freedom. Despite his recent appropriation as an icon for markets and paring back the activities of modern states, Berlin himself was emphatic in his view that liberty is not the only value, and that it must sometimes be sacrificed for other ones. In this, Berlin was not anti-collectivist, but simply anti-confusion: if freedom is to be sacrificed, it should be clear what is being sacrificed, and why. Berlin viewed appeals to positive liberty as attempts to build all values into the concept of freedom in a way that denied, or, worse yet, disguised, genuine conflicts of values and the need to address them. Liberty, he reminded us, is one thing, not every thing. Other goods may be equally important, and must be balanced against it.

For negative liberty, the conflict between freedom and other values seems inevitable. The difficulty is straightforward: as Coleridge puts it, “not every man can get what he wants.” My desire to keep you off my property may conflict with your desire to cross it, and so on. Our dispute can’t be resolved through an appeal to freedom, but only by someone deciding which interest matters more. Each of us wants some liberties inconsistent with ones the other wants. Even if we could figure out a way to maximize liberty on this understanding, it seems impossible to equalize it the same time unless we have some way of choosing between liberties.

Much of the debate about the harm principle takes Berlin's claim about the potential for conflict between liberty and other values for granted. The harm principle demands a drastic narrowing of the class of competing values that can justify limits to liberty. That demand acknowledges that liberty itself provides no grounds for its own

limits, coupled with the setting of an exacting standard for limiting it. It is no surprise that defenders of negative liberty usually understand property, for example, as a beneficial social practice. Despite continuing controversy (at least among philosophers) about what kinds of things people should be allowed to own, it is uncontroversial that it is legitimate to prohibit taking or damaging another person's property without their consent. If this is to be an acceptable limit on freedom, it must be brought within the reach of the harm principle.¹²

The sovereignty principle rejects the balancing metaphor, because its conception of freedom is neither of Berlin's categories of positive or negative liberty. Both positive and negative liberty can be predicated in the first instance of an individual. It makes sense to ask about the extent to which I am free to do as I please, or the extent to which you are true to your inner self. These questions can be asked about each of us without any consideration of where any other person might stand along the preferred scale of freedom. Both positive and negative liberty are features of particular persons, in the way that height or weight or wealth might be. The thing measured is partly relational – weight is a function of gravity, and wealth of purchasing power – but questions about someone's wealth or weight take the local scale as fixed. Comparisons across people are parasitic upon independent assessments of the individuals being compared. This structural feature is at the root of Hart's objection, because preventing someone from doing something will limit that person's freedom but may enhance another's, in

¹² Hart's objection is equally forceful against ideas of positive liberty, as Berlin understood it. My ability to be true to my inner self may be incompatible with your ability to be true to your inner self, depending on just what is required of each of us. If there is a conflict, there is no single currency in which we can resolve the question of what would be the greatest liberty for each of us.

something like the way that you can only give more money to one person by taking it from another.

The sovereignty principle understands freedom as independence, which is a feature of relationships between persons, rather than a feature of any particular person. You are free if you are the one who decides what you will do, as opposed to having someone else decide for you. You may still mess up, decide badly, or betray your true self. You may have limited options. You remain independent, because nobody else gets to tell you what to do. Negative liberty couldn't make up a consistent and self-contained system because my doing what I want and you doing what you want stand in no systematic relation. Our equal independence from each other can be systematically connected, so as to create a system of equal freedom. The relational structure of sovereignty enables it to overcome Hart's objection because it makes it possible to formulate an idea of equal freedom, according to which people are equally free provided that no person is subject to any other person's choice.

Recent scholars have pointed out that Berlin's dichotomy between negative and positive liberty leaves out a prominent idea of liberty, sometimes referred to as the "Republican" or neoRoman conception of liberty, according to which liberty consists in independence from others. The civic Republicans of the Renaissance, and their contemporary heirs, were centrally concerned with the dangers of despotism, and with protecting their political liberty, especially the ability to participate in the government of their own public affairs. The early modern Republicans did not object to despotism because it interfered with their negative or positive liberty (to use anachronistic terms they would not have recognized). A benevolent or prudent despot would allow people,

especially potentially powerful ones, opportunity to do what they wanted and be true to themselves. The objection was to the fact that it was up to the despot to decide, to his having the power, not to the possibility that he would use it badly.¹³ It is of course true that if a person lacks a power, there is no danger of him using it badly. But the core concern of the civic republicans was the despot's entitlement to use it, and the subjugation of his subjects that followed regardless of how it was used. They were subject to him.¹⁴

The republican focus on the prerogatives of citizenship leads to a focus on the powers of society, and to legitimate fears about the power that a despotic monarch or majority might exercise over individuals. It is not an idea of getting to do what you want, but of others not being able to determine what you do. Recent discussions of republicanism have understandably focussed on questions of democracy and self-rule. Colonists rebelled against their overseers in its name, and contended that they would have done the same even if those overseers had been more benevolent or competent than they actually were. The problem was that had the range of choices they did only by the grace of others.¹⁵

¹³ Berlin seems aware of this idea of independence in his discussion of the breakup of Colonial empires after World War II. He notes that people would often prefer to be governed badly by themselves than to be governed well from outside. Berlin himself associates this with a nationalistic identification with an *ethnos*, but the structure of the complaint reflects a concern for independence. (cite)

¹⁴ cite to Petit, Skinner

¹⁵ Mill seems sensitive to this distinction between independence as a relation and freedom as a feature of each particular person when he invokes the metaphor of sovereignty. A sovereign state may lack negative liberty, perhaps because its natural resource base is so meagre as to make it unable to achieve its ambitions, or it may lack positive liberty, because corruption is so rampant that it fails to act in any systematic or coherent way. Nonetheless, it can still be sovereign, in that it is not subject to the choice of any other state. In the same way, a person might lack negative liberty because there are natural or legal obstacles in the way of achieving her purposes, or lack positive liberty because he is hopelessly disorganized or addicted to video games, but still have sovereignty in the sense of not being subject to any other person's choice. Sovereignty, or rather, reciprocal sovereignty, is a relation between persons. Unfortunately, Mill then shifts his focus to the relation between society and the individual, overlooking the threat to sovereignty that one person can raise against another.

The sovereignty principle carries this same idea of independence further, to relations amongst citizens. It insists that everything that is wrong with being subject to the choice of a powerful ruler is also wrong with being subject to the choice of another private person. As a result, it can explain what is wrong with the sort of harmless wrongdoing we saw in our examples. In each case, one person is subject to another person's choice. Most familiar crimes are examples of one person interfering with the freedom of another by interfering with either her exercise of her powers or her ability to exercise them. They are small-scale versions of despotism or abuse of office.

Freedom and Choice

This idea that powers that you have are fundamental to your freedom is familiar, common to Rawls's emphasis on the moral power to "set and pursue a conception of the good," and the distinction, common to Aristotle and Kant, between choice and wish. The ability to choose in this sense doesn't depend on the ability to stand outside the causal world, or even to abstract from your own purposes in making choices. Instead, it rests on the familiar observation that if you choose to do something, you must set about doing it, which requires that it be within your powers to pursue.

There is a different image of choice that is sometimes prominent in philosophy, according to which people simply have certain purposes, and then use whatever means are available to achieve them.¹⁶ On this understanding, people choose means, not ends.

This image is exactly backwards. Even if it were true that whatever wishes you have are

¹⁶ As economics textbooks frequently put it, preferences are "given". As a matter of the best empirical theory of human motivation, this may be true. If so, the distinction between choice and wish applies *within* a person's preference profile. This elementary distinction underlies the significance of consent in legal and medical contexts. A surgeon who rightly infers that a patient wants a certain procedure performed, and correctly surmises that patient's hesitation reflects neurosis or superstition, still commits a battery if he performs the surgery without the patient's consent. The patient's wishes don't matter to the assessment of the surgeon's conduct. Only her choices do.

facts about you fixed by your biology and upbringing, you can only *do* something if you set out to do it, and you can only set out to do what you have the power to do it. Without the powers, you can wish for anything – to walk on the moon and be home in time for dinner – but it is not a choice you can make. Your wishes may all *come* true, but you only *do* things by exercising your powers.

Your powers can be interfered with two basic ways, by usurping them or by destroying them. I usurp your powers if I exercise them for my own purposes, or get you to exercise them for my purposes. If I lie to you, in order to get you to do something for me that you would not otherwise do, I wrong you, even if the cost I impose on you is small. I have used you, and in so doing, made you choice subject to mine, and deprived you of the ability to decide what to do. If you did the same thing, even if I got the same benefit from it, but I had no role in generating the mistake that lead you to do it, I haven't wronged you; I just took advantage of the effects of something you were doing anyway. When I lie to you, I subject you to my choice. I can use you in other ways as well. Suppose that you are opposed to the fluoridation of teeth on what you believe to be health-related grounds. You are terribly mistaken about this, but committed to campaigning against fluoridation. I am your dentist, and as I am filling one of your (many) cavities, I surreptitiously fluoridate your teeth, proud to have advanced the cause of dental health, and privately taking delight in doing so on you, the vocal opponent of fluoridation. In this example, I don't harm you, and there is even a sense in which I benefit you. I still wrong you because I draw you, or, strictly speaking, a part of you, into a purpose that you do did not choose. I am like the despot who uses his office for personal gain.

The other way that I can subject you to my choice is by injuring you, or in the limiting case, killing you, putting your powers to an end. If I break your arm, I destroy some of your powers, and in so doing limit the ends that you are able to set and pursue for yourself. If I choose to do it, I use my powers to subject your choice to mine in a straightforward way, by taking it upon myself to decide what powers you will have. If I usurp your powers, I decide what purposes you will pursue, and make you dependent on me in one way; if I destroy your powers I do not set any particular purposes for you, but take away your ability to set your own purposes.

I suggested earlier that the sovereignty principle provides a powerful explanation of why harm matters, in a way that the harm principle cannot. I am now in a position to redeem that claim. If I harm you, I deprive you powers you had, and so make you dependent on my choice. When I do so intentionally or even knowingly or recklessly, I subordinate your ability to use your powers to set and pursue your own purposes as you see fit, to my pursuit of my purposes. Doing so intentionally is particularly egregious, because I set myself up as your master. For the sovereignty principle, then, intentional injury is despotism by another name.

The sovereignty principle can also explain why harm does not merit notice by the criminal law if it is brought about in other ways. By focusing on the despotism contained in intentional injury, the sovereignty principle pays no attention to self-inflicted injury, because it involves no despotism.¹⁷ Ordinarily, injury that results from consensual

¹⁷ The familiar legal maxim "*volenti non fit iniuria*" sits uneasily with the harm principle. It allows exercises of freedom to legitimate act that would otherwise be prohibited. It might be thought that this is just another example of the priority of liberty that is cherished by defenders of the harm principle. But the harm principle rests on the idea that harm *is* bad enough to outweigh exercises of freedom. If protecting you from harm is sufficient grounds for limiting my freedom, it might be wondered it is not grounds for limiting yours. Nor can the *volenti* principle say that the freedom of two people is enough to outweigh any harm that might result. You and I cannot engage in a joint exercise of our freedom that harms third parties,

undertakings will not involve despotism either. If consent is genuine, the person injured as a result of a voluntarily undertaken danger is not subject to another person's despotism. Through the exercise of your sovereignty, you can turn an act that would otherwise be another person's despotism over you into an exercise of your own freedom.¹⁸

Harms suffered as a result of fair contests are also irrelevant: If you defeat me in a fair contest, you do not deprive me of any powers that I had. I merely failed at something that I was trying to do. That failure may disappoint me, but it doesn't deprive me of means that I already had, it only prevents me from acquiring further ones. If that can be done in a way that doesn't interfere with my ability to choose, it doesn't wrong me, no matter how costly it is. Reasonable people may disagree about what counts as a fair contest, or about the specific claim that economic competition is fair. But nobody can coherently dispute the claim that a fair contest is one that nobody is entitled to win in advance. No matter how significant the impact on those who lose at fair contests, the loss does not amount to the despotism of the winner over the loser.

The sovereignty principle does not claim that independence is the thing that each person desires the most, or even that it is the thing that matters the most to each person. To focus on what people want, or should want, as the measure of a conception of freedom obscures the issue that both the harm principle and the sovereignty principle seek to

claiming that somehow our freedom outnumbers the harms to others we produce. Both the *volenti* principle and liberalism more generally require the more ambitious idea that you have a special relation to any harms you choose to risk. It is not that your freedom somehow outweighs those harms, but rather that it prevents them from being wrongs at all.

¹⁸ It does not follow that consent must be a defense to all crimes against the person. The classic exceptions to consent is a defense, murder and maiming, are distinctive precisely because they appear to be cases in which one person has consented to be entirely subject to another, in a way that appears to undercut the idea of reciprocal freedom that gives consent its significance. I hope to investigate this matter in more detail elsewhere.

address, the basis for the legitimate use of force: when, and on what grounds, can a person forcibly be prohibited from doing something? The sovereignty principle contends that prohibitions must be justified by the fact that they protect independence.

Independence is not the only thing that matters, but it is the only legitimate basis for interference with freedom, because force designed or threatened in order to protect independence can be consistent with the independence of everyone. If everyone is subject to the same limits on freedom, those who interfere with the freedom of others can be prevented from doing so. That is just to say that the set of limits on freedom are presumptively enforceable, that no person can subject another to his choice. So you can stop somebody from interfering with another person's freedom in a way that is consistent with equal freedom for all, because the interferer claims a greater title to direct the affairs of others than others have to direct his affairs. I don't mean to deny that being injured (or killed) is dreadful in other ways. The question is why does it count as a reason for restraining freedom? The sovereignty principle defends equal freedom for all, so any limits on freedom are justified to protect the freedom of others.

Framing the issue in this way may seem to just raise the stakes on Hart's objection. Crimes against property are arguably the case in which the idea of equal freedom runs out. Prohibiting me from camping in your backyard interferes with my freedom, because it limits my ability to use my powers, including my body, as, and in this case, where, I see fit. Two centuries of objections have assumed that it does so to prevent harm in a way that has no connection to freedom.

The sovereignty principle has the resources to address the property version of objection. It provides a way of thinking about crimes against property in terms of

freedom in a way that is parallel, though not equivalent, to the way each of us has our own powers. Property matters to independence because it is a way of having additional powers at your disposal that enable you to set a different range of purposes. That is why people can do, and aspire to do things, that earlier generations could only dream of. Technology and wealth bring power to those who have them by giving them means to use in setting and pursuing their own purposes. They also bring vulnerability, because any powers you have can be taken from you or pressed into other people's purposes.

The parallel between the powers you are sovereign over, simply as a person, and the powers you own is not an identity. The most obvious difference is that you do not need to acquire your own personal powers (though you may need to develop them) but you must acquire any powers you own, creating them, appropriating them from an unowned condition, trading them for something, or accepting them as a gift. Despite this obvious difference, the possibility of a régime of equal freedom providing for its own limits does not depend upon any particular account of how property is acquired. The crucial issue concerns the ways in which *other* people are allowed to treat *your* property now that you have it. You are sovereign over it in relation to them, and they can wrong you by intentionally damaging it or using it without your permission. If they do either of those things, they interfere with your freedom in a way parallel to the way they do if they draw you into their purposes without your consent, or injure your person. In each case, your sovereignty has been eroded, because you have been deprived of some of your ability to decide what purposes you will pursue by deciding how to use your means. Your choices have been demoted to wishes.

This way of looking at property does not depend on any controversial or even interesting theses about whether property is possible outside of a legal system, in “a state of nature” as early modern thinkers called it. Its focus on wrongs is consistent with the obvious role of institutions, practices and conventions in making particular types of property possible. If your home is a condominium, I wrong you if I enter it without your permission, even though condominiums presuppose complicated legal arrangements. If, instead of invading your property in your bed, I embezzle from your bank account, I wrong you, because your money in the bank is yours. I wrong you just the same if I later pay it back with the interest you would have received had it stayed in your account. You, rather than the banking system have been wronged, despite the fact that you only “have” money in the bank in virtue of various forms of legal alchemy that effectively transform a series of contractual obligations on the part of various parties into something amounting to a property right. It is your property right because of the ways in which other people can wrong you by violating it. Property in land and chattels is less obviously tied to institutions, but wrongs against it have exactly the same structure.

I do not mean to deny that property has other significance in people's lives, experientially and in terms of the social meaning that ownership can give, or the relation of land and a sense of place to memory. Just as the undeniable significance of bodily integrity to many aspects of a person's life does not undermine the sovereignty principle's account of why it merits coercive protection against intentional invasion, so too, these aspects of ownership are not the ones that explain why it is wrong for others to intentionally damage or use your property without your consent. Your sense of outrage when I nap in your bed without your permission may be connected to your experience of

privacy in your home, but your right to ask the police to remove me follows from your entitlement to determine what goes on in your home. That is the opportunity I deprive you of when I nap in your bed without your permission, and I deprive you of it just the same even if you suffer no experiential loss because you never learn of what I have done.

So the answer to Coleridge, Maitland, and Hart's objection is that crimes against property are prohibited because they interfere with another person's use of his or her powers. Property does not need to be thought of as a compromise with freedom necessitated by conditions of material scarcity. The protection of property against intentional invasion just is the protection of freedom. Although something like Coleridge's objection may have provided part of the impetus for the harm principle¹⁹, it is striking that the motivating example for the objection is not harm-based, but a matter of a harmless trespass, the very example that caused difficulty for the harm principle itself. The objection can be answered by the sovereignty principle.

The sovereignty principle's ability to articulate the nature of crimes against property does not carry with it a commitment to the moral acceptability of the prevailing *distribution* of property, any more than the wrongfulness of battery speaks to questions about the unfairness of the "natural lottery"²⁰ in skill and talents. Moral objections to the distribution of wealth neither license theft, nor mean that the trespasser does not wrong his victim.

Understanding the protection of property in terms of independence also enables the sovereignty principle to focus on questions of criminalization while bypassing debates about property rights and economic redistribution that so often preoccupies

¹⁹ Fin to Mill on Bentham and Coleridge

²⁰ Fn to Rawls

political debate and philosophy. The criminal law protects your right to decide how your property will be used, consistent with a like freedom for everyone else to use their property as they see fit, and so protects it (and thus you) against those who wish to take it or use it without your permission. This focus on what someone does to you if they invade your property right provides ample rationale for prohibiting invasions. You are the one who gets to decide, and anyone else who takes it upon themselves to decide for you thereby interferes with your freedom. But it makes no appeal to any idea of a special or "intimate"²¹ connection between you and your property, or on any idea that such a connection is created through your efforts in acquiring it. It is consistent with a wide range of views about what kinds of things people should be allowed to own, and how transfers should be regulated, including the view that the state has a legitimate interest in regulating the acquisition and transfer of property, including taxing particular types of transfers so as to provide for economic redistribution.

It still must be shown the state can do limit the use or transfer of property in a way that is consistent with the freedom of all. Without the Lockean image of property as a special kind of relationship between persons and things, there is no necessary conflict between public regulation of property and the prohibition of private regulation of other people's property. The only rationale for public regulation that is consistent with independence must come from independence itself, as John Rawls put it, to protect it against the aggregate effects of otherwise legitimate private transactions.²² To be

²¹ Cite to Simmons

²² cite to *Political Liberalism*. I consider the relation between Rawlsian justice and individual responsibility in private interactions in "The Division of Responsibility and the Law of Tort" *Fordham Law Review* 2004.

legitimate, any such regulation must be able to speak on behalf of the public, in a way that no private act of theft ever could.

Despite its conceptual distance from the idea of negative liberty, the sovereignty principle gives defenders of negative liberty everything they could want. In practice, it will carve out a large sphere for negative liberty as it is typically understood, because the only grounds for interfering with one person's ability to set and pursue his or her own purposes is the need to protect the freedom of others. People will be free to do as they want, without legal inference, except where those hindrances are instances of other people's freedom. My negative liberty to take my afternoon nap in your bed will be curtailed, but that is something defenders of the harm principle would like to do. It is difficult to see what could count as a more powerful presumption of liberty, because the only grounds for limiting freedom are based on freedom itself.

The sovereignty principle also meshes in an obvious way with culpability, the other aspect of conduct in which the criminal law takes an interest. If I use or damage what is yours by mistake or accident, I interfere with your freedom in so far as I use or deprive you of means that are properly yours. Non-culpable wrongdoing can be addressed through a civil remedy, something that restores to you the proceeds of the use of your means, or the means themselves in proper condition. If I wrong you intentionally, I do so culpably, because I have made my use or damage of your means the means through which I pursue my purposes: I break your window to gain entry to your house, or I take my nap in your bed. In either of these cases, I exercise despotism over you, and so interfere with freedom in the deeper sense. My deed is more objectionable

because of the intention with which I do it. My intention is more objectionable because it materializes in a deed.

Finally, the sovereignty principle gives defenders of the harm principle the thing that they want most, protection of individual freedom from interference by the state. Any legislation they cannot be rendered consistent with individual sovereignty amounts to a form of despotism, a case in which the state subjects an individual's freedom to its choice. Just as your neighbor cannot decide which ends you may pursue, so the majority of your neighbors, acting through the state are not allowed to do so. As a special case of this, they can't act through the state to prohibit you from doing something that isn't objectionable as a means of preventing others from doing something that is. That is liberalism's core insight: Against the choices of others, the individual's sovereignty is, as Mill says, absolute.