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Steven D. Smith

*University of San Diego School of Law*, [smiths@sandiego.edu](mailto:smiths@sandiego.edu)

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**The Hollowness of the Harm Principle**

**Steven D. Smith**

## THE HOLLOWNESS OF THE HARM PRINCIPLE

Steven D. Smith<sup>1</sup>

Among the various instruments in the toolbox of liberalism, surely one of the most popular– and the most effectively used– has been what is often called “the harm principle.” Presented by John Stuart Mill as “one very simple principle . . . *entitled to govern absolutely* the dealings of society with the individual in the way of compulsion and control . . .,” the principle holds 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 . . . *to prevent harm to others.*”<sup>2</sup>

Even its supporters (including Mill himself) have typically been less stringent than Mill’s absolutist language might lead us to expect, and hence have sometimes allowed for limited restrictions on liberty– paternalistic restrictions, for example<sup>3</sup>– not authorized by the harm principle. Still, the principle has been and continues to be invoked frequently and with powerful effect in debates on a range of issues from prohibitions on obscenity to regulations of marijuana to motorcycle helmet and seatbelt requirements to the hot button controversy of the moment: same-sex marriage. Though the principle’s proponents sometimes argue that it has been effectively embraced in recent constitutional

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<sup>1</sup> Warren Distinguished Professor of Law, University of San Diego, and Co-Executive Director, Institute for Law and Philosophy. I thank Larry Alexander, Paul Horton, Michael Perry, and George Wright for helpful comments on earlier drafts. In addition, I was helped greatly by comments and suggestions in a workshop at the University of San Diego.

<sup>2</sup> John Stuart Mill, *On Liberty* 13, in J. S. Mill, *On Liberty and other writings* (Stefan Collini ed. 1989) (emphasis added).

<sup>3</sup> See *infra* notes

decisions,<sup>4</sup> in fact the harm principle has not officially or explicitly been adopted into American constitutional law. Nonetheless, its influence is discernible, not only in the judicial sphere but in academic and popular discourse as well.

Courts have occasionally declared the harm principle to be part of our fundamental law. In *Commonwealth v. Bonadio*,<sup>5</sup> for example, the Pennsylvania Supreme Court stated that the “concepts underlying our view of the police power . . . were once summarized . . . by the great philosopher, John Stuart Mill, in his eminent and apposite work, *On Liberty* (1859)”;<sup>6</sup> and the court proceeded to quote extensively from Mill, beginning with his statement of the harm principle. In the state court decision affirmed by the Supreme Court in *Cruzan v. Missouri Department of Health*, the Missouri Supreme Court noted that “courts regularly turn to J. S. Mill for inspiration” and went on to quote with approval Mill’s formulation of the harm principle.<sup>6</sup> More recently, state courts have explicitly invoked Mill and the harm principle as providing the legal rule for issues concerning the appointment of a conservator for an elderly person,<sup>7</sup> abortion regulations,<sup>8</sup> decisions regarding medical treatment,<sup>9</sup> and prohibitions of

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<sup>4</sup> See infra notes

<sup>5</sup> 415 A.2d 47, 50-51 (Pa. Sup. Ct. 1980).

<sup>6</sup> *Cruzan v. Harmon*, 760 S.W.2d 408, 417 n. 11 (Mo. Sup. Ct. 1988), aff’d in *Cruzan v. Missouri Dept of Health*, 497 U.S. 261 (1990).

<sup>7</sup> In the matter of *Conservatorship of Groves*, 109 S.W. 3d 317, 328 (Tenn. Ct. App. 2003) (citing Mill for the proposition that “[a]utonomy, an adult person’s right to live life consistent with his or her personal values, is one of the bedrock principles of a free society”).

<sup>8</sup> *Armstrong v. State*, 989 P.2d 364, 373 (Mont. Sup. Ct. 1999) (quoting Mill’s harm principle, and suggesting that the principle is embodied in both the Montana and United States constitutions).

<sup>9</sup> *Morin v. MGH Institute of Health Professions*, 15 Mass. L. Rptr. 417, 417 (Mass. Super. 2002); *Thor v. Superior Court*, 855 P.2d 375, 380 (Cal. Sup. Ct. 1993).

homosexual sodomy.<sup>10</sup> And the harm principle might in fact be working behind the scenes even when it is not explicitly invoked: it might influence litigators and judges to justify challenged laws on the basis of concrete interests whose frustration can easily be depicted as a kind of “harm” instead of relying on more obvious but less clearly “harm”-based rationales.<sup>11</sup>

The United States Supreme Court has not explicitly conferred legal status on the harm principle. Nonetheless, commentators and occasionally Justices themselves sometimes argue that the principle has been silently at work in the cases. In *Barnes v. Glen Theatre*,<sup>12</sup> for example, in which a fragmented Court narrowly upheld a “public indecency” statute applied to prevent nude dancing in adults-only establishments, Justice Scalia colorfully accused the four dissenting justices of embracing the principle

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<sup>10</sup> Commonwealth v. Wasson, 842 S.W.2d 487, 498 (Ky. Sup. Ct. 1993).

<sup>11</sup> For example, in the recent case of *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. Sup. Jud. Ct. 2003), invalidating a state law denying marriage to same-sex couples, the court declared that the law could be upheld only if it “serves a legitimate purpose in a rational way.” *Id.* at 960. The state responded by asserting various ostensible functions served by the law: it preserved a favorable setting for procreation, the state said, or it promoted the upbringing of children in optimal circumstances, or it saved resources by excluding same-sex couples from valuable but costly benefits. Though a 4-3 majority found them too flimsy to support the restriction, these are interests that, if found to be genuine, could readily support claims that same-sex marriage would cause “harm”—harm to children, or monetary harm.

By contrast, the various opinions in the case pay virtually no attention to what might seem to be the obvious basis of laws restricting marriage to opposite-sex couples—namely, the traditional view that homosexual marriage is *morally wrong*. The court acknowledged in its statement of the background to the case that “[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral.” *Id.* at 948. But neither the court nor the state itself appeared to regard this sociological fact as providing a possible *justification* for the law. A hazy version of the morality rationale appears near the end of the majority opinion, only to receive a brusque, one-sentence dismissal that seems only obliquely responsive to the claim. *Id.* at 967. Tellingly, even that negligible discussion of the issue was a response to *amicus* briefs, not to any argument advanced by the state itself.

<sup>12</sup> 501 U.S. 560 (1991).

(though Scalia attributed the principle to Thoreau rather than Mill).<sup>13</sup> And some commentators have argued that the recent case of *Lawrence v. Texas*,<sup>14</sup> in which the Supreme Court invalidated a Texas law prohibiting homosexual sodomy, effectively constitutionalized the harm principle.<sup>15</sup>

If the influence of the harm principle in judicial contexts is most often tacit and hard to corroborate, its adoption in the academy is more explicit and demonstrable. The principle received a huge boost as a result of the famous debate about the enforcement of morals that began in the 1960s with an exchange between the English judge Lord Patrick Devlin<sup>16</sup> and H. L. A. Hart, the Oxford legal

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<sup>13</sup> *Id.* at 575:

Perhaps the dissenters believe that “offense to others” *ought* to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian “you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else” beau ideal— much less for thinking that it was written into the Constitution. The purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *contra bonos mores*,” i.e., immoral.

<sup>14</sup> 123 S. Ct. 2472 (2003).

<sup>15</sup> See Randy E. Barnett, Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*, in *Cato Supreme Court Review 2002-2003*. But see Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 *Minn. L. Rev.* 1312 (2004) (arguing that *Lawrence* does not constitutionalize libertarianism). See also Randy E. Barnett, *The Proper Scope of the Police Power*, 79 *Notre Dame L. Rev.* 429, 486-91 (2004) (discussing view that police power extends only to activities that cause harm).

<sup>16</sup> See Patrick Devlin, *The Enforcement of Morals* (1965).

philosopher and a self-acknowledged proponent of Mill's position (with modifications,<sup>17</sup> of course). It was, Robert George recalls, "one of the most remarkable debates in the history of English-speaking jurisprudence."<sup>18</sup> And the crucial fact is that (at least according to the received understanding) Hart decisively won and Devlin lost the debate.<sup>19</sup> The standard verdict has ongoing importance because the debate plausibly could be, and was, viewed as a debate about the harm principle, so that Devlin's supposed drubbing can be taken to signify the triumph of that principle. Thus, Bernard Harcourt observes that

over the course of the 1960s, '70s, and '80s, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became

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<sup>17</sup> In particular, Hart criticized Mill's rejection of paternalism. H. L. A. Hart, *Law, Liberty, and Morality* 32-33 (1963):

. . . Mill carried his protest against paternalism to lengths that may now appear to be fantastic. He cites the example of restrictions on the sale of drugs, and criticises them as interferences with the liberty of the would-be purchaser rather than with that of the seller. No doubt if we no longer sympathise with this criticism this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion;; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts.

<sup>18</sup> Robert George, *Making Men Moral* 49 (1993). Jeffrie Murphy remembers that the Hart-Devlin debate was "one of the primary topics being discussed— perhaps the main topic—" in the field of philosophy of law. Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 *Ariz. L. Rev.* 73, 74 (1995).

<sup>19</sup> George observes that "[m]any, . . . perhaps even most, think that Hart carried the day . . ." George, *supra* note at 65. Joel Feinberg reports that it is "fair to say" that Devlin's position has been "discredited." Joel Feinberg, *Harmless Wrongdoing* 136 (1990). That verdict is contestable, I think, but this is not the place to revisit the matter.

the critical principle used to police the line between law and morality within Anglo-American philosophy of law. Most prominent theorists who participated in the debate either relied on the harm principle or made favorable reference to the argument.<sup>20</sup>

Perhaps the most impressive defense of the harm principle occurred in a four-volume work by the legal philosopher Joel Feinberg that has become an oft-cited jurisprudential classic.<sup>21</sup> Like others in the liberal tradition, Feinberg was not quite a “harm principle” absolutist: unlike Hart and some other liberals, he opposed paternalism,<sup>22</sup> but he accepted a hint from Mill in allowing for limited restrictions on liberty to prevent serious offense to others.<sup>23</sup> In the main, though, Feinberg’s opus amounted to a massive sympathetic exposition of the harm principle, and it generated lavish praise even from scholars who disagreed with Feinberg on important points.<sup>24</sup>

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<sup>20</sup> Bernard Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109, 131 (1999).

<sup>21</sup> Joel Feinberg, *Harm to Others* (1984); Joel Feinberg, *Offense to Others* (1985); Joel Feinberg, *Harm to Self* (1986); Joel Feinberg, *Harmless Wrongdoing* (1990).

<sup>22</sup> See generally Feinberg, *Harm to Self* (1984). Compare Hart, *supra* note ; Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 *U. Chi. L. Rev.* 1159 (2003).

<sup>23</sup> See Mill, *supra* note at 98 (observing that “there are many acts which, . . . if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightfully be prohibited”). See generally Joel Feinberg, *Offense to Others* (1985).

<sup>24</sup> Vincent Blasi described Feinberg’s opus as “[a]mong the most balanced, comprehensive, and rigorous treatises of recent times.” Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 *Wm. & Mary L. Rev.* 611, 619 (1992). Kent Greenawalt appraised the project as a “nuanced and exhaustive treatment of the subject.” Kent Greenawalt, *Legal Enforcement of Morality*, 85 *J. Crim. L. & Criminology* 710, 711 (1995). See also Richard J. Arneson, *Liberalism, Freedom, and Community*, 100 *Ethics* 368, 368 (1990) (Feinberg “argues brilliantly” for his positions and his work is characterized by “sensitive and precise conceptual analysis”); Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 *Mich. L. Rev.* 1415, 1415 (1990) (review essay) (Feinberg’s work “a model of clear, rigorous, and fairminded philosophical



Unlike some other darlings of legal and political philosophy, however (such as, arguably, “public reason” and some of its implications), the harm principle is not merely or even mainly an academic phenomenon. On the contrary, much of its power derives, I will argue, from its resonance with views and adages that pervade popular political discussions. Although terminology may vary, you are as likely to hear the harm principle invoked in a popular discussion of obscenity or seat belt requirements or abortion as in an academic discussion.<sup>25</sup>

Because of its widespread appeal and its apparent significance for a range of current and highly contested issues (such as abortion, pornography, and same-sex marriage), the harm principle deserves continuing and close scrutiny. Is the principle as strong and sound as it often seems to be? Should it play a significant or even decisive role in resolving the issues of the day?

Contrary to prevailing liberal wisdom, I will argue in this essay that it should not: on the contrary, our public debates about liberty would be greatly enhanced if the harm principle were discarded outright. In taking this position, I do not mean to join up with the principle’s renowned (or notorious) critics—namely, Lord Devlin and his nineteenth-century predecessor, James Fitzjames Stephen<sup>26</sup>—who argued (or at least are taken to have argued) that the harm principle is mistaken and that society *should* sometimes prohibit immoral conduct even when the conduct is not discernibly harmful. Such arguments make it seem that the harm principle is substantial and contested— that it has definite content and that this content is accepted by some and rejected by others.

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argument”).

<sup>25</sup> See *infra* Part I.B.

<sup>26</sup> See James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Liberty Fund ed. 1993).

But I think this description does not get the matter quite right. My argument will be, rather, that upon closer examination the harm principle turns out to be not mistaken, exactly, but hollow— and hence mischievous. It is an empty vessel, alluring and even irresistible but without any inherent legal or political content, into which advocates can pour whatever substantive views and values they happen to favor. Vessel and contents can then easily become confounded— with pernicious effects.

Perhaps the major problem that results is that advocates are tempted to advance their values and views not on their substantive merits, but rather by promoting the vessel, or the packaging. And like the harm principle itself, that temptation has proven irresistible— not merely to the office party debater or the talk show host, but to sophisticated philosophers as well, notably including the principle’s most articulate proponents: Mill and Feinberg. To shift metaphors, the evil that attaches to the harm principle is that it promotes free riding. By tying their views to an irresistible but substantively vacuous principle, advocates try to sell positions that accordingly are not required to (and might not be able to) earn their own way.<sup>27</sup>

This essay develops this criticism in two parts. Part I explains that the harm principle has

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<sup>27</sup> My argument is quite similar in this respect to Peter Westen’s famous criticism of “The Empty Idea of Equality.” Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537 (1982). Equality, Westen contended, is an empty and purely formal principle: it simply means that like cases should be treated alike. No one really disagrees with that proposition: the real disagreements are over which cases *are* alike, or over what *substantive criteria* should be employed to determine whether cases are or are not alike. So when the notion of “equality” is deployed as if it were capable of supporting some substantive conclusion, we can be quite confident that intellectual mischief is occurring. Westen’s criticism provoked a variety of responses, see, e.g., Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 *Colum. L. Rev.* 1167 (1983); Anthony D’Amato, *Is Equality a Totally Empty Idea?*, 81 *Mich. L. Rev.* 600 (1983), and we need not consider here whether the criticism was valid with respect to the principle of “equality.” The present relevance of Westen’s argument, rather, is that it illustrates the *kind of criticism* made in this argument.

proven to be virtually irresistible because of two important virtues: its simplicity, and its resonance with intuitions, familiar adages, and common axioms about the purpose and function of government that pervade the American political community. Part II considers the question “What is harm?” and argues that the question confronts liberal thinkers with a dilemma. The harm principle’s appeal, I argue, arises from a generic and subjective conception of harm, but that conception also renders the principle useless for its intended purpose—protecting liberty. Conversely, the principle can be made serviceable by adopting more technical and objective conceptions of what counts as harm. But these conceptions effectively empty the principle of independent content, making its content instead derivative of some independent vision or theory of government and the good life; they thereby sacrifice the simplicity and resonance that make the principle attractive in the first place.

Part II goes on to argue that proponents of the principle have, in effect, cheated: they have adopted artificially narrow conceptions of harm in order to secure their desired conclusions, but have continued to rely on the more generic and subjective senses of harm to do the work of persuasion. Consequently, the harm principle has served not to clarify discussion and disagreement but instead to promote obfuscation and equivocation.

## I. The Irresistibility of the Harm Principle

For present purposes, we can analyze the harm principle into two components— and then bracket one of those components. The harm principle holds (a) that the only justification (with perhaps a few grudging qualifications) for coercively restricting liberty is to prevent *harm* and (b) that the harm that may justify such restrictions must be harm *to others*. Component (b)— the anti-paternalism

component— has been defended by Mill, Feinberg, and others; but as noted it has been questioned or rejected by others in the liberal Millian tradition (notably H. L. A. Hart<sup>28</sup>), and it has seemingly been less influential than the core principle itself in debates about legal issues. As noted, there is an eminently contestable but at least a plausible case that the basic harm principle— component (a)— should be or possibly even has been incorporated into constitutional law.<sup>29</sup> By contrast, the case for reading an anti-paternalism restriction into the Constitution seems much more tenuous.<sup>30</sup> This essay, therefore, will focus on the basic harm principle, bracketing the anti-paternalism corollary.

So simplified, the harm principle seems virtually (or perhaps actually) irresistible. Its allure arises from two features. First, the principle is (or at least it presents itself as) a “very simple principle,” as Mill observed<sup>31</sup>. Second, the principle’s animating idea— we might call it simply the “no harm” precept— resonates with powerful intuitions and popular notions that make the precept seem almost self-evidently right.

#### A. Simplicity

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<sup>28</sup> See supra notes

<sup>29</sup> See notes

<sup>30</sup> But cf. *Richards v. State*, 743 S.W. 2d 747, 751 (Tex. App.1987) (Levy, J., dissenting) (quoting Mill’s statement of the “harm to others” principle and adding that “if we uphold the authority of the State to punish one’s failure to use a seat-belt, we are one more step on our way to an Orwellian society in which the State can punish merely for smoking cigarettes, for not brushing one’s teeth, or for being foolish”).

<sup>31</sup> Mill, supra note at 13.

Start with the feature of simplicity. Appearances can be deceiving,<sup>32</sup> but at least on its face the harm principle seems to live up to this part of Mill's advertising.<sup>33</sup> If your actions do or at least may cause harm, government has the authority to restrict such actions. The harm principle does not entail, of course, that government *must* restrict all conduct that causes harm: whether restrictions are appropriate depends on a consideration of relevant factors, such as the costs and benefits of restrictions and the value of liberty to engage even in potentially harmful conduct.<sup>34</sup> Restriction of particular harmful conduct may or may not be *prudent* or *expedient*, therefore, but it is *legitimate*; it lies within government's "jurisdiction,"<sup>35</sup> so to speak. Conversely, if your conduct does *not* cause harm, then government should leave you alone: it has no "jurisdiction," or no legitimate grounds for interfering.

This apparent simplicity makes the harm principle seem almost tailor-made for judicial use. Judges, after all, are supposed to resolve cases not by doing *ad hoc* cost-benefit analyses of each individual dispute, but rather by applying "law"—rules or principles of a majestic generality. Especially in the realm of constitutional law, it has become almost axiomatic that courts are supposed to act only

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<sup>32</sup> See *infra* Part II. And cf. Feinberg, Harm to Others, *supra* note at 25 (observing that "as many of his critics have since pointed out, neither Mill's principle nor the principles he rejects are simple and unitary").

<sup>33</sup> Cf. Harcourt, *supra* note at ("[The harm principle offered a bright-line rule. A rule that was simple to apply. A rule that was simply applied.").

<sup>34</sup> Jorge Menezes Oliveira observes that "Mill does certainly not pretend that the [harm] principle is a *sufficient* condition for legitimate use of coercion against individuals; it specifies only a *necessary* condition . . . . It tells us when we may restrict liberty, not when we ought to." Jorge Menezes Oliveira, Harm and Offence in Mill's Conception of Liberty, <http://users.ox.ac.uk/~magd1534/JDG/oliveira.pdf>, at p. 3 See also Feinberg, Harm to Others, *supra* note at 10.

<sup>35</sup> See Mill, *supra* note at 76.

on the basis of “principles.”<sup>36</sup> Moreover, in the American constitutional system with its commitments to separation of powers and to democracy, judges are not supposed to usurp the role of legislatures. These are mere truisms. And a “simple,” sweeping principle like Mill’s caters to these judicial limitations. If conduct causes harm, then absent some other constitutional obstacle it is for the legislature— *not* the courts— to make the complex cost-benefit or prudential judgments needed to decide whether to regulate that conduct. Courts can exult in the deference they give to the elected branches. Conversely, if conduct does *not* cause harm, then it is none of the legislature’s business: the “liberty” protected by the Constitution has been improperly infringed, and it is the courts’ job to say so. So it should not be surprising if at least some “courts regularly turn to J. S. Mill [and the harm principle] for inspiration.”<sup>37</sup>

But it is not only judges who might be expected to feel the allure of the harm principle’s apparent simplicity. Academic theorists may be attracted as well. After all, theorists (at least when they are acting *as* theorists) are not immersed in the nitty gritty, hurly burly doings and disputations of life, but rather are seeking some more detached position from which to examine and explain and, if they are normative theorists (including law professors), to *criticize* and *prescribe*. Consequently, in thinking and writing about the proper limits on government’s legitimate authority to regulate abortion or obscenity or drugs, academic theorists cannot just be pragmatic moral accountants who do a cost-benefit analysis of every controversy that comes along: they need to be able make and apply more

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<sup>36</sup> The classic expression is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

<sup>37</sup> *Cruzan v. Harmon*, 760 S.W.2d 408, 417 n. 11 (Mo. Sup. Ct. 1988), *aff’d* in *Cruzan v. Missouri Dept of Health*, 497 U.S. 261 (1990).

general precepts from within the quiet of their offices or the measured calm of the seminar room or lecture hall. And to do this, they need a relatively “simple” principle or set of principles not requiring careful, case-by-case field work for every messy question that arises. The harm principle’s apparent simplicity is thus a strong recommendation for employment in academic contexts. It seems to permit the kinds of judgments– and the kinds of recommendations to courts– that detached academicians are competent to make.

Joel Feinberg provides a nice illustration of the point. In his ambitious study of the moral limits of the criminal law, Feinberg considers a host a questions, both general and specific, about the legitimate limits of government coercion, and offers a variety of conclusions and prescriptions both general and specific. Yet Feinberg acknowledges at the outset that as an academic philosopher his main contribution must consist of “conceptual clarification.”<sup>38</sup> Hence, his study will “not probe deeply into the facts or discuss, for example, the varieties of drug addiction, or the effects of pornography on children, or the degree of physical protection provided by seat belts . . .” Nonetheless, the study’s “aim is to be *practical* anyway”<sup>39</sup>– to discuss and even to make recommendations on just these kinds of matters. But without “prob[ing] deeply into the facts,” that practical aim could be accomplished, it seems, only with the aid of some fairly simple principle or set of principles whose application to issues does not demand any heavy reliance on empirical research.

Of course, it is not only judges and theorists but also ordinary citizens who argue about the propriety of restrictions on liberty. Should motorcyclists be required to wear helmets? Should the use

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<sup>38</sup> Feinberg, *Harm to Others*, supra note at 16-17.

<sup>39</sup> *Id.* at 16 (emphasis in original).

of marijuana be prohibited? What about abortion? The right to die? The instances are endless, and the issues can be vitally interesting to us all— and hence they are the subject of countless conversations at social gatherings or lunchtime discussions or radio call-in shows. And like the theoreticians and judges, most of us typically cannot claim to have carefully researched all of the empirical dimensions of these diverse issues. Maybe *you* have methodically studied the pros and cons of motorcycle helmets or seatbelts, but *I* haven't, and neither has anyone I know. So in order to express an opinion on such matters, we might naturally wish for criteria whose application do not require a Ph.D in a particular area of social science. Mill's "very simple principle" meets this need— or at least it seems to.

## B. Resonance

Thinking about how the harm principle works in ordinary conversations also suggests a second feature of the principle that can make it nearly irresistible: the basic precept animating Mill's proposal seems almost self-evidently true. It resonates with intuitions most of us have, and with adages that are standard fare in everyday exchanges, and with familiar wisdom about the role of and justification for government.

Thus, the "no harm" precept expresses an intuition most of us have had from childhood. If I really *want* to do something, and if I'm *not harming* anyone, then what possible reason could Daddy have for telling me I can't do it? And we carry this intuition into adulthood. "What harm would it do?," we ask, or "Who [sic] would it hurt?"

A similar intuition is often expressed as a "none of your business" appeal: what doesn't injure or affect anybody else is "none of their business." The intuition is powerful and widespread, and though



the phrasing may seem inelegant, in fact the eminent thinkers who have addressed the issue have often resorted precisely to that “none of their business” language to convey the point.<sup>40</sup> Though it can be abused, freedom in itself is a good thing— who doubts this?— so as long as a person is exercising her freedom in ways that causes no harm, why is it anybody else’s business (including government’s) to tell her she can’t?

The “no harm” precept also resonates with an adage that all of us must have heard a thousand times, beginning in grade school or before: we could call this the “somebody else’s nose” adage. “Everyone must understand,” as the West Virginia Supreme Court of Appeals put it, “that his right to swing his arm ends at the other chap’s nose.”<sup>41</sup> The inculcation is familiar. The teacher tells a third grader on the playground to stop doing something that is bothering or threatening other students. The obstreperous student complains: “Why can’t I? It’s a free country, isn’t it?” And the teacher patiently explains that freedom is not unqualified. “You have the right to swing your arm, Johnny, but only up to the point where it runs into somebody else’s nose: at that point your freedom ends.” The harm principle and the “somebody else’s nose” adage seem nicely congenial, if not virtually identical.

In slightly more dignified terms, government is often conceived in the American political tradition

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<sup>40</sup> See, e.g., Mill, *supra* note at 86 (arguing that “with the personal tastes and self regarding concerns of individuals the public has no business to interfere”); *id.* at 87 (“intrusively pious” persons should “mind their own business”); Feinberg, *Harm to Others*, *supra* note At 9 (conduct not covered by coercion-legitimizing principles is “*not the business of the state*”) (emphasis in original).

<sup>41</sup> *State v. Parson*, 447 S.W.2d 543, 546 (W. V. Sup Ct. App. 1994). See also *United States v. Joseph*, 37 M. J. 392, 397 (1993) (“According to ancient legal maxim, one’s liberty to swing one’s arms stops where another’s nose begins.”); *Boissonneault v. Mason*, 221 N.W.2d 393, 393 (Mich. Sup. Ct. 1974) (invoking “the now classic observation that your right to swing your arm ends at the tip of my nose”).

as the product of a social contract that extricated us from a figurative “state of nature” in which we imaginatively lived (or would live) before (or without) the institution of government.<sup>42</sup> The state of nature had its attractions-- there was no official authority to boss us around-- but it also had drawbacks. In particular, there were no officials and no police to prevent other people from doing whatever they wanted to do *to us*: hence, life could be “nasty, brutish, and short.”<sup>43</sup> So we formed a government, the familiar story says, in order to remedy this deficiency, preserving as much of our erstwhile liberty as possible while providing a mechanism to prevent us from injuring each other. From this picture it seems to follow that government may step in to prevent some citizens from harming others: that is why we formed government in the first place. Conversely, if someone wants to do something that does *not* injure or affect others, then it seems that government’s commission-- its reason for being-- is not implicated; so the earlier rule of freedom should remain in force.

For those who object to the metaphors of states of nature and social contracts,<sup>44</sup> the same idea can be expressed in less figurative terms. We might simply say that the purpose of government is to protect and promote human welfare, or perhaps “human flourishing.” After all, something like that

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<sup>42</sup> For a thoughtful defense of the social contract-natural rights interpretation of the American political order, see Michael P. Zuckert, *The Natural Rights Republic* (1996). For an enormously influential modern variation on the social contract idea, see John Rawls, *A Theory of Justice* (1971).

<sup>43</sup> Thomas Hobbes, *Leviathan* 104 (Am. ed. 1950) (1651).

<sup>44</sup> See Mill, *supra* note At 75 (asserting that “society is not founded on a contract, and . . . no good purpose is answered by inventing a contract in order to deduce social obligations from it”). See also Hilary Putnam, *Ethics without Ontology* 6 (2004) (“Although Dewey agrees with the seventeenth- and eighteenth-century Enlightenment thinkers that just government must have the consent of the governed, he differs . . . in utterly rejecting the idea that we should think of society as based upon a ‘social contract’.”).

purpose seems to be the reason why we pay taxes and submit to government, doesn't it? Freedom to choose and act is surely part of human flourishing. And it seems to follow almost inexorably that if a person wants to do some action that will bring her pleasure or satisfaction or benefit, and if this action will cause no harm to anyone, then government will diminish human welfare rather than enhancing it by prohibiting the person from engaging in this harmless conduct.

C. Is the Harm Principle *Too* Powerful?

In short, the precept that animates the harm principle seems virtually irresistible. Resonating powerfully with familiar intuitions and adages and political theories, the basic idea seems almost self-evidently sound. H. L. A. Hart nicely made just this sort of appeal to the apparently self-evident quality of the harm principle:

[A] very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one. . . . [W]here there is no harm to be prevented and no potential victim to be protected, . . . it is difficult to understand the assertion that conformity . . . is a value worth pursuing, notwithstanding the sacrifice of freedom which it involves.<sup>45</sup>

It is difficult to understand indeed! The harm principle is powerful—*too* powerful, perhaps. The lack of justification for restricting conduct that some people want to engage in and that harms no one seems so obvious that it provokes a suspicion: does anyone really disagree? Could it be that, contrary to the prevailing assumption, everyone accepts the harm principle after all?<sup>46</sup> Perhaps

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<sup>45</sup> Hart, *supra* note at 57.

<sup>46</sup> Once again, we bracket the special question of paternalism— of restricting conduct on the ground that it causes harm *to the actor*. See *supra* notes

everyone agrees with Mill's basic idea— which would be a misfortune not a triumph for Mill and his followers, because in that case the harm principle might no longer serve to distinguish the positions favored by the Millians from those favored by their opponents.

The suspicion forces us to consider an obvious question that we have thus far tacitly deferred: What *is* “harm” anyway?

## II. What is “Harm”? The Liberal Dilemma

So, what do we mean when we say that government should act only to prevent “harm”? The question confronts us with a dilemma. I will preview the dilemma here and then try to elaborate on it.

One alternative would be to understand “harm” in a generic and what we may call “subjective” sense. We might, in other words, defer largely to everyday usage and to individuals’ own evaluations: if people sincerely believe and report that they are “harmed” by some occurrence, they are. As we will see, this broad and subjective approach can be expressed by understanding “harm” in utilitarian terms.

In the alternative, we might instead try to use the term in a more technical and normative sense. Individuals’ sincere reports that they have been “harmed” in some way would not be conclusive: instead, we would need to examine claims of injury reflectively, perhaps with the aid of some theory of human interests, in order to decide whether the reported injuries count as cognizable “harms” or not.

Both possibilities— the generic and subjective approach, and the technical and normative approach— are open to us. And the resulting dilemma is this: the features that make the harm principle so irresistible— its simplicity, and its resonant or truistic quality— attach to and grow out of the generic and subjective understanding of “harm.” But this understanding would also render the harm principle

wholly unsuitable for achieving its central purpose of limiting government and protecting liberty.

Conversely, we can make the principle more useful for liberal purposes by defining “harm” in a more crafted or technical sense: but in doing so we sacrifice the principle’s intuitive appeal.

So, how have Mill and his descendants resolved this dilemma? The answer is less than edifying. To be blunt, they have equivocated. They have tried to have it both ways. Millian liberals have acknowledged that generic and subjective understanding of harm would subvert the liberal purposes of the harm principle, and so they have proceeded to refine the concept in various ways— to make it more technical and normative. But having made the desired refinements, they have nonetheless proceeded to trade rhetorically— tacitly, perhaps, but rampantly— on the undifferentiated and subjective sense of the term to carry themselves and their readers to their desired conclusions.

#### A. The Generic and Subjective Approach to Harm

The present question, once again, is “What is ‘harm’?” And in answering this question, we might defer to ordinary usage and to subjective evaluations: if people sincerely report that they have been “harmed” by some occurrence, they have been. This approach seems nicely compatible with what Joel Feinberg sometimes calls “the spirit of the harm principle”<sup>47</sup>: after all, a proposal designed to make room for individual choices and beliefs seemingly ought to respect individuals’ judgments about what does and does not cause them “harm.”

##### 1. The utilitarian conceptions

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<sup>47</sup> Feinberg, *Harm to Others*, *supra* note at 227, 228, 245.

One way of implementing this generic and subjective approach to harm would use a utilitarian framework to decide what counts as harm. Mill himself suggested that his proposal in *On Liberty* was offered on purely utilitarian assumptions.<sup>48</sup> Utilitarianism, however, has no single or canonical formulation; rather it has become a broad umbrella for a family of ethical theories, of which Mill's own version seems somewhat idiosyncratic.<sup>49</sup> For our purposes, it is enough that by drawing upon the remarks at the beginning of Mill's discussion in *Utilitarianism* together with the writings of his predecessor Bentham, we can extract two slightly different versions, either of which can supply a conception of "harm" that seems congruent with everyday understandings.

The most familiar formulation, endorsed by Bentham and recited at the outset of his book by Mill, understands utilitarianism as a position favoring the maximization of happiness understood in terms of pleasure and the absence of pain. Bentham had declared that the correct moral principle "approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question," and he had understood "happiness" in terms of those "sovereign masters, *pain* and *pleasure*."<sup>50</sup> Mill at least appeared to concur:

Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of

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<sup>48</sup> Mill, *supra* note at 14. It need not follow, however, that a purely utilitarian conception of "harm" would be employed.

<sup>49</sup> For helpful discussions, see Wendy Donner, Mill's utilitarianism, in *The Cambridge Companion to Mill* 235 (John Skorupski ed. 1998); David O. Brink, Mill's Deliberative Utilitarianism, in *Mill's Utilitarianism: Critical Essays* 149 (David Lyons ed. 1997).

<sup>50</sup> Jeremy Bentham, *The Principles of Morals and Legislation* 2, 1 (Prometheus Books 1988).

happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.<sup>51</sup>

On these premises, it would seem, “harm” might naturally be understood as *pain*— or, more accurately, as pain or the deprivation of pleasure. So my conduct harms you if it causes you pain or if it deprives you of some pleasure you would otherwise have enjoyed. This conception of harm is subject-based in the sense that if you report (sincerely) that you experience pain because of some action or state of affairs, then you have suffered harm.

A slightly different version of utilitarianism would focus not directly on pleasure/pain as the central desideratum but rather on the satisfaction or frustration of *preferences*. A page after asserting that pleasure and pain are the basis of right and wrong, Mill casually shifted to the vocabulary of preference.<sup>52</sup> The shift was calculated, it seems: Mill was concerned to justify the satisfaction of “higher pleasures” over lower ones, and even to justify valuing subjective dissatisfaction suffered by someone living according to his higher or intellectual nature over the coarser pleasures experienced by baser or more vulgar souls. Contrary to Bentham’s well-known dictum, Mill did not agree that pushpin (substitute poker, or pornography, or professional wrestling?) should be preferred to poetry if more people think pushpin is fun and poetry is a bore. “It is better to be a human being dissatisfied than a pig satisfied,” Mill famously insisted; “better to be Socrates dissatisfied than a fool satisfied.”<sup>53</sup> Mill’s nobler (and perhaps less democratic) predilections are difficult to square with a hedonic utilitarianism

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<sup>51</sup> J. S. Mill, *Utilitarianism* 55 (Roger Crisp ed. 1998).

<sup>52</sup> *Id.* at 56.

<sup>53</sup> *Id.* at 57.

emphasizing mere “pleasure” as the ultimate good, but refocusing on “preferences” seemed more promising: that is because Mill thought that “competent judges”<sup>54</sup> would in fact prefer and choose “higher” pleasures over baser ones, and would prefer to be a morose Socrates rather than a contented pig.

Using a utilitarianism oriented to preferences rather than pleasure, we would understand “harm” not in terms of inflicting pain but rather in terms of frustrating preferences. I harm you, it would seem, if I act in a way that prevents you from obtaining something you would prefer to have, or that brings about a state of affairs different from what you regard as the preferable state of affairs that would prevail if I acted differently. Again, this conception of harm is subject-based: if you report (sincerely) that your preferences have been frustrated, then you have suffered harm.<sup>55</sup>

Whichever of these alternatives we might choose, these utilitarian versions of “harm” preserve that principle’s attractive features of simplicity and of conveying an idea that seems almost self-evidently true. Suppose we opt for the “pleasure/pain” version. Then the harm principle will mean that it is

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<sup>54</sup> Id. at 58. Competent judges would consist of people “equally acquainted with, and equally capable of appreciating and enjoying, both [conditions].” Id. at 56-57. This standard permits the disqualification of many of those who might *think* they prefer the lower pleasures— who prefer professional wrestling over opera and poetry— because such people arguably have not been acquainted with or at least are not “capable of appreciating and enjoying” the higher pleasures. In this way, Mill’s expressed embrace of a preference version of utilitarianism allowed him to take the next step away from a straightforwardly subjective utilitarianism— to approval of “the *intrinsic superiority* of the higher [pleasures].” Id. at 58 (emphasis added).

<sup>55</sup> Since people usually prefer pleasure over pain, it seems that the “pleasure/pain” and “preference” versions of utilitarianism (with their corollary understandings of “harm”) would often lead to the same conclusions. But they might diverge in some situations. If I am a masochist, for instance, and accordingly prefer to be in pain, then the first version of utilitarianism suggests that you act morally by *not* inflicting pain on me; the second version implies that the moral course would be to indulge my preference for pain.



illegitimate for government to restrict my conduct except to prevent me from inflicting pain on others<sup>56</sup> or depriving them of pleasure. That idea seems simple enough, at least as an abstract matter, and it also seems intuitively attractive. If I want to do something (perhaps because I think it will bring me pleasure<sup>57</sup>), and the thing I want to do will not cause anyone else pain or deprive anyone of pleasure, then what good reason could government have for stopping me? No doubt some caveats and refinements might be needed, but the powerful appeal of the basic idea is apparent.

Or suppose we adopt the “preference” version. Now the harm principle means that government can restrict my freedom only to prevent me from acting in ways that frustrate other people’s preferences— that impose on them states of affairs that they do not prefer. Again, the basic idea seems both straightforward and attractive.

In this vein, the philosopher Richard Arneson argues that “a plausible liberal doctrine should incorporate a utilitarian value theory.”<sup>58</sup> And he explains the rationale for this utilitarian approach: “[I]n deciding on state policy, why should we care about anything except what will help make people’s lives go best *according to their own personal values*?”<sup>59</sup>

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<sup>56</sup> Or, if we drop the paternalism restriction, on myself.

<sup>57</sup> Cf. Feinberg, Harm to Others, *supra* note At 191 (“Every form of voluntary activity, of course, can be presumed to have some value for those who choose to engage in it.”).

<sup>58</sup> Arneson, *supra* note at 377. “‘Utility’ here is a measure of the value of each individual’s life from that very individual’s perspective. The preferences and values of each individual regarding how she wishes her life to go (corrected by hypothetical rational deliberation with full information) supply the proper measure of value for that individual’s life.” *Id.*

<sup>59</sup> *Id.* at 378 (emphasis added).

## 2. Nullifying the harm principle

So these two familiar and commonsensical versions of utilitarianism both supply conceptions of “harm” that preserve the harm principle’s simplicity and truistic quality. Unfortunately, these conceptions also render the principle incapable of protecting liberty, which of course was the whole reason for proposing the principle in the first place. Any sort of conduct to which some people object *will* inflict pain of various sorts and will interfere with the satisfaction of some people’s preferences—and hence will be within the realm of conduct that government may permissibly decide whether or not to regulate.

Take a common example—one that seems to present the sort of issue liberal theorists have wanted the harm principle to address.<sup>60</sup> Suppose I live in a community in which “Moral Majority” types are numerous and wield considerable political influence. The community as a whole thus tends to favor rigorous restrictions on materials that residents regard as obscene or pornographic. As it happens, I am a solid citizen with a family and a steady job, but one who happens on occasion to enjoy watching hard-core, XXX films in my living room. I watch these films alone, or sometimes with a few adult friends—law faculty colleagues, perhaps—who have been fully advised about the nature of the materials and have freely chosen to partake. (After particularly grueling and inane faculty meetings, we find these gatherings the best way to “loosen up” and recover our sanity.) But although these viewings are as private as my friends and I can possibly make them (we keep the volume down and make sure to close the curtains), they transgress the community’s anti-obscenity ordinance, which has no “private

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<sup>60</sup> For a similar though somewhat more elaborate example, see Feinberg, Harmless Wrongdoing, *supra* note at 57-60.

viewing” exception. So what I view as nosy neighbors complain, and the local authorities move to enforce the ordinance against me.

Naturally, I resent this invasion of my freedom. So long as I watch these films strictly in private, and so long as no one except fully informed and consenting adults participates, what business is it of the community (I ask indignantly) to tell me I can’t do this? I invoke Mill: the community has no right to restrict my freedom, I protest, so long as I am not *harming* anyone.

The city council responds, though, that at least according to the utilitarian conceptions of harm, I *am* harming other people, in a variety of ways. How?, I ask, and the council obliges by explaining two obvious ways in which I am, or at least may plausibly be thought to be, causing harm. These forms of harm will not elicit my sympathy, of course, and on balance they may not warrant restricting my liberty. Liberals— and others— have typically treated them with derision. But whether or not they deserve this treatment, the crucial point is that they *are* real and perfectly genuine forms of harm *according to the utilitarian conceptions*.

First, and most obviously, the knowledge that I am (or may be) watching XXX films in my home causes emotional distress to all those citizens who view my practice with abhorrence. Millian liberals will surely respond, of course, that this is not the kind of harm they had in mind. We can concede the point, and we can further concede that it would be ill-advised to permit government to restrict freedom just to avoid psychic distress to officious neighbors. But the immediate point is simply that I (the viewer of XXX movies) cannot plausibly deny that some citizens *do* feel emotional distress because of what I am doing— indeed, it may be obvious that they are deeply unhappy about my movie-watching predilections— nor can I deny that emotional distress *is* a kind of suffering— of pain. After all,

in other contexts (in tort law, for example) we readily acknowledge that the prevention of emotional or psychic distress is a perfectly legitimate state interest.<sup>61</sup> Or, if we want to make the point in terms of the “preference utilitarianism” conception of harm, then it is plain that a state of affairs in which citizens like myself can and do watch XXX films in our homes frustrates the preferences of citizens who would prefer to exclude such materials– and practices– from the community.

In short, the straightforward utilitarian conceptions would give us no grounds for ruling out even officious psychic distress as a form of “harm.” Depending on the facts, this sort of harm might even elicit the sympathies of liberal-minded citizens. In this vein, commenting on Feinberg’s discussion of whether a liberal polity should prohibit gladiatorial contests limited to consenting combatants who fight to the death before consenting spectators, Richard Arneson observes that “emotional reactions to what one’s neighbors and fellow citizens are doing can be powerful and can be virtually unavoidable for persons who have not detached themselves from all personal concern for the quality of life in their community.” Arneson suggests that “we should think of citizens who would be appalled at the thought of living in a community that tolerates Roman-style gladiatorial spectacles as *harmed by the bare knowledge that such events are occurring*. . . .”<sup>62</sup>

Returning to our earlier example, however, the city council goes on to explain that by watching XXX movies in my home I am also causing harm in another way that is more indirect but arguably more

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<sup>61</sup> See Restatement of Torts (2d) section 46 (recognizing claim for outrageous conduct causing severe emotional distress); section 905 (including “emotional distress” in the “nonpecuniary harm” for which compensatory damages are available).

<sup>62</sup> Arneson, *supra* note at 374 (emphasis added). Arneson ties this conclusion to a preference-utilitarian conception of harm. “The idea of harm that is invoked here is frustration of strong stable preference.” *Id.*

substantial. I insist, once again, that my conduct is purely private and hence affects no one else against their will (except in what I will naturally regard as the officious ways just noted). But the defenders of the anti-obscenity restriction point out that I am being, or at least am pretending to be, sociologically naive: I can maintain my position only by narrowly confining my field of view in an artificial and implausible way.

More specifically, what my consenting adult friends and I do in private will surely have some influence over the kind of people we are. Our movie-watching habits will affect how we talk, how we spend our time, what activities we choose to engage in and support or not to engage in and support. They will influence what we find interesting, and valuable, and humorous. In this way, our conduct will immediately influence and help to form *us*. And because we interact with the community— as teachers and lawyers and business people and consumers— it will affect others in the community as well.<sup>63</sup>

In addition, even if for now I limit the audience for my XXX films to a few friends who are all informed and consenting adults, it would be unrealistic to suppose that other people— our children, for example— will not be in some measure influenced in their own thinking about what sorts of films are available, and acceptable, and interesting. Perhaps as they get older my own children and those of my friends will be permitted to participate in some of our activities. You on the other hand would prefer that your children steer clear of such materials, but realistically it will be much more difficult for you to

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<sup>63</sup> Cf. Robert P. George, *The Concept of Public Morality*, 45 *Am. J. Juris.* 17, 18 (2000): [T]he accumulation of private decisions to use pornography affects— sometimes profoundly— the community as a whole. For example, where pornography flourishes, as it does in our own culture, it erodes important shared public understandings of sexuality and sexual morality on which the health of the institutions of marriage and family life in any culture depend. This is a classic case in which the accumulation of apparently private choices of private parties has big public consequences.

inculcate these values if many of your children's associates and friends are participating.

Or you might fear that in a certain kind of community *you yourself* might come to develop a liking for such materials, and that this would be a regrettable moral or cultural decline. Arneson describes this sort of concern as “self-paternalism,” and he argues that “self-paternalism is in principle a legitimate reason for instituting criminal prohibitions.”<sup>64</sup>

I might argue, of course, that if you prefer this level of cultural innocence you always have what we might call “the Amish option”: you can opt out of normal society. But you would point out that for many people this is not in fact a viable option (remember *Mosquito Coast*?); and in any case, it would be a massive imposition on your preferences to put you to that choice. Why should you and your friends (who are by hypothesis a sizable majority in our town) be the ones who are forced to take that drastic course? Why not tell me that if I really care so much about my XXX movies I always have “the Babylon option”? Why shouldn't I move to some less squeamish community? I would immediately recognize the cost—the “harm”—that this forced choice imposes on me: but if left unregulated, the movie-watching and related habits of people like me will impose similar harmful costs on you.

Over time, in short, what we do in private will almost certainly have a real though difficult to measure influence on the sort of community all of us live in. That influence seems undeniable.<sup>65</sup> And

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<sup>64</sup> Arneson, *supra* note at 375.

<sup>65</sup> Cf. Ronald Dworkin, *A Matter of Principle* 349 (1985):  
Suppose that the community is persuaded such a right [to pornography] exists, and that in consequence it would be wrong to forbid the use of pornography in private. That decision would sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their families' sexual experience are likely to have these qualities in less degree. They would not be free to campaign for the enforcement hypothesis in politics on the same basis as others would be free to

even citizens with no independent desire to be officious or to interfere in the lives of others will typically have a very personal interest in the kind of community they (and their children) live in.<sup>66</sup> Such desires are deeply felt and are routinely expressed in people's decisions about where to live. Arneson explains that

[p]eople, as a matter of fact, do tend to want to live in proximity to likeminded others and share ways of life in common with others. The kind of life that any person wants to live almost invariably includes relations to others beyond immediate family and close friends. Face-to-face arm's-length transactions with one's neighbors, the residents of one's local community, colleagues at work, and inhabitants of one's city or county can be important determinants of the degree to which one's life is experienced as satisfying. Call such concerns "communitarian." The difference in price between otherwise identical houses located in "desirable" and "undesirable" neighborhoods is one indicator of the extent to which people care about such matters.<sup>67</sup>

Consequently, conduct that is likely over time to make a community incongruent with the values of many of its residents, or even just less to their liking, causes these residents pain and frustrates their

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campaign, for example, for programs of conservation or of state aid to the arts . . . . If we are concerned only with the power of individuals to influence the conditions in which they must try to thrive, any theory of self-development that forbids the majority the use of politics and the law, even the criminal law, is at least *prima facie* self-defeating.

<sup>66</sup> Robert George compares public morality to a kind of "community's 'moral ecology'— an ecology as vital to the community's well-being, and, as such, as integral to the public interest, as the physical ecology which is protected by environmental laws." George, Public Morality, *supra* note At 25.

<sup>67</sup> Arneson, *supra* note At 378-79. Arneson illustrates the point using the "gladiatorial contests" question:

I might care a lot about living in a society where recreation of the gladiatorial sort does not occur and where I can interact with any fellow citizen or community member without wondering whether she is a gladiatorial combat enthusiast. I simply want to live in a community the members of which bear allegiance to a minimal standard of civility in recreation. I don't want to live in a society some of whose members offer money to others in order to induce them to slaughter each other . . . .

*Id.* at 374.

preferences: such conduct undeniably “harms” them in the familiar utilitarian senses.

So what should we conclude from this brief recitation of the utilitarian harms caused even by my private viewing of XXX films? Citizens who favor the sort of community that the obscenity law is calculated to promote will likely argue that the law should be enforced against me. And, crucially, in taking this position they need not question or depart from the harm principle; they may on the contrary insist on the principle, pointing out how my conduct produces the harms discussed above (and perhaps others<sup>68</sup>).

In the abstract, though, we can hardly determine whether the moral majoritarians’ favored conclusion is the right one. It might be that on balance, the harms I am indirectly causing by watching XXX movies are far less than the harms that the community would cause me by restricting my freedom— or than the harms and risks to the members of the community in general (including those who have no interest in pornographic films) from a government that assumes the authority to regulate this sort of “private” behavior.<sup>69</sup> What we *can* confidently conclude is simply that *the harm principle* as we have thus far understood it is not helpful in deciding between my favored state of affairs and yours.

If harm is understood in utilitarian terms, in short, then once again my conduct (or *any* conduct that members of the community might in fact want to restrict) *does* cause harm, and the harm principle accordingly renders *legitimate* (though not necessarily prudent or expedient) public regulation of that

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<sup>68</sup> Bernard Harcourt stresses what we might call “secondary effects” or “broken window” harms associated with the kind of conduct Millians have typically wanted to shield against regulation. Harcourt, *supra* note

<sup>69</sup> Cf. George, *Public Morality*, *supra* note At 30 (observing that “there are often compelling prudential reasons for law to tolerate vices, lest efforts to eradicate them produce worse evils still”).



conduct. This is an obvious point, actually, and thoughtful proponents of Millian positions typically do not deny it.<sup>70</sup> I have nonetheless belabored the point, because I think a clear appreciation of the problem helps us to perceive the “confession and avoidance” strategies to which Millians have typically resorted, and which we will consider momentarily.

What is the significance, we might ask, of the conclusion that the harm principle *understood in straightforward utilitarian terms* proves useless in defending liberty? One lesson that we might be tempted to draw on first thought (and, I will argue, that we ought to draw on third thought) is that for all of its initial appeal, the harm principle is after all not helpful in answering the question of the legitimate limits of government authority over individuals. The path Mill pointed us to looked promising, but it turned out to be a dead end. *Harm*, of course, still is and always will be a crucial consideration in evaluating governmental decisions, including decisions to restrict liberty; but *the harm principle*—the “very simple principle” that was supposed to be “entitled to govern absolutely . . . the dealings of society with the individual in the way of compulsion and control”—proves upon examination to be of no use for its designated purpose.

#### B. Reining in “Harm”: the Technical and Normative Approach

Understandably, Mill and his followers have been reluctant to draw that lesson. And indeed, given the almost irresistible allure of the harm principle, discussed earlier, it would seem almost tragic to have to discard the principle as useless. So instead, in a quick stipulation, Millian liberals typically acknowledge the difficulties just discussed but treat these difficulties as a warrant *not* for abandoning

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<sup>70</sup> See, e.g., *infra* note

the harm principle, but rather for rejecting utilitarian or subjective conceptions of harm.<sup>71</sup> They then adopt either or both of two strategies. The primary strategy has been to define “harm” in narrower, more technical terms. A secondary strategy has been to propose maxims or principles for prioritizing harms and interests. We will consider these strategies in turn.

Under the first strategy, not every reported injury (however real the injury and sincere the report) will automatically qualify as a “harm.” That conclusion, rather, must be the result of a more theoretical reflection. Perhaps the two leading proponents of the harm principle— Mill and Feinberg— both take this course.

#### 1. The narrowing of “harm”— Mill

Consider what Mill himself does with the concept of “harm.” Almost immediately after announcing the harm principle, Mill asserts that he “regard[s] utility as the ultimate appeal on all ethical questions,” and this assertion might lead us to think that he understands “harm” in something like the straightforward utilitarian senses just discussed. But in the same sentence he disabuses us of this idea. “Utility” is ultimate, but “it must be utility in the largest sense, grounded in the permanent interests of man as a progressive being.”<sup>72</sup> So evidently the frustration of more temporary interests, or of interests not associated with “progressive” conceptions of humanity, will not count as harm.

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<sup>71</sup> See, e.g., Feinberg, *Harm to Others*, *supra* note at 12 (“harm” must be refined because otherwise the principle “might be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others to *some* degree, and thus would properly be the state’s business”).

<sup>72</sup> Mill, *supra* note at 13-14.

These suggestions are somewhat obscure, to be sure. But as the essay proceeds Mill gives at least glimpses of his “progressive” view of what a good life and a good society would be. And his conception of what should be regarded as “harm” is intimately tied to those views. Thus, in a chapter on freedom of thought and expression, Mill emphasizes the value of lively, independent thought.<sup>73</sup> Later, though, he concedes— or rather vigorously insists— that very few persons are actually capable of this sort of thought: most people are mired in “collective mediocrity.” Those of us so mired might be tempted to conclude that lively thought is not so important *for us* after all; but this is not Mill’s conclusion. He argues, rather, that humanity achieves its highest status and receives its general benefactors in a few “[p]ersons of genius”— the “highly instructed One or Few.”<sup>74</sup> “I insist thus emphatically,” Mill says, “on *the importance of genius*, and the necessity of allowing it to unfold itself freely both in thought and practice . . . .”<sup>75</sup>

Other Millian values emerge as the essay proceeds. Mill places great value on “Individuality”; his use of the upper case conveys the emphasis. He praises whatever causes “human beings [to] become a noble and beautiful object of contemplation.”<sup>76</sup> He finds a rich diversity in ways of life highly appealing.<sup>77</sup> “Originality” is to be prized.<sup>78</sup> More generally, Mill yearns for strength and intensity (at

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<sup>73</sup> Id. at 35-36

<sup>74</sup> Id. at 65-66.

<sup>75</sup> Id. at 65 (emphasis added).

<sup>76</sup> Id. at 64, 63.

<sup>77</sup> Id. at 63, 67-68.

<sup>78</sup> Id. at 64.

least in the intellectual realm) over moderation and calm— for “great energies,” “vigorous reason,” “strong feelings controlled by a conscientious will.”<sup>79</sup>

For Mill, these values determine the meaning of “harm.” Contrary to what his avowed utilitarianism might lead one to expect, “mere displeasure” is not necessarily a harm at all.<sup>80</sup> But conduct or restrictions that impair lively thought or originality or individuality or nobility or beauty *are* harms.

Later in his essay Mill introduces, almost as an afterthought, another drastic limitation on what counts as “harm.” The conduct that society can expect of us, Mill remarks in what is offered as a sort of summary of the preceding discussion, consists “in not injuring the interests of one another;”— now the crucial qualification-- “or rather *certain interests*, which, either by express legal provision or by tacit understanding, *ought to be considered as rights . . .*”<sup>81</sup> Injury to others’ interests will not count as cognizable “harm,” it seems, unless those interests are of the type to be regarded as “rights.”<sup>82</sup> Consequently, a person’s conduct may be “*hurtful* to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights”: such hurtful (but not “harmful,” in Mill’s increasingly rarified sense) conduct may be “punished by opinion, though not by

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<sup>79</sup> Id. at 70.

<sup>80</sup> Id. at 63.

<sup>81</sup> Id. at 75 (emphasis added).

<sup>82</sup> Jorge Menezes Oliveira explains that in Mill’s view “one can have a vital interest to which one does not have a right, for instance a medicine stolen can be a vital interest to me, but the fact that it was stolen does not in normal circumstances allow one to say I have a right to it.” Oliveira, *supra* note At 5 n.4.

law.’<sup>83</sup>

This limitation of “harm” to injuries inflicted on interests protected as “rights” seems at once sensible, even inevitable, and also deeply problematic. It is obvious, Mill and his followers might point out, that not *all* injuries to *all* interests can justify legal restrictions. Suppose my business (in which I surely have an “interest”) suffers because you start an entirely legitimate competing business that drives me into bankruptcy: should I be able to say that you “harmed” me, and hence that your business should be prohibited?<sup>84</sup> Even so, by limiting harms to injuries to “rights” Mill drastically undermines the ostensible simplicity of the harm principle.<sup>85</sup> He also severs “harm” from what it would mean in ordinary understanding, in which it would seem a kind of double-talk to distinguish “harming” from “hurting.” (“True, I promised to do nothing that would *harm* your baby. But I *didn’t* ‘harm’ her; I only ‘hurt’ her.”)

## 2. The narrowing of “harm” – Feinberg

In attempting to salvage the harm principle for liberal purposes, Joel Feinberg remodels the concept of “harm” in ways that directly parallel Mill’s qualifications (though Feinberg is more careful

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<sup>83</sup> Mill, *supra* note at 75 (emphasis added).

<sup>84</sup> This of course would not be a necessary or even a very natural conclusion of saying that my business and I were “harmed” by your business. Causing “harm” would bring your business within government’s and the law’s “jurisdiction,” as Mill puts it, *id.* at 76, but government obviously might decide that this sort of harm caused by free competition is no reason to prohibit you from operating your business in fair and competitive ways. See Feinberg, *Harm to Others*, *supra* note at 218-21 (discussing “competitive interests”).

<sup>85</sup> The circularity that may result from defining “harm” in terms of “rights” and “rights” in terms of “harm” is discussed *infra* at

and deliberate in his fashioning of the concept). More clearly than Mill, Feinberg disavows standard or Benthamite utilitarianism, noting that within a utilitarian framework the distinction between “harms” and “moral evil” would disappear.<sup>86</sup> Feinberg also explicitly acknowledges that “harm” as he uses the term will not correspond exactly to ordinary usage, and that there will accordingly be “clear examples of harm as the term is used in ordinary language” that will not count as harms within his own theoretical framework.<sup>87</sup> More specifically, Feinberg defends two limitations that operate to exclude numerous injuries that people might ordinarily think of as “harm” from qualifying as the sort of harm that justifies legal coercion.

First, Feinberg says that “harm” consists of a “thwarting, setting back, or defeating of an interest.” An “interest,” in turn, is something in which a person has a “stake.”<sup>88</sup> These terms are opaque, but Feinberg attempts to clarify them; in doing so he emphasizes distinctions between “harms” on the one hand and the “[u]nhappy but not necessarily harmful experiences” that he describes as mere “hurts” and “offenses” on the other.<sup>89</sup> Feinberg offers a lengthy and macabre list of nonharmful “hurts”<sup>90</sup>

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<sup>86</sup> Feinberg, *Harmless Wrongdoing*, supra note at 11.

<sup>87</sup> *Id.* at 32.

<sup>88</sup> Feinberg, *Harm to Others*, supra note at 33-34.

<sup>89</sup> *Id.* at 46, 45-51.

<sup>90</sup> *Id.* at 46:

Physical pains include pangs, twinges, aches, stabs, stitches, cricks, and throbs, as caused by cuts, bruises, sores, infections, muscle spasms, over-dilated or contracted arteries, gas pressures, and the like. Roughly analogous to these are various forms of mental suffering (they “hurt” too): “wounded” feelings, bitterness, keen disappointment, remorse, depression, grief, “heartache,” despair. Nonpainful forms of physical unpleasantness include nausea (which can be even more miserable a condition than pain,

but explains that these are not “harms” because “[t]here is no interest in not being hurt as such, though certainly we all want to escape being hurt, and the absence of pain is something on which we all place a considerable value.”<sup>91</sup>

The rejection of subjective pain or subjective preferences as the criteria of harm is explicit here; normative judgments (as opposed to victims’ subjective judgments) are plainly at work.<sup>92</sup> But the second limit Feinberg places on what can count as a “harm” is even more overtly normative in nature. Like Mill, Feinberg makes “harm” dependent not only on “interests” but also on pre-existing “rights.” Thus, he argues that a setback even to what is admittedly an “interest” does not count as a “harm” unless it is wrongfully inflicted— which is to say that it is inflicted in violation of a right.

To say that *A* has harmed *B* in this sense is to say much the same thing as that *A* has wronged *B*, or treated him unjustly. One person *wrongs* another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s right . . . .<sup>93</sup>

So it turns out that only a carefully delimited subset of the universe of injury can support “harm” in Feinberg’s scheme. The limitations on what can count as “harm” are so restrictive that Feinberg is pushed to acknowledge various other kinds of “harmless” misfortunes— or of what Feinberg himself calls “evils.” We have already noted two such evils— “hurts” and “offenses.” But in the final volume of

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but does not, strictly speaking, *hurt*), itches, dizziness, tension, hyperactivity, fatigue, sleeplessness, chills, weakness, stiffness, extremes of heat and cold, and other discomforts.

<sup>91</sup> *Id.* at 47.

<sup>92</sup> Cf. Arneson, *supra* note 37 at 378 (arguing that “the trouble with Feinberg’s liberalism is that its categories privilege certain preferences and values of individuals over others no less rational, no less innocent, and no less worthy of regard”).

<sup>93</sup> Feinberg, *Harm to Others*, *supra* note 37 at 34.

his project Feinberg goes on to offer an elaborate taxonomy of “evils.”<sup>94</sup> On the most general level he distinguishes between what he calls “theological evils” (such as natural disasters and “killer diseases”) and “legislative evils,” which are the result of human action.<sup>95</sup> Subdividing the latter category, he describes “grievance evils”—“harms” belong in this subcategory-- and “non-grievance evils.” Among the latter are “free floating” evils, which are so named because they “‘float free’ of [human] interests, needs, and desires.”<sup>96</sup>

Unlike Mill, Feinberg does not contend that the harm principle is the only possible justification for restrictions on liberty.<sup>97</sup> He allows for coercion to prevent some types of offensive conduct.<sup>98</sup> More generally, he concedes that “[s]ince evils are by definition something to be regretted and prevented when possible, it seems to follow that the prevention of an evil, *any* evil, is always a *reason*

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<sup>94</sup> Feinberg, *Harmless Wrongdoing*, supra note at 17-20.

<sup>95</sup> *Id.* at 18.

<sup>96</sup> *Id.* at 20. The nature of these “free floating” misfortunes is mysterious. Why should we call something an “evil” if it has no detrimental impact on human concerns? Of course, utilitarians and others might plausibly consider injury to nonhuman but sentient beings— in particular, animals— to be harms, see Peter Singer, *Rethinking Life and Death* 172-80 (1994), but Feinberg does not take this course. Instead, his conclusory (and arguably circular) explanation is that although these misfortunes neither “harm” nor hurt or offend anyone, but they are nonetheless “evils” in the sense that they are “rather seriously to be regretted” because “the universe would be a better place without [the evil].” Feinberg, *Harmless Wrongdoing*, supra note. at 18. Feinberg gives examples of what he regards as free-floating evils: these include violation of moral taboos, false belief, extinction of a species, and “the wanton, capricious squashing of a beetle (frog, worm, spider, wild flower) in the wild”). *Id.* at 20-25.

<sup>97</sup> Although Mill does make this claim, Mill, supra note at 13, as noted, he arguably relaxes the requirement at times. See, e.g., *id.* at 98 (suggesting that public violations of “good manners” might be prohibited to avoid offense).

<sup>98</sup> Feinberg, *Offense to Others*, supra note



of some relevance, however slight, in support of a criminal prohibition.” But Feinberg minimizes this relaxation of the harm principle by arguing that evils other than “harm” (and to a limited extent “offense”) will rarely justify curtailing liberty. “[T]he liberal . . . can grant . . . that legal moralism is technically correct, or correct in the abstract, but insist that, in fact, non-grievance evils can never (or hardly ever) have enough weight to justify the invasion of personal autonomy.”<sup>99</sup>

In sum, both Mill and Feinberg (the author and the most careful expositor, respectively, of the harm principle) self-consciously depart from conventional or generic usages and from subject-based senses of “harm.” Instead, they define the concept in narrower, theory-driven senses that exclude many injuries that people would ordinarily regard as “harms.” In addition, they import an element of law or political morality into the concept, so that injuries that do not invade “rights” or are not “wrongfully” inflicted do not count as “harms.” These qualifications are necessary, as they argue, if the harm principle is to serve the liberal purposes for which it was devised.

The refinements seem to have generated admiration among academic critics.<sup>100</sup> And the admiration is understandable: an intricate analysis such as Feinberg’s, piling nice distinction on distinction and taxonomy on taxonomy, is surely more impressive than a crude or undifferentiated notion that merely defers to the unanalyzed notions of often unreflective persons, accepting that if someone’s subjective desires or preferences have been frustrated she has *ipso facto* been harmed. Nonetheless, by reshaping the notion of “harm” and wrenching it away from its more natural or ordinary meanings, the liberal proponents of the harm principle seriously undermine the usefulness— and the integrity— of

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<sup>99</sup> Feinberg, *Harmless Wrongdoing*, *supra* note at 38.

<sup>100</sup> See *supra* note

their position.

### C. Harm to Discourse

Liberal theorists, we have seen, depart from conventional usage and subjective reports and instead refine the notion of “harm” into a term of art. On first impression, it is hard to fault them for this. Doesn’t careful consideration of an issue often require us to try to achieve more precision in our basic terms than those terms would have in ordinary conversation? Won’t the effort to obtain such precision necessarily cause our meanings to depart from less disciplined everyday usages?

Nonetheless, refinements of the notion of “harm” introduce serious mischief into political and legal discourse. We can notice some of these problems, beginning with the less grave and proceeding to the more serious.

#### 1. Loss of simplicity

Most obviously, the numerous refinements and qualifications introduced by proponents of the harm principle deprive the principle of the simplicity that Mill attributed to it. On its face the principle is still simple—government can restrict liberty only to prevent “harm”—but since “harm” itself is not a simple fact but rather the conclusion of a controversial and complex normative reflection, the simplicity is illusory. It is as if someone were to say that there is one “simple moral principle” that can readily be applied to resolve all moral questions and conflicts: “Do good and avoid evil.” Okay, but . . .

It may be, of course, that such matters are simply not amenable to simple propositions and nice generalizations. Nonetheless, as we have seen, its apparent simplicity is one of the harm principle’s

major attractions. It is part of what makes the principle seem suitable for judicial use; and in different ways the principle's apparent simplicity is also a major recommendation for its use in academic contexts and in everyday conversations.<sup>101</sup> By depriving the principle of this attractive feature, liberal refinements make it much less useful than it at first appears.

## 2. Confusion

A second and closely related drawback of the Millians' technical conceptions of "harm" is that these conceptions, though attempting to make the concept of "harm" more precise, risk promoting confusion in discussions of the issues to which the harm principle is addressed. Without great care, discussants are likely use the term "harm" sometimes in the complex and specialized senses elaborated by thinkers like Mill and Feinberg and at other times in the more generic senses of the term.

It might seem that this is a risk that could be avoided simply by paying careful attention to how the term is being used. Perhaps-- but such attentiveness is more easily preached than practiced. In everyday conversations, it would be remarkable if the risks of confusion could be avoided. And as we will see, this risk is often realized in academic discussions as well, even in the written work of careful theorists like Feinberg.

## 3. Circularity

A somewhat different or at least more specific danger is that of circularity. Liberals and others use the harm principle to argue for their favored positions on questions of individual freedom, often in

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<sup>101</sup> See *supra* Part I.A.

the context of specific controversies over obscenity, regulation of sexual conduct, abortion, or similar issues. But, reversing directions, they also use their favored positions on issues of individual liberty to argue for understanding “harm” in particular ways— and for excluding from the category of “harm” injuries that are in fact harmful in any ordinary sense not skewed to satisfy the demands of a particular theory or to reach (or avoid) particular favored (or disfavored) conclusions. So it seems that premises and conclusions are constantly switching places. A *conclusion* (“no regulation of . . .”) is said to be justified because it follows from the *premise* (the harm principle). But a contested interpretation of the *premise* (subjective injuries  $x$ ,  $y$ , and  $z$  should not be counted as “harms”) is justified because it is necessary to support the preferred *conclusion*.

Thus, we have already noted that although injuries in the utilitarian senses are in fact “harms” in any ordinary or subjective sense of the term— I *do* “harm” you by inflicting pain on you, or by frustrating your preferences— proponents of the harm principle peremptorily dismiss these senses of the term. They do so quite simply and unapologetically because, so construed, the harm principle would permit rampant limitations of freedom that liberals oppose.<sup>102</sup>

We have also noticed that both Mill and Feinberg are willing to count as “harms” only injuries to interests protected by “rights.” But what “rights” we have against governmental interference with our liberty was precisely the question— or at least one way of stating the question— that the harm principle was supposed to help us answer. So it seems that we cannot know whether something counts as a “harm” unless we know what “rights” people have, and we cannot know what “rights” we have unless

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<sup>102</sup> See, e.g., Feinberg, Harm to Others, *supra* note at 65 (arguing that a narrow definition of “harm” must be stipulated because “otherwise we shall find ourselves defending the legitimacy of state interferences with liberty that, preanalytically, we would find dubious or wrong”).

we know what will count as “harm.”

Feinberg notices, and briefly responds to, this apparent circularity.<sup>103</sup> He acknowledges that the circularity is vitiating if the rights invoked to classify which interests can be the subject of “harm” are *legal rights*, but he argues that the circularity can be avoided by specifying that the rights used to classify interests are “*moral rights merely*.”<sup>104</sup> This suggestion might seem to demote the harm principle into a minor corollary of some larger doctrine of moral or “natural rights,” but Feinberg eschews any such doctrine. Instead, he tries to explicate the notion of “moral rights” by asserting that “*any indefensible invasion of another’s interest (excepting of course the sick and wicked ones) is a wrong,*” and hence an infringement of a “moral right.”<sup>105</sup> But far from resolving the circularity, this response merely complicates the problem with additional normative questions. Which among the interests people think they have are genuine and valid, as opposed to “sick and wicked”? And how do we know which invasions of interests are “indefensible.” It seemed that these were the sorts of questions that the harm principle was supposed to help us answer (or deflect), but it turns out that we cannot even use the principle unless we already have answers to these questions.

In sum, it seems that in many ostensible applications of the harm principle, the conclusion is justifying the premise, not vice versa. Indeed, Feinberg is sometimes endearingly candid as he reshapes his harm principle to support conclusions he favors in advance. In the final volume of his series, he considers a situation much like our earlier example of a highly moralistic community in which a few

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<sup>103</sup> Id. at 109-14.

<sup>104</sup> Id. at 111.

<sup>105</sup> Id. at 111-12.

citizens want to watch pornographic movies at home.<sup>106</sup> Feinberg concedes (revealingly?) that when he wrote his first volume, *Harm to Others*, it had not occurred to him that moralistic citizens might seek to justify a restriction by asserting-- quite plausibly, as he now admits-- that they *are* harmed by their neighbors' practice because "their paramount interest in living in a community of a certain sort has definitely been set back."<sup>107</sup> "If that had occurred to me in time," he forthrightly acknowledges, "I no doubt would have tried to control the damage to my liberalism by adding another 'mediating maxim for the application of the harm principle,' one which would place constraints on the way appeals to harm prevention can be made in those quite common circumstances in which interests are opposed."<sup>108</sup> Having noticed the difficulty, Feinberg then goes on to propose just such a further refinement-- one favoring "personal" interests over "external" ones.<sup>109</sup>

The point is not that there is anything necessarily unseemly about revising one's premises to avoid untenable conclusions-- some such back-and-forth revising is arguably a part of the "reflective equilibrium" involved in modern normative thinking generally-- and indeed Feinberg's candor in the matter is impressive. Nor need we consider here whether his distinction between "personal" and

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<sup>106</sup> In Feinberg's example, "a community of like-minded puritan fundamentalists" discover a second-generation member who "has been secretly reading romantic novels in the privacy of his quarters, occasionally drinking a can or two of beer, and listening (at low volume of course) to popular music on his tiny radio." Feinberg, *Harmless Wrongdoing*, supra note at 57.

<sup>107</sup> *Id.* at 58.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 59-64.

“external” interests succeeds in persuasively supporting Feinberg’s preferred conclusion.<sup>110</sup> The point for now is simply that when “harm” is severed from its conventional and more straightforward meanings, the relation between ostensible premise and ostensible conclusion is placed in doubt. It is hard to know whether the premise is carrying the conclusion or the conclusion is carrying the premise.

#### 4. Free (or heavily subsidized) riding

But this is still not the most serious objection provoked by the more crafted definitions of harm to which Mill and his followers have been forced to resort. The greatest problem is that the possibilities of confusion and equivocation and circularity created by different meanings of “harm” permit liberal thinkers to “free ride” on the irresistible appeal of the harm principle in its more ordinary or generic senses. A favored conclusion thus becomes dependent on a sort of parasitism, and is deprived of the benefit of being tested and assessed on its own merits— of (to borrow a phrase) “fighting for its

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<sup>110</sup> Similar distinctions had been invoked by liberal theorists before Feinberg, of course, see, e.g., Ronald Dworkin, *A Matter of Principle* 359-72 (1985)— and (in my view, at least) decisively criticized by other liberal theorists. See, e.g., John Hart Ely, *Professor Dworkin’s External/Personal Preference Distinction*, 1983 *Duke L.J.* 959. Richard Arneson explains:

[T]he distinction between external and personal interests tends to break down in genuine enforcement of morals cases. There, either the distinction cannot be drawn or it fails to mark a nonarbitrary line that matters. My desire to live my own life sometimes includes the desire to live in a certain kind of physical environment (no tacky-tacky apartments in the Cotswolds), or in certain relationships with others (a community of kindred spirits at the workplace), or in proximity to persons who share a minimal moral sensibility (no association with persons who are willing spectators at fight-to-the-death gladiatorial contests. . . . My desire to lead the life I want can, and often does, include the desire to live in certain relations with others, and this will necessarily mean wanting that others lead their own lives in certain ways (namely, related to me so my life flourishes).

Arneson, *supra* note At 380.

existence” and of being “fully, frequently, and fearlessly discussed.”<sup>111</sup>

Such “free riding” is possible because, as we have seen, in its ordinary sense the harm principle states what seems to be almost a self-evident normative truth— one that resonates both with familiar intuitions and popular adages and with more developed theories of legitimate government. If I want to do something, and if it doesn’t harm anyone, what good reason does the government have to stop me? We have noticed how this intuition fits with what we have called the “somebody else’s nose” and “nobody else’s business” adages. In everyday conversation (and also, as we will shortly see, in liberal theory) the point is often made in terms of a “doesn’t affect” claim: if my conduct “doesn’t affect” anyone else, then government should leave me alone.

Once “harm” has been redefined in a more technical and much narrower sense, however, proponents of the harm principle forfeit their claim to rely on these familiar intuitions. If what I am doing “hurts” and “offends” others, and if it causes them pain and frustrates their preferences, then perhaps I should still be allowed to do it: but I can hardly claim in good faith that the reason I should be allowed to do it is that my conduct doesn’t “affect” them. What I want to do may not cause harm in the narrow, artificial senses elaborated by Mill and Feinberg, but it surely *does* “affect” others— detrimentally, and perhaps quite powerfully.

By rights, then, proponents of the harm principle ought to forego any reliance on the “doesn’t affect” appeal (and on the related intuitions). But the multiple meanings of “harm” would make it difficult to exclude any such appeal even if liberal thinkers wanted to earn their own way. And in any case, it seems they are *not* inclined to be so scrupulous. On the contrary, a close reading of their

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<sup>111</sup> Mill, *supra* note at 41, 37.



arguments suggests that they pervasively, even flagrantly, exploit the equivocation involved in “harm” to piggyback their arguments and conclusions onto the more conventional or straightforward senses of “harm” that they elsewhere disavow.

*Mill as free rider.* Thus, in the same paragraph in which he introduces the harm principle, Mill gives it a powerful rhetorical boost by asserting that an individual’s freedom should be respected in that part of his conduct “which *merely concerns himself*.”<sup>112</sup> This language is repeated throughout the essay.<sup>113</sup> Almost as numbingly frequent is an appeal framed in “not affecting” language. A person should be free in “conduct which affects only himself . . . .”<sup>114</sup> He should not be “restrained in things not affecting [others’] good.”<sup>115</sup> Society has no coercive jurisdiction over a man in “conduct which does not affect the interests of others in their relation to him.”<sup>116</sup> Or the protection of the principle may be said to cover the individual’s “judgment and purposes in what *only regards himself*.”<sup>117</sup>

The effect of these recurring appeals is to create a depiction of the sort of regulation that Mill is

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<sup>112</sup> *Id.* at 13 (emphasis added).

<sup>113</sup> *Id.* at 56 (“But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in *things which concern himself*. . . .”); at 61 (“in what concerns only themselves”); *id.* at 80 (“the part of a person’s life which *concerns only himself*”); at 94 (“so far as these concern the interests of no person but himself”); at 104 (“A person should be free to do as he likes in *his own concerns* . . . .”); at 108 (“the freedom of the individual in *things which concern only himself*”) (emphasis added).

<sup>114</sup> *Id.* at 15 (emphasis added).

<sup>115</sup> *Id.* at 63.

<sup>116</sup> *Id.* at 87. See also *id.* at 76 (no jurisdiction “when a person’s conduct affects the interests of no person besides himself, or needs not affect them unless they like . . . .”).

<sup>117</sup> 77 (emphasis added).

resisting (and that an overbearing “society” is ostensibly eager to impose) as almost wholly gratuitous— an officious effort to interfere in and curtail conduct which simply does not “concern,” “affect,” or “regard” anyone other than the actor. Little wonder that such gratuitous interference would provoke Mill’s opposition: who other than the most insensitive meddler would *not* be indignant at such gratuitous interference?<sup>118</sup>

A moderately careful reading of Mill’s essay shows, of course, that *this* indignation is misinformed, because the crucial terms— “concern,” “affect,” “regard”— are actually being used in narrow and highly artificial senses. As Mill quietly acknowledges, the same conduct that in his special usage does not “affect” or “concern” other people may very well be “hurtful” to them, and may have a powerful detrimental impact on “interests” of theirs that (unfortunately for them) do not rise to the level of “rights.” Viewed in this light, Mill’s position seems much more fragile. Is it so obvious that individuals have an “absolute” right to do things that are “hurtful” to others so long as they do not “harm” others in Mill’s special and convoluted sense, and that society has no right to restrain such “hurtful” conduct? How much of the appeal of Mill’s position is owed to free or at least subsidized riding— to equivocations involving terms such as “harm,” “concern,” and “affect”?

*Feinberg as free rider.* As noted, Joel Feinberg is more deliberate in his analysis and his use of terms. Nonetheless, Feinberg does not forbear from exploiting the rhetorical possibilities of equivocating about the meaning of “harm.”

For instance, we have earlier noted that persons who value a particular kind of community or

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<sup>118</sup> Once again, for present purposes we are bracketing the question of paternalistic restrictions. See *supra* note and accompanying text.

culture might plausibly argue that they do in fact suffer “harm” from actions that undermine that community or culture. (Whether such harm justifies restrictions on such actions is, once again, a different and more complicated question.) Although at times Feinberg appears to concede the point,<sup>119</sup> however, in his more elaborate taxonomy this sort of injury is typically classified as an “evil” but not a “harm.” But in arguing passionately that no one’s liberty should be restricted to prevent *this kind of evil*, Feinberg seemingly makes at least tacit but powerful use of the more generic sense of “harm.”

So he protests that restrictions aimed at protecting community character, by limiting the freedom of some individuals, would inflict “palpable harms” merely to avoid “states of affairs that *harm no one*.”<sup>120</sup> Such an exchange—of “palpable harms” for the cessation of harmless conduct—seems manifestly unreasonable, to be sure. But then of course it is only in Feinberg’s highly artificial sense of “harm” that the loss of a kind of valued culture or community “harm[s] no one”: in any less gerrymandered sense of the term such a loss might be viewed as a very serious harm.<sup>121</sup>

It is likewise wrong, Feinberg insists, “[i]f I am forbidden on pain of criminal punishment and public humiliation from acting as I prefer in ways that *harm no one . . .*”<sup>122</sup> Same response. And again: “The free-floating evils [including merely moral wrongs] *do not hurt anybody*; they cause no injury, offense, or distress. . . . To prevent them with the iron fist of legal coercion would be to impose

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<sup>119</sup> See supra note

<sup>120</sup> Feinberg, Harmless Wrongdoing, supra note at 67 (emphasis added).

<sup>121</sup> See supra notes

<sup>122</sup> Id. (emphasis added).

suffering and injury *for the sake of no one's good at all.*<sup>123</sup> And yet again: “[I]t is *no reason whatever* to restrict *A*'s behavior simply because *B* disapproves of it, in the absence of harm or offense.”<sup>124</sup> The same response applies: these protests *seem* powerful and persuasive, but their power is dependent on the more subjective and generic senses of harm. Conversely, if we keep constantly in view that Feinberg is using “harm” in a “special narrow sense”<sup>125</sup> and that in fact the behavior he wants to immunize *does* cause harm in more ordinary senses, his pleas lose much of their force.

Indeed, it is at least arguable that Feinberg quietly depends on free riding as the major source of support for his harm principle generally. In a perceptive and in some respects admiring review of Feinberg's opus, Gerald Dworkin attempts to clarify just what the harm principle as advocated by Feinberg entails. Having done so, Dworkin asks, “What is the argument for it?” The response is sobering: “In truth, I cannot find a clear argument in Feinberg.”<sup>126</sup> So Dworkin comments wryly that “[a]s Bertrand Russell observed with respect to logical matters, postulation has all ‘the advantages of

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<sup>123</sup> *Id.* at 79-80 (emphasis added).

<sup>124</sup> *Id.* at 122 (emphasis added).

<sup>125</sup> Feinberg, *Harm to Others*, *supra* note at 118.

<sup>126</sup> Gerald Dworkin, *Devlin Was Right*, 40 *Wm. & Mary L. Rev.* 927, 939 (1999). See also Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 *Mich. L. Rev.* 1415, 1416-17 (1990) (review essay):

[Feinberg] recognizes that “the liberal position” on the moral limits of the criminal law is not self-evidently true, and that its truth must therefore be established by argument. Despite this recognition, however, he offers little direct or affirmative argument to establish its truth. His method is one of dialectical, rather than direct, argumentation.

theft over honest toil.”<sup>127</sup>

An inspection provides support for Dworkin’s judgment. The explication of the harm principle is the task primarily of Feinberg’s first volume. That book leads off with discussions of various senses of harm. It proceeds to introduce some intricate refinements into the concept— we have noticed a few of them— and then to apply the concept as refined in imaginative and provocative ways to a host of particular problems. It is not hard to understand why the book has generated the almost extravagant praise that it along with its sequels has received.<sup>128</sup> And yet . . . if one looks for any sustained *justification* of the harm principle as a limitation on government, one will search the book in vain.<sup>129</sup>

Perhaps it seemed that no justification was needed. Perhaps Feinberg imagined himself, as liberal theorists sometimes self-consciously do, to be engaged in a conversation with people who already share his basic assumptions and commitments,<sup>130</sup> so that only refinements, not full-

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<sup>127</sup> Dworkin, *supra* note at 946. James Stephen made a similar complaint about Mill. “There is hardly anything in [Mill’s] whole essay which can properly be called proof as distinguished from enunciation or assertion of the general principles quoted.” Stephen, *supra* note At 8.

<sup>128</sup> See *supra* note

<sup>129</sup> Perhaps this assessment understates the justification Feinberg offers. It is likely true, as Feinberg suggests, that not many people (liberal or otherwise) will question the harm principle as a *justification for restricting harmful conduct*, as opposed to a *limitation on government power*. Not many will deny, that is, that government can regulate to prevent the kinds of injuries he counts as “harms”: the controversial question, it seems, is whether preventing harm so understood is the *only* or *exclusive* rationale that justifies legal coercion. (As noted, Feinberg argues that coercion is sometimes justified to prevent “offense” as well as “harm.”) Hence, Feinberg’s more complete argument for the limited harm principle occurs not so much in his discussion of the principle itself as in his criticism of other possible rationales— in particular, morality-based rationales— for coercion. Unfortunately, that criticism depends heavily on the equivocations just noted.

<sup>130</sup> See, e.g., John Rawls, *The Idea of Public Reason Revisited*, in *Law of Peoples* 131, 132 (noting, with respect to those with a “zeal to embody the whole truth in politics,” that “[p]olitical

scale defenses, were needed.<sup>131</sup>

Or perhaps the efficacy of the principle just seemed self-evident. Thus, after presenting a number of potentially controversial refinements in and applications of the harm principle, Feinberg comments sanguinely that “[a]s it has been formulated here, the harm-to-others principle is virtually beyond controversy.”<sup>132</sup> His confidence at this point seems remarkable. It may be true, as discussed earlier, that the core idea contained in the harm principle *is* a virtual truism. Unfortunately, the truism and Feinberg, though sharing the term “harm,” are not talking about the same thing.

#### D. Prioritizing Harms?

The preceding discussion has suggested that the harm principle cannot perform the function for which it is offered: it cannot serve as a device for delineating the domain of “liberty of action,” or the realm within which “power can be rightfully exercised over any member of a civilised community,

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liberalism does not engage those who think in this way”); *id.* at 178 (“They assert that the religiously true, or the philosophically true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism nothing more need be said.”).

<sup>131</sup> Feinberg indicates early on that he hopes “to persuade the skeptical reader that liberalism is true doctrine.” Feinberg, *Harm to Others*, *supra* note at 15. This ambition might suggest that he is speaking at least in part to people who do not already share his liberal assumptions. Shortly thereafter, however, he explains that his methodology relies on the “coherence” or “ad hominem” method, which “presupposes a great deal of common ground between arguer and addressee (reader) to begin with.” *Id.* at 18. Perhaps the clearest indication of intention explains that “I hope to convince many who share my basic ideals and attitudinal outlook also to share less obvious specific judgments about the particular subject matter of the book.” *Id.* at 19. Perhaps that somewhat select audience is presumed to accept in advance the harm principle more or less (though not completely) as Feinberg presents it?

<sup>132</sup> *Id.* at 187.

against his will.”<sup>133</sup> Unless the notion of “harm” is gerrymandered to support the limits on coercion that the theorist already favors on other grounds, the natural conclusion will be that *every* action causes harm, and hence that every action is subject to governmental regulation.

Liberal theorists may confess the point but seek to avoid the conclusion. The primary avoidance strategy, as we have seen, is to rig the notion of “harm” so as to justify the desired conclusions: but that tactic provokes the objections just discussed. A different avoidance strategy suggests that the basic harm principle needs to be “supplemented” by further guidelines or maxims that will help government to navigate its way through the broad ocean of diverse and often conflicting concerns that the theorist is willing to count as “harms.”

Thus, even after refining the harm principle for almost 200 pages, Feinberg acknowledges that “[w]hatever this innocuous statement of the harm principle gains in plausibility, . . . it loses in practical utility as a guide to legislative decisions.”

Solutions to these [practical] problems cannot be provided by the harm principle in its simply stated form [*sic!*], but absolutely require the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice.<sup>134</sup>

Feinberg then goes on to suggest a number of such “principles” and “maxims” that will help legislators balance and weigh the various competing interests that real-world legislative decisions must confront.

Some of these maxims and guidelines are controversial, as Feinberg acknowledges. As noted, for example, his (and other liberals’) argument that “personal” interests should usually be given priority over “external” interests— such as interests in living a particular kind of culture or community— asserts a

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<sup>133</sup> Mill, *supra* note At 13.

<sup>134</sup> Feinberg, *Harm to Others*, *supra* note at 187.

distinction that is conceptually dubious and highly contestable as a normative matter.<sup>135</sup> By contrast, other proposed guidelines seem uncontroversially sound—almost platitudinous. Who will quarrel with the suggestion that in making policy choices, “we should protect an interest that is *certain to be harmed* in preference to one whose liability to harm is *only conjectural*, other things being equal”<sup>136</sup> Does anyone doubt that “we should deem it more important to prevent the *total* thwarting of one interest than the mere invasion to *some small degree* of another interest, other things being equal”<sup>136</sup>

Whether or not the particular maxims and trade-offs proposed by Feinberg or other theorists are attractive, however, the crucial point is that these suggestions are no longer in service of the jurisdictional purpose for which the harm principle is offered. After all, the idea that governments should adopt laws and policies to reduce harm is hardly either a liberal or a modern idea: it is a point so obvious that it could scarcely be doubted by anyone of any political persuasion. Preventing crime and violence, protecting property in whatever form a particular regime recognizes it: these are the most basic functions that any government performs. It seems equally obvious and elementary that since people’s interests sometimes conflict, what one person wants to have or do will sometimes collide with what other people want to have or do; so governments will have to assess and compare different sorts of harms that are the subject of their laws and policies. Liberal theorists like Mill or Feinberg may have useful suggestions about how these comparisons and assessments should be made, of course, and they

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<sup>135</sup> See *supra* notes     And accompanying text. As noted, the “personal/external” guideline was not part of Feinberg’s original set of maxims, but was developed later in response to perceived difficulties.

<sup>136</sup> Feinberg, *Harm to Others*, *supra* note     at 204 (emphasis added). See generally *id.* at 188-93.



will surely want the assessments to be made in way congenial to liberal or “progressive” values. But this is not the sort of problem for which *the harm principle* has been offered.

That principle was and is held out, rather, as a device for delineating a realm within which the government has “no business.”<sup>137</sup> In other words, the harm principle seeks to establish the outer boundaries of the coercive use of law, not to tell government how to make decisions *within* those boundaries. As noted earlier, the harm principle was and is offered as a principle of “legitimacy,” or of proper *jurisdiction*, as distinct from the domain of prudential judgment covering matters over which government *does* have jurisdiction. Conversely, maxims telling government how to balance or rank harms are addressed more to questions arising in the latter domain. Such maxims may be perfectly sensible, but it is misleading to present them as if they were supplements to or applications of *the harm principle*.<sup>138</sup>

As we have seen, Mill was explicit about the principle’s jurisdictional or “legitimacy” purpose.<sup>139</sup> Likewise, at the beginning of his project Feinberg carefully and explicitly distinguishes between the questions of “legitimacy,” on the one hand, and of what we might call “policy” or prudential legislative judgments on the other; and he explains that his purpose is to address the first of these questions, not the second.

It is not my purpose to try to specify what such a [legislative] body *would* choose to

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<sup>137</sup> See supra notes and accompanying text.

<sup>138</sup> Cf. Harcourt, supra note at 193 (“The original harm principle was never equipped to determine the relative importance of harms. Once a non-trivial harm argument has been made, the harm principle itself offers no further guidance.”).

<sup>139</sup> Mill, supra note at 13, 76.

include in its ideally wise and useful penal code, but rather what it *may* include, if it chooses, within the limits that morality places on its legislative decisions. This four-volume work, then, . . . attempts to provide a coherent and plausible set of moral principles to guide the legislator by locating the moral constraints that limit his options. *The book will not consider the further questions of cost-benefit analysis that must guide the legislator in his choices among those alternatives that do fall within the recommended moral limits.* Within the proper limits the legislator must consider the social utility of his various opinions, their likely effects on various private and public interests, constituent desires and pressures, even the demands of “politics” in a narrow sense (log-rolling, compromising, political debt-paying, etc.). *Our primary question, however, is not one about social utility and practical wisdom. I do not offer suggestions here about what it would be “a good idea” to legislate within the scope of what may be legislated.* This book is a quest not for useful policies but for valid principles.<sup>140</sup>

Later in the book, though, in offering suggestions and guidelines for the task of “Comparing and Assessing Harms,”<sup>141</sup> Feinberg effectively does just what he says he would not do: he addresses the question of how government should operate *within* the domain in which the harm principle would allow that regulation is legitimate. Indeed, his maxims are self-consciously addressed to “the legislative interest-balancer”<sup>142</sup> in an effort to guide judgment in matters over which the legislature *is* assumed to have jurisdiction, including matters such as setting the minimum drinking age, regulating competition, setting up licensing schemes, and reducing environmental pollution.<sup>143</sup>

There is nothing wrong, probably, with an author deciding mid-course to do more than he initially set out to do— to address questions he said he would *not* address. But it is misleading to

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<sup>140</sup> Feinberg, Harm to Others, *supra* note 4 at 4 (emphasis partly added).

<sup>141</sup> *Id.* at 187.

<sup>142</sup> *Id.* at 207

<sup>143</sup> *Id.* at 200-02, 218-21, 194-98, 227-32.

suggest, as Feinberg does, that these various maxims and guidelines are “supplementing” the harm principle,<sup>144</sup> or are somehow strengthening *it* or making it more useable or defensible for its own distinct purpose. In fact, the suggestions for “comparing and assessing harms” are performing a function altogether different than the one for which the harm principle is offered— a function for which the harm principle is, by Feinberg’s admission, of no use<sup>145</sup>— and they do nothing to make the harm principle more serviceable for its own function.

Indeed, by first insisting on but later smudging and ignoring the distinction between legitimacy and prudence, Feinberg in effect achieves another unearned rhetorical subsidy for his views. Offering what are plainly cost-benefit and *prudential* guidelines as if they were supplementing and elaborating a principle of *legitimate jurisdiction*, Feinberg manages tacitly to upgrade his prudential objections against particular kinds of regulation into claims that such regulations are “illegitimate,” or beyond government’s proper jurisdiction. This way of packaging the analysis may give it more rhetorical force, especially in judicial contexts in which courts are commonly supposed to defer to other branches’ prudential judgments but also to make sure that other branches act only for “legitimate” objectives.<sup>146</sup> By blurring his own distinction, therefore, Feinberg promotes his analysis into something that is potentially cognizable *in the courts*. But the promotion is the product of an illicit

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<sup>144</sup> *Id.* at 187, 214.

<sup>145</sup> Cf. Feinberg, *Harm to Others*, *supra* note at 202, 203 (“The harm principle as so far clarified is a clear and univocal guide to the legislator only for the range of cases where he has no need of a guide at all.”) (“Where the legislator urgently needs guidance, however, the harm principle as so far clarified, being largely an empty formula, lets him down.”).

<sup>146</sup> See, e.g., *Romer v. Evans*, 116 Sup. Ct. 1620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

analytical erasure.

### III. Conclusion: Retiring the Harm Principle

We have seen that if “harm” is understood in generic and subjective senses (as in the utilitarian conceptions of harm), the harm principle is attractive or even irresistible— and also useless. It is useless because every sort of conduct that anyone wants to restrict *will* cause harm, and hence will fall within government’s coercive jurisdiction. To avoid this conclusion, liberal theorists resort to equivocations. Primarily, while clinging to and exploiting ordinary and generic senses of “harm” for persuasive purposes, they also try to define “harm” in more narrow, technical, and normative senses consistent with the more particular conclusions they favor.

Normative and technical approaches make “harm” into a term of art, with conclusions about whether an injury counts as cognizable harm depending not on empirical observation (Do people sincerely *think* and report that they’ve been injured or set back by \_\_\_\_?) but rather on the reflective application of political and moral theory. But once we recognize that “harm” is being used as a term of art, and that conceptions of harm are being derived from a larger vision or theory rather than *vice versa*, it becomes apparent that there is no reason why anyone should object to the harm *principle*. Everyone can embrace the principle and simply count as “harms” injuries to the sorts of values or interests for which protection would be prescribed by his or her theory of government or the good life. For example, if instead of Mill’s “progressive” view you hold the sort of “perfectionist” view that teaches that moral character is essential to the good life and that government has a role in “making men

moral,<sup>147</sup> then you will naturally and logically want to recognize “moral harm.”<sup>148</sup> Different visions or political theories will produce different inventories of harms. But there is no reason for anyone to question *the harm principle* itself.

It follows that meaningful debates will contend *not* over the harm principle— or even over the meaning of “harm,” as if that were a basic or primary question that could be addressed and answered in its own right. Instead, meaningful debate will contend over the larger theories or visions from which particular understandings of “harm” are derived.<sup>149</sup> We have seen that Mill proposed, at least in rough sketch, a vision of the good life— one that placed preeminent value on things such as intellectual development (especially for the few who qualify for the distinction of “genius”), individuality, diversity of lifestyles, and beauty. H. L. A. Hart, though following in the general utilitarian tradition, seemed less impressed with the imperatives of “genius” and more concerned with reducing human suffering.<sup>150</sup> Feinberg expressly disavowed utilitarianism as a comprehensive theory and offered, albeit in piecemeal

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<sup>147</sup> See generally Robert George, *Making Men Moral* (1993). See also Kim Yuracko, *Perfectionism and Contemporary Feminist Values* (2003).

<sup>148</sup> George, *supra* note At 1426-28. Feinberg, by contrast, rejects the claim that people have an “interest” in having a good moral character, except insofar as they adopt this as a goal. Feinberg, *Harm to Others*, *supra* note at 65-70.

<sup>149</sup> Bernard Harcourt observes that [o]nce non-trivial harm arguments have been made, we inevitably must look beyond the harm principle. We must look beyond the traditional structure of the debate over the legal enforcement of morality. We must access larger debates in ethics, law and politics— debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values that give meaning to the claim that an identifiable harm matters. Harcourt, *supra* note at 183.

<sup>150</sup> See, e.g., Hart, *supra* note At 82-83.

fashion, a somewhat different vision of what is good and valuable in life— with an obvious emphasis on long-term projects and plans over passing satisfactions, and with special emphasis on personal autonomy.<sup>151</sup>

Any of these visions will of course be attractive to some, unattractive or perhaps even anathema to others.<sup>152</sup> Such disagreements can be the source and locus of fruitful discussion. The conclusion of this essay is simply that this is where the debate ought to be joined— in questions about the theories or visions of the good life and the proper role of government. Conversely, arguments for and against “the harm principle,” or arguments that purport to derive particular conclusions *from* the harm principle itself, serve only to mislead and distract. When the often subtle values and premises of a general theory or at least a general orientation toward life and government are squeezed into the notion of “harm,” productive discussion becomes next to impossible.

To be sure, we *can* attempt to carry on discussion by using specialized and normatively laden notions of “harm” as proxies for our more complex and encompassing views (and we do). But it would be less misleading to substitute some other, more transparently technical term— “legally cognizable occurrences,” perhaps. And notice what would happen to the basic harm principle if we made this adjustment: it would become an empty tautology. “One very simple principle governs the use of coercive governmental power,” we would say— “which is that such power should be used only to

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<sup>151</sup> Bernard Harcourt succinctly describes the leading Millians’ visions as follows: Mill’s ethical vision emphasized human self-development, Hart was especially concerned with reducing human suffering, and Feinberg laid special stress on individual autonomy. Harcourt, *supra* note at 186-91.

<sup>152</sup> See, e.g., Stephen, *supra* note At 33 (questioning “Mr. Mill’s enthusiasm for individual greatness” and criticizing “[t]he odd manner in which Mr. Mill worships mere variety, and confounds the proposition that variety is good with the proposition that goodness is various”).

address legally cognizable occurrences.” Or, better yet: “Coercion should be used only to prevent the kinds of occurrences that coercion should be used to prevent.” Who could disagree with that? Who would want to disagree?

Empty tautologies can be rhetorically useful, to be sure: they can be rhetorically useful precisely *because* they are substantively empty. But they do not thereby promote clarity of thought or discussion. The harm principle is hollow, and our public deliberations would benefit from its retirement.