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HARM, SOVEREIGNTY, AND PROHIBITION

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What restrictions are there on the scope of the criminal law? One familiar suggestion is that it is wrong to criminalize conduct that is not harmful. Another suggestion is that it is wrong to criminalize conduct if criminalizing that conduct does not prevent harm. The first suggestion focuses on the conduct criminalized. The second focuses on the effects of the decision to criminalize. A third suggestion is that it is wrong to criminalize conduct if that conduct does not wrongfully interfere with the sovereignty of others. None of these suggestions points to a valid principle of criminalization, though each points to part of the truth. Versions of the harm principle can deal with some familiar objections but cannot explain why it is permissible to criminalize interference with some nonharmful conduct, for example, interference with self-sacrificial acts. The sovereignty principle can explain the cases that the harm principle struggles with. But it makes the permissibility of preventing harm through the criminal law depend on interference with sovereignty. This is not attractive either with respect to the protection of those who have the capacity for sovereignty but especially with respect to the protection of those who do not. I conclude that any valid principle of criminalization will be complex, drawing on two independent ideas: of harm and of interference with sovereignty.

What restrictions are there on the scope of the criminal law? One familiar suggestion is that it is wrong to criminalize conduct that is not harmful. Another suggestion is that it is wrong to criminalize conduct if criminalizing that conduct does not prevent harm. The first suggestion focuses on the conduct criminalized. The second focuses on the effects of the decisions and actions involved in criminalization. A third suggestion is that it is wrong to criminalize conduct if that conduct does not wrongfully interfere with the sovereignty of others.

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These suggestions all fail, or so I argue. None of them points to a valid principle. Each of them points to a legitimate reason to criminalize conduct: that the conduct is harmful, that criminalizing the conduct would prevent harm, and that individual sovereignty would be interfered with by the conduct. But as either prevention of harm or prevention of interference with individual sovereignty may provide a sufficient reason to criminalize some conduct, these principles are not exclusive principles of criminalization.

In response to this, we might seek a single principle that can capture these different ideas. My suspicion is that we can do no better than simply combining their concerns: it is wrong to criminalize some conduct unless this is done on the basis *either* of the prevention of harm *or* for the protection of individual sovereignty. I believe that this is true for the reason that harm and sovereignty provide independent foundations for restrictions on interfering with others. A sentient being may be harmed by making her suffer irrespective of whether her sovereignty is interfered with, and indeed, even if she lacks a sovereign will. And a person's sovereignty may be interfered with even if her well-being is in no way diminished and even if it is enhanced. This suggests that any valid principle of criminalization must be complex: it must make reference to each of these moral ideas. Through the criminal law we wish to protect people both from being harmed and from having their sovereign will wrongfully interfered with.

Even that more complex principle may not be valid. It supposes that there are no other grounds for criminalization. For example, we might think that it is permissible to criminalize conduct simply to protect the natural environment even if doing so neither prevents harm nor protects individual sovereignty. I do not take a view on that here. My aim is more modest: to show that neither a harm-based principle nor a sovereignty-based principle can provide an exclusive constraint on criminalization.

This essay is structured as follows. In Section I, I consider one rendition of the harm principle, which is focused on harmful acts. I consider three objections to the harm principle, showing how those objections might be either rebutted or avoided by defenders of the harm principle. One of these objections does give us some reason to doubt the validity of the harm principle but does not provide a knockdown argument against it.

In Section II, I consider an alternative rendition of the harm principle, one that is focused on the harm that might be prevented through the decision to criminalize conduct. Such a principle might be developed in order to respond to doubts that I raise at the end of Section I. I argue that it is not an adequate response to these doubts. Furthermore, I suggest that the principle is in danger of being rendered trivial and that it is very difficult to specify it in a way that is nontrivial but also plausible.

In Section III, I develop a more powerful objection to any rendition of the harm principle as a restrictive principle: that it cannot prohibit interference with some self-sacrificial acts. I suggest, from this discussion, that there is a paradox at the heart of the harm principle. It is concerned to

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protect people against interference by others but it prohibits preventing people from interfering with others in nonharmful ways. Hence it has a self-defeating quality.

In Section IV, I consider an alternative principle that is more directly concerned with protecting people against interference: the sovereignty principle. I argue that while defenders of this principle can respond in a more satisfactory way to the doubts I express at the end of Section I and can respond adequately to the problem raised in Section III, it is an inadequate principle. This is so because it cannot warrant protecting agents against being harmed in circumstances where their sovereignty is not interfered with. As there are some agents who ought to be protected by the criminal law but who do not have the capacities required for sovereignty, the sovereignty principle is inadequate as an exclusive principle of criminalization. Furthermore, it is difficult to believe that the permissibility of criminalizing harmful conduct depends on that conduct also interfering with sovereignty. I conclude that protection against harm and protection against interference with sovereignty can provide alternative grounds for criminalization.

I. CRIMINALIZING HARMFUL ACTS

Let us begin with a familiar version of the harm principle, which I call *harm principle 1*:

> HP1. It is wrong to criminalize some conduct *v* if *v*ing does not cause or risk harm.

HP1 is a restrictive principle. It instructs us only about what not to criminalize: conduct that is nonharmful. It is common also to think that harm might help to justify criminalization.[1] HP1 has nothing to say about that. It is consistent with HP1 that we may criminalize conduct for a range of reasons, including that the conduct is seriously wrongful, as long as the conduct criminalized is also harmful. But the idea that prevention of harmful conduct is a reason in favor of criminalizing that conduct is in the spirit of the harm principle. A further important feature of HP1 is that it is act-focused. The harm principle is obviously concerned with harm. But *what* exactly must harm relate to? The answer that HP1 gives is that the conduct criminalized must be harmful.

HP1 has come under attack from a number of different directions. In this section I consider three objections to HP1 and show how they might be responded to. One familiar objection to HP1 is that it implausibly rules out the criminalization of all offensive conduct. I suggest that the offensive conduct that we are mostly concerned with fails to provide a challenge

1. *See* JOEL FEINBERG, HARM TO OTHERS (1984), at 11–12.

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to HP1 because it is harmful. For this reason, we should not endorse Joel Feinberg's view that offence should be evaluated as an alternative to harm as a basis of criminalization.[2] Rather, it should be seen as a further restriction on criminalization; there is some conduct that should not be criminalized even though it is harmful on the grounds that the harm suffered comes about as a result of the person being offended.

A second objection to HP1 is more successful but can be responded to with amendment. This objection suggests that possession of offensive weapons does not always cause or risk harm. But it is implausible to think that criminalization of such conduct depends on its being harmful or risking harm. Hence HP1 is false. This may be true, at least if we assess risk from the perspective of the defendant, but if it is true, it can be responded to by amending HP1. It should not be surprising that HP1 can be appropriately amended, for the reason to criminalize possession of offensive weapons is surely in order to prevent them from being used to inflict harm.

A third objection to HP1 is that it rules out criminalizing interference with a person's body or possessions that she is not and will never become aware of. That conduct, it is suggested, is not harmful, but it is implausible that it is wrong to criminalize it. I suggest that there is something intuitive about the idea that the conduct concerned is nonharmful but that it is difficult to find a knockdown argument that this is so. It might plausibly be argued that not all harms are experiential and that this conduct harms a person without them realizing that they have been harmed. This objection to HP1, then, is suggestive but not conclusive.

A. Offensive Conduct

One criticism often leveled at HP1 is that it implausibly prohibits the criminalization of offensive conduct. One example that is useful in testing this claim is public sexual conduct. It is difficult to believe that it is wrong ever to criminalize sex in public. But, it may be argued, sex in public causes no harm. Perhaps it might be argued that sex in public can be criminalized because it would harm children to see it. But that does not seem to be the only reason sex in public may be criminalized.

In response to this argument, we might doubt that sex in public is nonharmful. Let us specify the example a little more to investigate further. Suppose that Bob and Jane will have sex on a bus that Margaret wishes to take. Margaret now has two options. Either take the bus and be exposed to Bob and Jane having sex, or do not take the bus. I assume that *removing* the option of going by bus harms Margaret if the option of going by bus is valuable to her. But the option of going by bus has not been removed. Now suppose that if Margaret goes by bus, seeing Bob and Jane having sex will

2. JOEL FEINBERG, OFFENSE TO OTHERS (1985).

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distress her. This diminishes the value of her option of going by bus. Better to go by bus without distress. Hence, if Bob and Jane have sex on the bus, Margaret is worse off. Diminishing the value of a valuable option is not as harmful as removing it. But it is harmful nevertheless.

One response to this argument is to suggest that the distress Margaret will feel if she goes by bus and sees Bob and Jane having sex on it is not harmful.[3] But it is difficult to believe that this is so. Suppose that Margaret feels an anxious churning in her stomach when she sees Bob and Jane having sex. This feeling is unpleasant. Surely experiencing this unpleasant feeling is harmful.

It is sometimes doubted that this is so. It is claimed that feelings like this are too transient to count as the kinds of harm that the criminal law should protect us against or at least that are engaged by the harm principle. This is sometimes argued for on the basis that only restrictions of autonomy, or personal projects, or opportunities count as harms for the purposes of the harm principle.[4]

But this restriction on the quality of harms that the harm principle is concerned with is not one that defenders of the harm principle should endorse. To see this, imagine that Bob could cause the same anxious churning by interfering with Margaret's body by using an electronic device that interferes with her brain. No sensible rendition of the harm principle would regard it wrong to criminalize *that*. Surely this counts as a legitimate kind of harm for the purposes of the harm principle, regardless of whether a person's projects or goals are frustrated. If harm is to be understood as a setback to one's interests or one's well-being, there is no good reason to exclude unpleasant feelings from the idea of harm. For unpleasant feelings erode well-being, and one has an interest in not experiencing them.

An alternative idea is that the harm principle is not concerned with protecting people from the feelings that they experience on judging that another person's conduct is wrong. It might be that Margaret feels an anxious churning in her stomach only because she judges Bob's and Jane's conduct to be wrong. Her distress is mediated by her judgment. It is not the conduct that is harmful, it might be argued, but her judgment of it.

We can unpack this argument in the following way. Margaret is responsible for the judgments that she makes. If her judgments cause her to feel a certain way, she is responsible for feeling that way. Margaret's responsibility for her judgment breaks the chain of causation from Bob's and Jane's conduct to the anxious churning in her stomach. Therefore Bob's and Jane's conduct does not cause Margaret's distress. It follows that Bob's and Jane's conduct is not harmful.

3. *See* J.J. THOMSON, THE REALM OF RIGHTS (1990), at ch. 10. For a more modest critique of Thomson's view than I mount here, *see* A. Ellis, *Thomson on Distress*, 106 ETHICS 112 (1995).

4. *See, e.g.*, A.P. Simester & A. von Hirsch, *Rethinking the Offense Principle*, 8 LEGAL THEORY 269, 280–281 (2002).

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There are three responses to this argument. First, it may not be the case that Margaret's anxious churning in her stomach is mediated through her *judgment*. Bob's and Jane's conduct may impact on her in a way that is independent of her judgment. Suppose that she judges that Bob's and Jane's conduct is not morally wrong. It may be that her anxious churning still comes about.[5]

Second, we might doubt that the fact that she is responsible for her judgments warrants the conclusion that the chain of causation is broken. We do not think that *all* conduct a person is responsible for breaks the chain of causation. For example, suppose that I threaten you that if you do not stamp on Eric's foot, I will kill Eric. You stamp on Eric's foot. In this case, you are responsible for stamping on Eric's foot. But I nevertheless caused Eric to be harmed. That is so because I created conditions under which you were justified in stamping on Eric's foot.[6]

A similar thing might be suggested about Margaret's case. If Margaret is justified in judging Bob's and Jane's conduct as being wrong, her judgment that Bob's and Jane's conduct is wrong is caused by Bob's and Jane's conduct. And the consequences that unavoidably follow from that judgment are also caused by their conduct. Hence their conduct is harmful in just the same way as it was harmful for me to threaten you to stamp on Eric's foot.

Let us support this argument a little further. Suppose that Margaret gets on the bus. Suppose also that the anxious churning in her stomach unavoidably arises due to the judgment that Bob's and Jane's conduct is wrong. How could she now avoid the anxious churning in her stomach? Only by making the judgment that Bob's and Jane's conduct is not wrong. But we cannot expect her to make that judgment if it is true that Bob's and Jane's conduct is wrong. That would require her to adopt the wrong moral view, or to corrupt herself, to avoid the anxious churning in her stomach. Hence Bob and Jane put Margaret in a position where she must choose one of three options: not to take the bus, or to feel an anxious churning in her stomach, or to corrupt herself. She is worse off having these options than she would be were she to be able to get on the bus without watching Bob and Jane having sex. We can conclude that Bob and Jane having sex on the bus results in Margaret being harmed.

A third argument is as follows. The spirit of the harm principle is that we are motivated to protect people from harm through the criminal law, and in this spirit, no sensible rendition of the harm principle would exclude all harms that are mediated by judgment. To see this, suppose that the judgment that Bob's and Jane's conduct is wrong would not only cause Margaret to suffer an anxious churning in her stomach; it would it also cause her leg to fall off. The loss of her leg is mediated by her judgment.

5. *See also* J. Tasioulas, *Crimes of Offence*, *in* INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR 152–153 (A. von Hirsch & A.P. Simester eds., 2006).

6. This is also the view of the criminal law. *See, e.g.*, R v. Pagett, (1983) 76 Crim. App. Rep. 279.

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But it surely does not follow that it is wrong to criminalize their conduct to protect her from suffering the loss of a leg. No sensible rendition of the harm principle would regard Bob's and Jane's conduct as being harmless in that case.

And that is so even if Margaret makes the *wrong* judgment about their conduct. It is sometimes supposed that conduct that is not objectively offensive but which nevertheless causes offence cannot be a legitimate object of the criminal law. The causation-based argument above provides some support for this view. It is normally true that nonwrongful conduct that causes some people to be offended ought not to be criminalized. But this is not, as is often supposed,[7] simply because the harmful effects of such conduct are mediated through wrongful judgment.

To see this, suppose that there is nothing wrong in itself about Bob and Jane having sex on the bus. However, they know that if they do this and Margaret is on the bus, she will form the wrong judgment about their conduct and will lose her leg. They surely have a strong reason not to have sex on the bus—the reason is that Margaret will suffer serious harm as a result of their conduct, albeit harm that is mediated through her wrong judgment. But Bob and Jane do not have strong reasons to have sex on the bus. On this basis, we may conclude both that it is wrong for Bob and Jane to have sex on the bus and that it would be permissible to prohibit them from doing so.

The difference between this case and the more realistic case where Margaret feels an anxious churning in her stomach is only in the gravity of the consequences for Margaret. And we have already seen that the anxious churning that she feels can amount to the kind of harm that the criminal law can protect us from suffering. It follows that it would be permissible, according to HP1, to prohibit Bob and Jane from having sex on the bus in order to prevent Margaret from suffering an anxious churning in her stomach. And that is so even if sex on the bus is not wrongful.

Of course, whether criminalizing this conduct is permissible *all things considered* is another matter. That depends on all of the reasons against criminalizing the conduct, such as protecting the liberty of Bob and Jane, the costs of criminalization, the availability of alternative methods of protecting Margaret, and so on. A proper understanding of the restrictions on criminalizing offensiveness should draw on these ideas to show that the harm caused by offensive behavior is often insufficient to warrant criminalizing it. This may well motivate a general principle against

7. FEINBERG, OFFENSE TO OTHERS, *supra* note 2, argues against an objective criterion for offensiveness. His view has been widely criticized. *See, e.g.*, J. Tasioulas, *Crimes of Offense*, *in* INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR 152–153 (A. von Hirsch & A.P. Simester eds., 2006); R.A. Duff & S.E. Marshall, *How Offensive Can You Get? in* INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR 152–153 (A. von Hirsch & A.P. Simester eds., 2006); and von Hirsch & Simester, *supra* note 4.

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criminalizing offensive behavior, as well as explaining some familiar exceptions to that principle. But it is a mistake to deny that offensiveness is harmful.[8]

I am tempted to say that if Bob and Jane have sex on the bus while Margaret is on it, they cause Margaret to feel an anxious churning in her stomach regardless of whether her judgment that their conduct is wrong is correct. If this is right, we should not think that mediation through judgment, even the wrong judgment, breaks the chain of causation for the purposes of the harm principle. If I am right, conduct that offends, even if it is not morally wrong, is harmful. But even if I am wrong, it would be permissible to prohibit offensive conduct in order to prevent others suffering harm through their own judgments. HP1 could be revised to accommodate this idea in the spirit of the harm principle.

It might be suggested that this argument, if it is valid, deprives the harm principle of any force. So while HP1 may be rendered plausible by the argument, it is also rendered unfit for purpose. For the whole point of the harm principle is to restrict states from criminalizing immoral conduct or conduct that others believe to be immoral. Were we to regard judgment-mediated distress as harmful for the purposes of the harm principle, the harm principle would collapse into a form of legal moralism.

This is a legitimate concern, but this way of putting it is overstated. Although HP1 provides a constraint on criminalization, it is in the spirit of the harm principle to see harm not only as a constraint but also as the primary reason that must be offered by states *in favor* of criminalizing some conduct. In that case, the criminalization of offensive conduct is not justified *in virtue* of the wrongfulness of the conduct.

That ensures that HP1 will have different implications from legal moralism, and of two kinds. First, as I suggest above, HP1 may warrant criminalization of some conduct that is *not* wrongful on the basis that it causes judgment-mediated distress. If the distress is serious enough and the liberty to be protected insufficiently important, it may be permissible to criminalize some conduct that people find offensive even if that conduct is not wrong.

Second, there may be wrongful conduct that does not tend to cause judgment-mediated distress. The mere judgment that there is wrongful conduct going on may not typically cause the relevant distress or may cause it only to a trivial degree. Such conduct would not be capable of being criminalized on the basis that it is wrong but only on the basis that it causes distress, and hence some morally wrongful conduct would be rendered incapable of being criminalized by the harm principle.

For example, consider gay sex in private. While knowledge that some people are having gay sex may cause some people to suffer distress, this

8. For an extended defense of the same view in the context of freedom of expression, *see* J. Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207 (1993).

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would hardly provide a powerful reason to restrict people's liberty to have gay sex. The harm done would be insufficiently grave to restrict liberty to this degree. Even those who think that gay sex is wrong would find it difficult to justify criminalizing it on *this* basis. Were we to endorse legal moralism, in contrast, they would be able to mount a different argument in favor of its criminalization—that it is wrong and for this reason ought to be prohibited and punished. Of course, sensible people will rightly reject the view that gay sex is wrong, but nevertheless, conservatives could legitimately offer the argument were legal moralism true. We would then be engaged in the kind of difficult moral issue that liberals typically wish to avoid by appealing to the harm principle. We may reject this conservative argument in the spirit of HP1 without making any judgment about whether gay sex is wrong. And that will make a real difference to criminalization decisions, for even those who believe that gay sex in private is more profoundly morally wrong than straight sex on the bus may recognize that straight sex on the bus causes greater distress than gay sex in private.

Nevertheless, there is a concern about taking judgment-mediated distress seriously as a ground of criminalization—that it warrants restricting the liberty of some people on the basis of the partial or defective moral judgments of others. Defenders of HP1 should be inclined to take this concern seriously, given the spirit of the harm principle. The spirit of the harm principle is to protect people against having their liberty restricted simply because of the moral judgments of others.

In light of this, HP1 defenders can conclude that while it is not plausible to rule out judgment-mediated distress as a relevant kind of harm for purposes of the decision to criminalize conduct, it is plausible to think that mediation through judgment makes a difference to criminalization decisions. The fact that a person feels distressed at some conduct in consequence of her judgment that the conduct is wrong is a reason against counting the distress very heavily in the decision to criminalize the conduct. The harm suffered is not very serious, almost everyone suffers it at some point, and the person suffering the harm could sometimes avoid it by controlling her reactions to her moral judgments. Furthermore, with respect to wrong moral judgments, the person affected could avoid suffering simply by making the correct moral judgment about the conduct. So focusing on the harm and taking into consideration other principles may tend to lead us not to criminalize conduct that others believe to be wrongful on the basis that perceiving the conduct causes judgment-mediated distress. There are exceptions where the conduct is especially distressing and the reasons to protect people's liberty to pursue the conduct are weak.

Finally, as I briefly suggest above, there are many other considerations that will often render it wrong to criminalize conduct that offends people. Often criminalization will be less effective a way of responding to offensive conduct than other social, political, and legal responses. We could reduce levels of offensive conduct through education, social stigma, civil regulations,

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and so on.[9] We have plenty of nutcrackers available to deal with offensive conduct, so why use the sledgehammer criminal law? While HP1 permits the criminalization of offensive conduct, criminalization of much offensive conduct will be wrong in any case.

B. Possession

HP1 permits criminalizing conduct that risks harm. Here are some uncontroversial features of risk. First, we associate risk with negative outcomes. I can be at risk of harm but not at risk of receiving a benefit. Second, it is common to understand risk-taking relative to the beliefs of the person taking the risk. I take a risk that my conduct will cause *v* only if I believe that there is a chance that my conduct will cause *v*. That is true regardless of whether a reasonable person would believe that there is such a chance.

I am taking a little more time to outline the third dimension of risk-taking as it is more important for our discussion. It is wrong to say that I take a risk of *v* while *v* remains completely within my control. I take a risk of *v*ing only if I might *v* and whether I *v* is in some way beyond my control. For example, if I throw a stone over a wall, I take a risk of hitting someone. That is because whether I hit someone is beyond my control. If I merely hold a stone, in contrast, I do not typically take a risk of hitting anyone with it. It is true that I do not take a risk of hitting anyone with the stone even though I might throw it.

We do sometimes use the language of risk where I retain control over an outcome but my control is incomplete. For example if I might be tempted against my better judgment to *v*, we may nevertheless conclude that I am at risk of *v*ing. For example, I risk eating too much if I keep lots of cakes in the house, even though eating cakes is more or less within my control. That is so because I might be tempted against my better judgment to eat lots of cakes if I keep them in the house. Temptation undermines my control in some sense: it undermines my ability to stick to my plan of eating less.

This third dimension of risk-taking has important implications for our understanding of possession of offensive weapons and other preventive offences. It is difficult to believe that it is wrong to prohibit at least *some* possession of offensive weapons—nuclear weapons, for example. But do those who possess offensive weapons cause or risk harm through their conduct? Suppose that I have possession of an automatic weapon in a public place. Do I take a risk that I will harm others with my weapon? Perhaps I do, in that if I carry a weapon, I might be tempted to use it against my better judgment. So perhaps this case has something in common with the case where I keep

9. For a discussion of other responses to offensive conduct, *see* Duff and Marshall, *supra* note 7.

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lots of cakes in the house. Perhaps defenders of HP1 can justify prohibition of offensive weapons on this basis.

But this defense of the offence of possession of offensive weapons is unsatisfactory. Some people who possess offensive weapons may retain full control over whether they use their weapons. The prohibition on possession of offensive weapons does not plausibly depend on the tendency of those who possess them to use them against their better judgment. It does not depend on possessors being weak-willed. It would surely be sufficient reason to warrant prohibition that they will tend to use weapons in accordance with their better judgment if their better judgment tends toward evil. If anything, it is the highly disciplined and strong-willed wrongdoers that we *most* wish to prevent possessing offensive weapons.

But we should already suspect that HP1 could be amended to meet this concern. After all, the prohibition on possession of offensive weapons is grounded in our ambition to prevent harm. So the prohibition of the conduct is in the spirit of the harm principle. Let us focus on the relationship between possession of offensive weapons and the causing of harm. We know that offensive weapons do often play an important role in causing harm. They play this role when they are used. This suggests that it is likely that widespread possession of offensive weapons will result in many people being harmed. And this indicates that widespread possession of offensive weapons does increase the risk that any person will be harmed.

While it may sometimes be wrong to say that a person who possesses offensive weapons takes a risk of harming others with them, it is not wrong to say that others are at an increased risk of being harmed if that person possesses an offensive weapon. Furthermore, when this risk is realized, the possession of the weapon will play an important causal role in the harm coming about. In light of these facts, we can conclude that there is an appropriate relationship between possession of offensive weapons and harm.[10]

This suggests that we should adjust HP1:

> HP1(rev). It is wrong to criminalize some conduct *v* if *v*ing does not have the appropriate relationship to harm.

By substituting "appropriate relationship" for "cause or risk," we have found a way to accommodate criminalization of possession of offensive weapons within the harm principle. And this is in keeping with the spirit of the principle. We have done this at a cost, however—the cost of vagueness. The idea of "appropriateness" needs fleshing out in order to ensure that

10. Some doubt this. For example, Doug Husak thinks that the person must be at least negligent as to the use of a weapon to be guilty of an offence of possession of a dangerous weapon. *See* D. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008), at 175. I doubt that this is necessary. If the use of the weapon is fully within the person's control, the person cannot be thought negligent as to its use. But would we really be required decriminalize possession of the most dangerous weapons, such as nuclear weapons, on this basis?

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the principle is fit for the purposes that it is designed for. HP1(rev) gives rise to a series of difficult judgments about appropriateness. But this is no objection to HP1(rev). Any plausible principle of criminalization will face similar difficulties.

C. Interference with Sovereignty

A third objection to HP1 concerns the prohibition on interference with a person's body or possessions if the person's body or possessions are interfered with, but in a way that she does not know about and will never come to know about. John Gardner and Stephen Shute develop one example, which they describe as a "pure" case of rape. By describing the case as "pure," they mean that the wrongdoing, in this case, is purified of the harm that the wrongdoing typically causes. In this case, D has intercourse with V while V is unconscious. D wears a condom and leaves no trace of having had intercourse with V. They also add that D is then run over by a bus, so there is no chance of the act ever coming to light.[11] This kind of harmless rape, they suggest, can shed light on what is wrong with rape: sheer use of another person. The sheer use of another person may not be harmful but it is nevertheless seriously wrongful. Arthur Ripstein develops a similar example of a harmless trespasser.[12] This person breaks into another person's home and sleeps in her bed, leaving absolutely no trace behind. Again, Ripstein believes that this conduct is seriously wrongful but not harmful. We ought to have sovereign control over our property, and the trespasser interferes with that control.

In both these examples, a person's control over her body and her possessions is interfered with by someone else. In both cases this is done in a way that seems to have no impact on the experiences of the person to whom it is done or on her prospects for well-being. And yet in both cases it seems plausible that the state is justified in interfering with the conduct described.

Both Gardner and Shute and Ripstein believe that cases of this kind should lead us to reject HP1. Gardner and Shute believe that we should endorse a different version of the harm principle: one focused on the harms prevented by the decision to criminalize rather than the harm that would be caused by the conduct criminalized. Ripstein believes that we should reject the harm principle altogether in favor of an alternative: the sovereignty principle. I consider these suggestions in detail below; in this section I limit myself to the question of whether these examples pose a challenge to HP1.

It is not very plausible that it is wrong to prohibit conduct of this kind. The question is why it should be prohibited. One possibility is that we should focus on the risk of harm rather than the harm caused by the conduct. If a

11. John Gardner & Stephen Shute, *The Wrongness of Rape*, *in* OXFORD ESSAYS IN JURISPRUDENCE (4th ser., J. Horder ed., 2000), at 196.

12. A. Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 218 (2006).

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person has intercourse with an unconscious person or trespasses when the homeowner is absent, she inevitably risks the victim being harmed. We might object to these examples: were it possible for people to have intercourse with others or to trespass on their property without their discovering it, it would be wrong to prohibit this conduct. But this is not possible. Those who trespass when people are not at home or who have intercourse with unconscious people risk harm, and hence their conduct may be prohibited by HP1.

This response may seem unsatisfactory, for it makes the prohibition of the conduct depend on the risk that the victim will be harmed. Perhaps we should not rule this response out altogether, though. Imagine a world in which it was possible regularly to use a person's body or property without any risk that they would discover it and with no risk of other ill effects. Perhaps in that world we would take a different attitude toward our bodies and property. At least in the case of property, I find it difficult to believe that exclusive control of objects could be justified in a world where exclusive use was not required to advance anyone's interests. So perhaps the very judgment that this conduct is wrong depends on contingent facts about our relationship with our bodies and our property that give rise to a requirement that we have exclusive control over them. And this requirement that we have exclusive control over our bodies and property rests upon the fact that providing us with exclusive control over them is the only way to prevent us from suffering harm.

Suppose that this is false and that the wrongness in these cases is grounded in some deeper relationship between a person and her body or her property. Perhaps I just *am* my body, and so use of my body amounts to use of me. Were my body available for use by others, I would be like an object or a tool. This is plausible enough. In the case of intercourse with an unconscious person, she is used; she just does not know it. The question is whether using a person in this way harms them.

Gardner and Shute swiftly conclude that it does not. But that may be mistaken. Harm is a vague idea, but the view that sex with an unconscious person does not harm her is not completely intuitive.[13] Imagine that you are about to have sex with an unconscious person. I hold you back, bruising your arm. Would we conclude about this case that even if I am permitted to do this, I have done more harm than good? I am not sure that we would. I am at least tempted to say that I have harmed you to prevent you harming another.

It is worth recalling here the familiar though contested idea that harm to a person need not depend on her *experience* of a setback to her interests. There are many plausible instances of nonexperiential harms. Take two people who are happy with their marriages. Their experiences of marriage

13. *See also* J. Stanton-Ife, *Horrific Crime*, *in* THE BOUNDARIES OF THE CRIMINAL LAW (R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo & V. Tadros eds., 2010).

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are identical. However, one is being cheated on by her husband, whereas the other is not. We might think that the one is worse off than the other. Her whole attitude toward her marriage is mistaken. She trusts a person she ought not to trust.

We might even believe in posthumous harms.[14] Suppose that I write a great novel. After finishing it, I leave it with my publisher, and I am then killed. You are jealous of me and destroy the novel. It is plausible that you have harmed me by doing this. My life has been devoted to communicating with others through my novel, both while I am alive and after I am dead. You set back this project by destroying the novel.

Perhaps we should say the same thing about sex with an unconscious person. She gives her life a certain shape and meaning by choosing particular sexual partners. When someone has sex with her, that shape and meaning is altered. Her project of shaping her sexual life through her choices is thus set back. This is so even though she does not know that it has been altered in this way. It is not implausible to conclude that intercourse with an unconscious person harms her regardless of whether she finds out about it. Hence defenders of HP1 may be able to accommodate this case.

Even secret trespass may be understood in the same way. Interfering with a person's property without her consent might alter the meaning that is given to the property by the person. I might restrict entry into my home to my friends and guests. These relationships might be constituted in part by the invitations that I extend to them, invitations that I deny to others. If so, entering into my home without my consent interferes with the shape and meaning of my relationships. Exclusive control over my home may be justified in part because it tends to play this role. Entering someone's home might harm her in that case because it erodes the distinction that is drawn between friends and guests, who have access to her home, and strangers, who do not.

There is much more to be said than I have space for here about the relationship between experience and harm. My only point is that there are resources for defenders of HP1 to draw on to show that these supposed counterexamples to the principle can be accommodated within it. These cases may give us some reason to doubt HP1. We may doubt that there can be harm without experience. If not, we have some reason to reject HP1. But we do not have a knockdown argument against HP1, for the idea of harm may be sufficiently fluid to accommodate nonexperiential harms.

14. *See* T. NAGEL, *Death*, *in* MORTAL QUESTIONS (1979), J. FEINBERG, HARM TO OTHERS (1984), at 79–95. For doubts, *see* C. Fabré, *Posthumous Rights*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY (M. Kramer, C. Grant, B. Colburn & A. Hatzistavrou eds., 2008).

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II. THE HARM OF DECRIMINALIZATION

Although we have not found a knockdown argument against it, we have seen some reason to doubt HP1. But even if these doubts are legitimate, it might not follow that we ought to reject the harm principle. Our doubts about nonexperiential harm might motivate us to seek alternative renditions of the harm principle to HP1. This is Gardner and Shute's view. Their rendition of the harm principle focuses not on the harm that the prohibited acts cause but rather on the harms that might be caused or prevented by decisions to criminalize. Let us call this rendition of the harm principle *harm principle 2*:[15]

> HP2. It is wrong to criminalize some conduct v if criminalizing v does not prevent harm.

This principle is concerned with the harm that we would fail to prevent were we to refrain from criminalizing some conduct. Criminalizing harmful conduct is, obviously enough, one of the ways that this might be done. But it is not the only way. Criminalizing some conduct that is nonharmful may itself prevent harm. If this is true, HP1 prohibits the criminalization, but HP2 does not.

While HP1 might be capable of addressing the objections to it that I have considered so far, HP2 might seem better able to deal with them. One advantage of HP2 over HP1 is that in focusing on the effects of criminalization, we can naturally accommodate cases of possession of offensive weapons. While possession may not harm or risk harm to others, prohibiting possession may well prevent harm.

And there is another reason to think that HP2 is more attractive than HP1. When we decide what to criminalize, we wish to evaluate the implications of *our* actions rather than the implications of the actions of the people doing the harming. Suppose that I can do some action, and if I do it, harm will be prevented. That seems a strong reason to do the action. And there seems to be a strong reason not to prohibit me from doing that thing. To prohibit my doing it prevents me from preventing harm. This analysis applies as much to the collective action of criminalizing something as it does to any other action. If criminalizing some conduct prevents harm, there is strong reason to criminalize it, and therefore there are strong reasons not to prohibit its criminalization. Unlike HP1, HP2 treats the act of criminalization in the same way as any other act. Acts, including the act of criminalizing conduct, are to be evaluated at least in part in their tendency to cause or prevent harm.

15. It is not clear exactly how Gardner and Shute would define the harm principle. Their analysis in Gardner & Shute, *supra* note 11, at 215–217, indicates that they believe that something like HP2 is the right definition.

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HP2 might also seem preferable to HP1 in that there are some actions that are harmful, but prohibiting them either would be ineffective or would do more harm than good. HP2 may rule out criminalizing these actions, depending on how it is interpreted. HP1 does not. HP2 thus requires legislatures to evaluate the implications of their decisions, not the decisions of those who would do the harming, and that seems a perfectly sensible thing for them to do.

Gardner and Shute suggest that rejecting HP1 in favor of HP2 can attractively explain why it is permissible to criminalize their pure rape case. While intercourse with a comatose person is not necessarily harmful in itself, they suggest, decriminalization of intercourse with an unconscious person would cause more harm to be done. Hence, according to HP2, its prohibition is permissible.

We might doubt whether this explanation of the permission to criminalize pure rape is attractive, though. Suppose that intercourse with a person in a coma is nonharmful, as Gardner and Shute believe. According to HP2, the fact that criminalizing intercourse with an unconscious person would prevent people having intercourse with unconscious people would be insufficient reason in favor of criminalizing it. It must be shown that criminalizing intercourse with an unconscious person prevents harm. If intercourse with unconscious people does not cause harm, as Gardner and Shute suppose, something further must be shown about the effects of criminalizing this conduct to render it capable of criminalization according to HP2.

But it is difficult to believe that the permissibility of criminalizing this conduct *depends* on the effects that criminalizing it would have on *other* conduct. Gardner and Shute suggest that pure rape is *wrong* because it involves treating another person as a sheer means. Its wrongness alone, they suggest, provides insufficient reason to criminalize it. Something more needs to be shown. But if having intercourse with an unconscious person violates her rights by treating her as a sheer means, surely that is sufficient reason to criminalize it. This simple argument in favor of criminalizing intercourse with an unconscious person would be invalid according to HP2, but that is difficult to accept.[16] Are we really to believe that the victim's right not to be treated as a sheer means is *legally unenforceable* in itself? This suggests that HP2 is plausible only if sex with an unconscious person harms that person. And if that is so, the example of harmless rape provides no motivation to endorse HP2 rather than HP1.

As I suggest above, while pure cases provide only a weak motivation for HP2, HP2 does point to a concern that we should attend to in a full theory of criminalization. Criminalizing an action that itself does modest harm would surely be unjust if we do a great deal of harm by criminalizing it. It follows that we must attend to both the conduct criminalized and the

16. For a related argument, *see* Ripstein, *supra* note 12, at 222–229.

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effects of criminalization in a full theory of criminalization.[17] We need a way of relating the concerns of HP and HP2 by focusing on both the harms of the actions we are concerned with and the harms that we do or prevent through criminalization.

Even if HP2 could be defended as a sole principle of criminalization, it is insufficiently specified to be useful as a principle. The problem is that HP2 tells us only that criminalization of conduct must prevent some harm. But in that case, HP2 can be satisfied very easily. Take criminalization of gay sex. Criminalization of gay sex prevents some harm. Some people would be deterred from gay sex by its criminalization, and some of those people would in consequence not get into relationships that harm them. For that to be true, it need only be true that some gay relationships are harmful. And surely some are. Of course, many gay relationships are not harmful. But that fact is compatible with the satisfaction of HP2.

In fact, I suspect that almost *any* potential rule of the criminal law will inevitably prevent some harmful conduct occurring. If all that is required to satisfy HP2 is that there is a token of harmful behavior that is prevented by criminalization of some conduct, then, for any reasonably large population that is affected by the criminal law, HP2 will always be satisfied. When a criminal law is passed, people's behavior changes, often in unpredictable ways. It is likely that almost any criminalization decision will cause some harms not to occur.

To be a useful principle, HP2 must be made more specific. We might attend to this idea by revising HP2 in the following way:

> HP2(rev). It is wrong to criminalize some conduct v if criminalizing v does not prevent harm on aggregate.

HP2(rev) might be thought to improve on HP2 in ensuring that the principle is not trivial. I suspect that Gardner and Shute endorse HP2(rev).[18] But this revision gives rise to other problems. HP2(rev) would be valid only if consequentialism were more generally true.

To see this, consider the following well-known example:

> *Bridge*. The driver of a trolley is hurtling down a track, and the brakes have failed. Five people are on the track in front of the trolley. However, there are two people on the bridge between the trolley and the five. One of those is a large person, large enough to stop the trolley if he falls in front of it. The other is a very strong small person. The only way for the strong small person to prevent the trolley hitting the five is by knocking the large person off the bridge so that he will fall in front of it.

17. *See* V. Tadros, *Crimes and Security*, 71 MOD. L. REV. 940 (2008), for further discussion.

18. Though it is not a completely clear endorsement of the idea, *see* J. GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW (2007), at 243–244.

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It is wrong for the small strong person to throw the large person in front of the trolley. It is wrong because it is wrong to harm a person as a means to the greater good of others. Harming the large person violates the means principle. And not only is it wrong for the small person to do this, it is permissible to prevent him from doing it in order to save the large person on the bridge from being thrown off.

But according to HP2(rev), it may well be wrong for the criminal law to prohibit the small strong person from throwing the large person off. Suppose that were his conduct not prohibited, the small strong person would save the five, harming the one large person. However, he would not do this if the conduct were criminalized. In that case, criminalizing the killing of the large person would not prevent harm on aggregate. Criminalizing the conduct would prevent harm to the one large person but it would fail to prevent the five from being harmed by the trolley.

Some doubt that it would be wrong for the small person to throw the large person off the bridge in *Bridge*. As I do so at length elsewhere, I do not attempt here to defend the means principle any further.[19] But if the means principle is a valid principle, there is good reason to believe that HP2(rev) is an invalid principle. Its truth depends on the truth of the view that it is always wrong to prevent a person doing more good than harm. *Bridge* suggests that it is not always wrong to do this.

Furthermore, HP2(rev) has implausible implications for actions that distribute harm poorly. Most people, even some who doubt the validity of the means principle, do not think that it is always permissible to act in a way that prevents the greatest amount of harm on aggregate. It also matters how the harm is distributed.[20] For example, it would be wrong to act in a way that prevents very many people being harmed to a very small degree if, as a side effect, one person is harmed a great deal. HP2(rev) appears to rule out prohibition of such action and for this reason is implausible.

What we have learned is that HP2(rev) is a plausible principle only if consequentialism is true. If we have some enforceable duties not to cause a smaller harm to prevent a greater harm, HP2(rev) is invalid. If nonconsequentialism is true, HP2 needs to be revised in a much more complex way. On its own, HP2 is merely a vague placeholder for a more complex set of principles that govern when it is wrong to harm one person for the sake of a greater good.

This fact should also alert us to the possibility that focusing simply on harm is inadequate. The fact that it is sometimes permissible to criminalize conduct that does more good than harm at least indicates that ideas other than harm will be of central importance in governing criminalization decisions. Even if HP2 were strictly true, we should be on notice that

19. V. TADROS,. THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW (forthcoming).

20. Tadros, *Crimes, supra* note 19.

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it will be radically incomplete as an account of the principles governing criminalization.

III. THE PROBLEM OF SELF-SACRIFICE

So far I have not shown either HP1(rev) or HP2 to be false. They are vague, but then, any very general principle of criminalization is likely to be vague. There does seem good reason to focus on the harms that we cause and prevent through our criminalization decisions as well as the harms that would be caused by the actions that are prohibited. We need a way of relating these two concerns that HP1 and HP2 do not quite manage. HP and HP2 both point to important considerations in deciding whether to criminalize some conduct.

In one way it should not surprise us that renditions of the harm principle are unhelpfully vague. For the idea of harm is itself vague. We see above that this fact about harm allows defenders of the harm principle to accommodate many cases that are thought to ground objections to it. Offensive conduct that the victim is unaware of is sometimes harmful.

I think that there is a clearer way of demonstrating that the harm principle is invalid, however. I do this by considering self-sacrifice. The commonsense understanding of self-sacrifice is that a person knowingly harms herself for the sake of some good. To be a true case of self-sacrifice, a person must believe that she will be worse off overall as a result of her actions, and she must *be* worse off overall as a result of her actions. She makes herself worse off because she is motivated by (what she perceives to be) the good. If there is such a thing as legitimate self-sacrifice understood in this way, self-sacrifice involves harming oneself. Preventing self-sacrifice involves preventing a person from harming herself. If it is legitimate to prohibit people from preventing others from sacrificing themselves, it appears that the harm principle is invalid.

Before proceeding, let us consider very briefly whether the commonsense understanding of self-sacrifice is right. On some theories of well-being, true self-sacrifice appears impossible. According to Joseph Raz, for example, a person's well-being is more or less identified with her successful pursuit of worthwhile goals that she sets herself.[21] On one understanding of it, this theory of well-being seems to define self-sacrifice away. Suppose a person harms herself for the sake of some good. She must also believe that the good is more important than the harm. If she endorses one interpretation of Raz's conception of well-being, she must believe that her well-being is more significantly enhanced than it is set back. For her autonomous pursuit of the good contributes to her well-being, and by her own lights, the good

21. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), at ch. 12. Even Raz, in fairness, acknowledges that there are some aspects of well-being—namely, "biologically determined needs and desires"—that may not fit this account. *See id.* at 290.

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that she pursues is more important than the harm that she does to herself. She harms herself in one way, but she does it to enhance her well-being overall by enhancing it in another way—through successful pursuit of the greater good.[22]

If this is the correct way to understand self-sacrifice, the objection that I raise to the harm principle fails. But I doubt that this is the best way to understand self-sacrifice. It is difficult to believe that it is impossible intentionally to harm oneself overall for the sake of a greater good.[23] Suppose that I sacrifice my life for your sake because I think that your life is more important than mine. Should we really conclude that because I autonomously pursue a greater good (saving your life) at the expense of a lesser good (preserving mine), *my* well-being is enhanced? The whole point of my decision to save you rather than me is that I think that your well-being is more important than mine.

And this idea may be accommodated within a conception of well-being that is focused on autonomous pursuit of the good. For we might assess the contribution that some action makes to a person's well-being, consistent with this view, not only in virtue of its goodness but also in virtue of how pervasively it affects each aspect of the person's life. The person doing the self-sacrificial act may consider it to be very morally important, and yet, because it is relatively detached from the full range of projects and goals that the person sets herself, its contribution to her well-being may be modest.[24]

Assume, then, that there are genuine cases where a person autonomously harms herself, all things considered, for the sake of a greater good. Suppose that you do that. You commit yourself to produce a great novel, for example, even though you take no pleasure in doing so and cause yourself great stress and anxiety. You harm yourself, making yourself miserable and setting back many other important projects that you have, because you think that production of the novel is so important.

You are, of course, permitted to harm yourself for the greater good. It follows that it would be wrong for me to prevent you from harming yourself for the sake of the greater good. It would be wrong for me to interfere with you in this case, even though in doing so I prevent you from harming yourself. But if I harmlessly prevent you from harming yourself, obviously enough I do not harm you. What this case demonstrates, then, is that one person can wrongfully interfere with another to prevent that person harming herself. If the one does this, he wrongfully interferes with the autonomy of the other, but he does so in a way that benefits rather than harms her.

22. In *id.* at 296, Raz seems to endorse this revisionist idea of self-sacrifice.

23. This is a common theme in the philosophy of self-sacrifice. *See, e.g.*, S. DARWALL, WELFARE AND RATIONAL CARE (2002), at 53.

24. This interpretation of the implications of Raz's view is encouraged by Raz, *supra* note 23, at 293.

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Not only is the interference wrongful in this case, it is surely also permissible to criminalize it. While my interference with you does not harm you, it does prevent you from doing something that is choice-worthy. Your action may not be valuable *for the reason that it benefits you*, but that does not render it valueless altogether. In preventing you from being harmed, I prevent you from using your life for the sake of something worthwhile.

Against this, it might be argued that it is wrong to interfere with the person who sacrifices herself for the sake of the greater good because preventing self-sacrifice sets back the greater good.[25] Hence the harm principle is intact. The first thing to note about this objection is that it mischaracterizes the reason it is permissible prevent interference with self-sacrifice. The person who would sacrifice herself is wrongfully interfered with—she is prevented from doing something that although it harms her, is choice-worthy. And this is objectionable in virtue of what is done to *her* as well as what is done to the greater good. And it is what is done to her that is our primary concern.

This idea is a parallel of a familiar objection to Raz's interest theory of rights.[26] Raz thinks that a person has a right to *f* if he has an interest in *f* that grounds a duty—say, a duty on others not to interfere with his *f*-ing. However, Raz does note that a person may have a right to *f* even though *f*-ing is not in his interests. This may be so if others have an interest in that person having the right to *f*. This is true, Raz thinks, in cases of free speech—*my* interest in having free speech may not be very weighty, but others, those who will learn from my speech, may have a weighty interest in my speaking freely.[27]

Although it is true that we protect free speech in part for this reason, this account also mischaracterizes the primary wrong that is done in restricting free speech. It is a wrong that is done primarily to the person who wishes to speak and only secondarily to the listeners. It is typically the speaker to whom the duty is primarily directed. When you stop me speaking, you frustrate my attempts to communicate with others, and that restriction on my self-expression is central to the right.[28]

To think otherwise implies that we ought to protect speakers to no greater degree than we ought to protect computers that produce useful information. The computer also benefits the interests of those who wish to learn from the information that it produces. And yet we do not think that the reasons to prevent the computer producing the information are anything like as strong as the reasons to prevent people from speaking. And although it may be wrong to prevent the computer from producing information, on

25. *See id.* at 295.

26. *See* F.M. Kamm, Intricate Ethics: Rights, Responsibilities, and Permissible Harm (2007), at 244–248.

27. Raz, *supra* note 23, at 253–254; J. Raz, *Free Expression and Personal Identification*, *in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 149–153 (1994).

28. For an excellent defense of this view, *see* Cohen, *supra* note 8.

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the grounds that we wish to benefit those who will learn from the information that it produces, the character of the wrong is quite different from the wrong that we do to others by stopping them from speaking. We should conclude that the benefit that I will do to others by speaking is secondary to the right of free speech. Absent a right to speak grounded in my autonomy, the right of others that I am permitted to speak is often quite weak.

Perhaps it might be argued that the person's right to speak is grounded in his interests in speaking. As Raz argues, speaking may be an essential component of some valuable forms of life and must be protected in part for that reason as well. And the value that the form of life has for the person may depend on that form of life being publicly validated.[29] But while it is true that expression sometimes has this value, it is difficult to believe that the right to freedom of expression depends on its tendency to improve the well-being of the person doing the expressing. The right is justified not—or not only—in virtue of the fact that her well-being is setback when she is prevented from expressing herself, but more importantly because such interference treats her with a lack of respect as a person whose moral significance is in part constituted by her capacity independently to develop views and opinions and to influence others with them. The moral importance of the fact that human beings develop and communicate views is not restricted to its role in enhancing their well-being. It is central to the very idea that they are independent autonomous agents. And it is virtue of this fact that they deserve to be treated with respect. Severe restrictions on freedom of expression thus may not make citizens much worse off, in that expressing oneself may not significantly enhance one's well-being, but it treats them with disrespect, and this is central to the best understanding of the importance of the right.

Here we draw on one of the central insights of nonconsequentialist philosophy: a person may be wronged by diminishing her well-being but she may also be wronged if she is treated with disrespect. The extent to which a person is treated with disrespect is at least to some extent independent of the extent to which she is harmed. And interfering with a person by preventing her from speaking treats her with disrespect regardless of whether she is harmed in consequence.[30]

Similarly, when we protect a person's right to sacrifice herself for the sake of others by prohibiting interference with her autonomy, we do so in order to protect *her* from interference, not to protect the good that she aims to sacrifice herself for the sake of. We ought to prevent interference with self-sacrificial acts because each person is entitled to give up her life for the ends that she chooses for herself and not simply because we wish to protect the end at which self-sacrificers aim. And yet we do not do so primarily in order

29. *See id.*

30. For an excellent account of this distinction in a different context, *see* J. MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE (2002), at 241.

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to protect her well-being. Indeed, overall her well-being is diminished by being permitted to sacrifice herself. We protect her from being interfered with not to prevent her from being harmed but rather to prevent her from being treated with disrespect.

And there is a further response to the objection that we protect people from interference with self-sacrificial acts in order to prevent harm coming about: the objection fails to grasp the scope of cases in which self-sacrifice may be choice-worthy. A person may harm herself not only for the sake of the well-being of others but also for the sake of impersonal values. Setting back these impersonal values harms no one. For example, a person may sacrifice herself for the sake of developing the natural environment. The natural environment is of impersonal value and it can neither be helped nor harmed, only enhanced or damaged. It is wrong to prevent a self-sacrificial act of this kind even though doing so harms no one.

Perhaps it might be doubted that the natural environment has impersonal value.[31] Some may believe that its value depends on the effects that it will have on sentient creatures. But while it may well be true that the value of the natural environment depends on the *capacity* that people have to recognize its value, it is less attractive to believe that its value depends on their actually *valuing it*. We can see this from the fact that we can come to appreciate things of natural beauty. When we do so, we come to appreciate their value. And that implies that they have value independent of their being valued. When a person sacrifices herself for the sake of the natural environment, she may sacrifice herself for the sake of the value that the natural environment has. She may do this even if she rightly believes that no one will ever value the natural environment as it ought to be valued. Hence, while the value of the natural environment may depend on the continuing existence of sentient creatures, it need not depend on those sentient creatures valuing it. And it follows that its value does not depend on the effects that it has on well-being.

And finally, it is sometimes permissible to sacrifice oneself for a lesser good. Suppose that I could sacrifice my life to prevent my child from being tortured. The torture of my child might be less weighty than the loss of my life. But there is nothing wrong with my sacrificing my life for this lesser good. It would be wrong to prevent me from doing this. Were another person to prevent me from giving up my life for the sake of my child, resulting in the torture of my child, it would be permissible to punish that person. Because I am permitted to allow myself to be harmed for the sake of a lesser good, it is wrong for others to prevent me from allowing myself to be harmed for the sake of a lesser good. And others may be restrained from preventing these actions.

31. I am grateful to a referee for LEGAL THEORY for raising this possibility.

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The example of self-sacrifice helps us to see a paradox at the heart of the harm principle that should make us more generally suspicious about it. The harm principle indicates that it is wrong to prevent a person from doing what is not harmful. But as not all preventing is harmful, it is sometimes wrong to do things that are not harmful—wrong in the spirit of the harm principle itself.

And those who endorse the spirit of the harm principle ought to be motivated to prevent some of these preventative acts. If you are inclined to do something that does not enhance your well-being, and I can prevent you from doing so without harming you, I prevent you from acting without harming you. It will often be wrong for me to do so if your action is not harmful. And, in the spirit of the harm principle, we should not only regard these acts of preventing nonharmful acts as morally prohibited, by endorsing the harm principle, but should also prevent them. But if we are to prevent them, we must reject the harm principle, for in preventing them we prevent nonharmful acts.

It follows that it is permissible to prevent people from doing things that are not harmful: to prevent them from preventing actions that do not harm others. The harm principle, we should conclude, is insufficiently thoroughgoing in protecting people's freedom to do nonharmful acts. It fails to warrant the prevention of prevention. In contrast, I suggest that we are permitted to prevent some nonharmful acts, namely preventive acts, to help to protect people's freedom to pursue other nonharmful acts. The basic idea, then, is this: we wish to protect people against being interfered with by others. However, not all of the ways in which we interfere with each other are harmful. We can see this from the fact that interference may prevent a person from acting in a way that would set back rather than enhance her wellbeing. If we wish to prevent people from interfering with each other, we will need to abandon the harm principle. For the harm principle fails to prohibit nonharmful forms of interference.

Before moving on, it is important to note that this objection to the harm principle is not derived from a concern that the state ought to remain neutral about conceptions of the good. If we are neutralist liberals, we can extend the account by arguing that it is sometimes wrong to interfere with my voluntary action to do something that harms me if I *believe* that my goals are valuable, even if they are not in fact valuable and without taking a stance on whether they are valuable. Plausibly, I sometimes have a right to do valueless things as long as what I do is consistent with a reasonable conception of the good and interferes with no one else. Perhaps I even have a right to do things of great negative value that do not interfere with others. If I do, it is wrong for others to interfere with me to prevent me doing them. The extent to which we can criminalize interference with others on these grounds is, of course, controversial. I believe that there is something to be said for a more neutralist liberal view, but I do not have space to explore that possibility here. We need not enter into that controversy to show that

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the harm principle is invalid, however. Even those who reject neutralist liberalism ought to reject the harm principle.

IV. THE SOVEREIGNTY PRINCIPLE

Arthur Ripstein recently suggests that we should reject the harm principle in favor of what he calls the *sovereignty principle*.[32] The arguments that I mount against the harm principle might seem to bolster that suggestion. The sovereignty principle is defined as follows:

> SP. It is wrong to criminalize conduct that does not wrongfully interfere with equal freedom.

SP is not clear. One intended implication of the principle is restricted to using another person for one's ends, or imposing ends on a person, or using a person as a means. Ripstein often focuses on this idea.[33] Freedom is equal, he claims, insofar as each person is entitled to fix his own ends and is not entitled to interfere with another person in service of the pursuit of his ends. This, he thinks, can be extended to unauthorized use of another's body or property. For example, he suggests that harmless trespass is wrong because it would use the property owner's property for one's own ends rather than for the property owner's ends.

But using a person for one's ends is at most one kind of wrongdoing that it is permissible to restrict through the criminal law. If I harm you as a side effect, I do not impose any ends on you and hence I do not use you as a means. But I often do something that is criminally wrong. Ripstein accounts for this by claiming that when one person harms another as a side effect, the one person hampers or destroys the means that the other has to pursue his ends. This is what makes, say, injuring another as a side effect of one's action both wrongful and worthy of prohibition on his view.

One difficulty with this second idea is that it seems to give rise to a problem with Ripstein's claim that we should ground restrictions on interference in the idea of *equal* freedom. It is sometimes permissible (both morally and legally) to harm a person as a side effect of some good action, and sometimes it is not. For example, I can divert a lethal threat away from five people toward one. I cannot divert a lethal threat away from one person toward five. The idea of equal freedom does not obviously have resources to explain either of these conclusions nor to help us to decide intermediate cases. If anything, on Ripstein's account it appears that *all* side-effect harms must be prohibited by the criminal law on the grounds that they destroy a

32. Ripstein, *supra* note 12; A. Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009), at ch. 2.

33. *See* Ripstein, Force, *supra* note 34, ch. 2.

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person's ability to pursue her own ends using her body as a means, which is implausible.

If Ripstein were to suggest something less—that harming a person as a side effect *may or may not* interfere with equal freedom—he could no longer maintain something that he is keen to maintain: that there are no clashes of freedom. Ripstein suggests that his account of equal freedom can avoid familiar problems with equal freedom as an ideal—that extending the freedom of one person inevitably restricts the freedom of others. He rightly notes that there are no clashes of this kind in the case where each person is restricted from using another as a means. Each person maintains her independence from each other person.

But the idea is false in the case of side-effect harms. If I am not permitted to harm others as a side effect, my freedom to do what I want to is restricted. If I am permitted to harm others as a side effect, the freedom of others is restricted. We need a way of resolving these conflicts, and the idea of equal freedom seems inadequate to the task.[34]

Even if we could find a way of specifying SP to provide plausible results for side-effect harms, SP would need further revision. As Antony Duff notes, on its surface it cannot justify criminalizing endangering others. For endangering others does not interfere with their sovereignty.[35] But SP can be revised along the same lines as HP(rev) to accommodate endangerment:

> SP(rev). It is wrong to criminalize conduct that lacks the appropriate relationship with the erosion of equal freedom.

SP(rev) is an improvement on SP in that it permits criminalizing conduct that tends to interfere with sovereignty as well as conduct that actually does. It follows the approach that we took to revising HP in light of the problem of criminalizing possession of offensive weapons.

Let us suppose that the problem of side-effect harms can be resolved, perhaps by abandoning the idea that freedom must be equal. What are the virtues of SP(rev)? One virtue is that SP(rev) seems well suited to explain the permissibility of criminalizing throwing the large person off the bridge in *Bridge*. The means principle, it is commonly argued, is grounded in the idea that we are independent persons who are entitled to set ends for ourselves rather than having them imposed on us by others. Were the small strong person to throw the large person off the bridge, he would interfere with the large person's freedom. Of course, we can establish this result only by further specifying what "equal freedom" means in a way that accommodates the means principle. Assuming that this is done, criminalizing his conduct would not violate SP.

34. *See*, further, V. Tadros, *Independence without Interests?* OXFORD J. LEGAL STUD. (forthcoming).

35. *See* ANTONY DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007), at 138–140.

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As HP2 can be refined to accommodate these aims, are there other reasons to prefer SP(rev) to a refinement of HP2? Ripstein believes that the harm principle is incompatible with criminalization of rape of the comatose person or trespass that does not damage my property. But, he thinks, these actions would interfere with the sovereignty of the victim. We see above that some might doubt that these actions are nonharmful. However, perhaps Ripstein might argue that SP(rev) explains these cases in a more natural way. They constitute wrongful interference with a person that is nonharmful, and it is permissible to prevent and punish wrongful interference whether or not that interference is harmful.

However, this defense of SP(rev) also faces problems in explaining the very cases that are said to motivate it. It is not even clear that in raping a person who is in a coma, I interfere with that person's sovereignty. After all, the person in a coma is not in control of her body. I may interfere with her body, but I do not interfere with her will or her powers.[36] Ripstein believes that this conduct is wrong and may be criminalized because a person is entitled to have complete control over her body. But SP(rev) itself does not explain why that should be the case. SP(rev) is dependent on our establishing what we should have sovereign control over. If I ask why it is permissible to criminalize rape of an unconscious person, it is no answer to say that this is permissible because each person ought to have sovereign control over her body even while she is unconscious. It is no answer because that is exactly what is at issue when the question is asked about this case. What is needed is an answer that provides a deeper explanation of why we ought to have exclusive control over our bodies and property. And if SP(rev) is to be shown to be superior to HP(rev) on this basis, that explanation must not appeal to the harm that would be caused to us were we to have anything less than exclusive control over our bodies.

Ripstein believes that we do have exclusive ownership of our bodies,[37] but his explanation of why this must be so begs the question. He thinks that it is wrong for others to use my body because I require my body to pursue my ends. It is true that my ability to pursue my own ends is dependent on me having use of my body. It is false, though, that it is dependent on me having *exclusive* use of my body. If another person has intercourse with me while I am unconscious, that person does not interfere with my ability to pursue my own ends, for I am unable to do anything with my body to pursue my ends while I am unconscious. The exclusive right to use of one's own body is, then, something that needs to be defended independently of the idea of independence itself.

Defenders of the HP might build on this suggestion to argue that some version of HP is required to give SP(rev) more determinate content. This

36. Ripstein believes that touching a person while she is unconscious does co-opt her powers. This view is odd, for a person in a coma surely lacks the power to do anything. *See* RIPSTEIN, FORCE, *supra* note 34, at 45–46.

37. *See id.* at 40–42.

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may have been more or less what John Stuart Mill believed. Mill thought that we ought to protect the sovereignty of individuals to pursue the life that they see fit. "Over himself, over his own body and mind, the individual is sovereign," Mill wrote.[38] But he thought that this idea and the harm principle simply followed from each other.

In the same spirit as Mill, we might believe that sovereignty over one's own body and mind is required by the harm principle. It might be argued that it is because interference with the body of an unconscious person harms her or because decriminalization of that conduct would be harmful that she ought to be given sovereign control over her body. We can conclude from this discussion that no conflict between SP(rev) and versions of HP has been demonstrated. HP may provide one way of specifying SP(rev). As equal freedom is a very vague idea, Ripstein has not shown that it is superior to or even distinct from all versions of HP.

SP does improve on HP in one respect, though. It can help to explain why it is permissible to criminalize interference with self-sacrifice, something that I suggest HP struggles with. If I wish to harm myself for the sake of some end, it is sometimes wrong for others to prevent me from doing so. SP can help to explain this on the grounds that preventing me from sacrificing myself would constitute wrongful interference with me even if it would prevent me from being harmed. This suggests that Ripstein is right that SP is, at least in one way, an advance on HP.

However, although this suggests that there are reasons to prefer SP to HP, SP also has problems that HP lacks. SP derives its apparent force from the independence of persons in virtue of their autonomous will. This is attractive in one way. There are cases where one person harms another but where that person does not wrongfully interfere with that other. And there is no reason in favor of criminalization (or indeed any kind of legal prohibition) in some such cases. And there are cases where one person does wrongfully interfere with another in order to prevent harm to the other. And there is good reason to criminalize such interference.

But SP's focus on the implications of the fact that we have a sovereign will is also problematic, most obviously with respect to protection of those who are of moral concern but who lack a sovereign will.[39] SP implies that criminalization decisions are concerned to prevent and punish wrongful interference with the autonomous actions of only those with a sovereign will. This is clearly false for a familiar reason. There are those who lack a sovereign will whom we wish to protect from harm through the criminal law. This includes very young infants, those who have severe cognitive defects, and, most obviously, nonhuman animals ("animals", for short). Animals lack

38. JOHN STUART MILL, ON LIBERTY (Oxford University Press, 1991), at 14.

39. This is a familiar objection to moral and political theories that ground justice in capacities that are exclusive to some human beings. *See*, for a good example, Jeff McMahan's critique of John Rawls in J. MCMAHAN, *supra* note 30, at 251–254.

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a sovereign will. It is nevertheless wrong to harm them for no good reason. And it is implausible to think it wrong to prohibit purposeless cruelty to animals. HP2 can give weight to the harm that animals suffer. SP cannot.

In deciding what to criminalize, as in deciding what is morally wrong, we must attend to special features that persons have. For example, because persons are capable of setting ends for themselves, it may be wrong to impose ends on them. This helps to ground the constraint on harming some humans as a means to a greater good. Animals lack an end-setting capacity, so it is not wrong to harm them for the greater good. Suppose that I could throw one deer in front of a trolley causing it great pain, but in doing so, I would prevent five deer suffering equivalent pain. It is not wrong to throw the deer in front of the trolley. So if we substitute animals for humans in cases like *Bridge*, we do not think it wrong to harm the agent for the sake of the greater good.

But while the means principle is importantly related to capacities that are exclusively possessed by humans, that is not true of all moral principles. Animals, just like humans, are capable of suffering great pain. This constitutes a harm that is wrong to impose on animals. It is permissible to prevent others harming animals. And it is permissible to do this through the criminal law. SP wrongly supposes that *all* conduct that it is permissible to prohibit violates the sovereignty of persons, but this is false.

Furthermore, while it may be true that we *could* characterize wrongful harms to humans (or at least those humans who possess the relevant capacities) as interferences with their sovereign will, this is not the best way to characterize some of those wrongful harms. It is true that when we harm another human being, we interfere with her sovereignty. But it is less obvious that sovereignty always plays an important role in determining *why* it is wrong to harm humans. For example, if you do something that causes me great pain, you typically interfere with my sovereignty as well. But in grounding a prohibition on your conduct, is it not sufficient to appeal to the idea that suffering great pain is one kind of harm? Need we also demonstrate the important connection with sovereignty? It is difficult to see why.

Furthermore, there are harms that we may wrongfully impose on each other that are not dependent on the fact that we have a sovereign will. For example, suppose that I have a pill. If I take the pill, I will have great dreams. However, the chemical in the pill will seep into the atmosphere and you will have terrible dreams as a result. Neither of us will remember our dreams in the morning. It seems permissible to prohibit me from doing this. But why is it wrong for me to take the pill? Although it is true that we *could* describe this as a case of wrongful interference with something over which you ought to have sovereign control, it is not obvious that this is important in the explanation of the wrong that I have done. It is enough to say that I cause you to suffer for insufficient reason.

Defenders of SP criticize defenders of HP for permitting prohibitions on interference with sovereignty only on condition that harm is also prevented.

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They rightly argue that it is not plausible that prohibiting interference with sovereignty should always depend on demonstrating that harm is prevented as a result of the prohibition. Defenders of HP can, however, object in a similar way to SP. It is not plausible that prohibiting harmful conduct depends on demonstrating that the harm also amounts to an interference with sovereignty. We should conclude that neither HP nor SP is adequate.

V. CONCLUSIONS

We have seen that the fact that conduct is harmful is often sufficient reason to prohibit it. The fact that conduct interferes with sovereignty is also often sufficient reason to prohibit it. Neither harm nor interference with sovereignty is a necessary condition of permissibly prohibiting conduct. Hence neither the harm principle (in any of its guises) nor the sovereignty principle is valid. Each principle focuses on something that is important in a full account of criminal wrongdoing: harm and interference with sovereignty. Each principle is defective in failing to attend to what is right in the other.

Perhaps that should lead us to endorse a more complex principle: one that permits criminalization of conduct only on condition that the conduct is harmful, or that criminalization of the conduct would prevent harm, or that criminalization would protect people against having their sovereignty interfered with.

Some might hope to do better than this—to find a single basic moral idea that captures both the idea of harm and the idea of interference with sovereignty. I have not shown that it is impossible to find such a principle, but I have my doubts. The idea of harm and the idea of interference with sovereignty are, I suspect, two important sources of moral demand that lack a single foundation. The idea of sovereignty is grounded in the idea that autonomous moral agents are permitted to shape their lives themselves in light of those things that they come to value through the independent exercise of judgment. Interference with a person's ability to do this shows a lack of respect for the agent who has the relevant capacities necessary to do this.

The idea of harm, in contrast, is grounded in the idea that the lives of agents are capable of going well or badly *for them*. That idea is in some ways importantly related to the previous idea, at least with respect to persons. A person's life goes well in part because she achieves satisfaction through the autonomous pursuit of valuable goals. But it is also independent of the previous idea in important respects. A person is entitled to pursue valuable goals that she fixes on through her judgment even if she achieves no satisfaction through their pursuit. And the lives of persons and of those who are not persons but who are sentient can go well or badly in ways that

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are unconnected to the autonomous pursuit of valuable goals. They can go well or badly simply in virtue of the pleasure or suffering that they contain.

The criminal law is valuable in the protection that it can provide for each of these elements of a valuable life. It may protect each of them independently of the other. And this gives us good reason to believe that any valid single principle of criminalization will be more complex than either the sovereignty principle or the harm principle. It must have reference both to harm and to interference with sovereignty.

Perhaps even that more complex and comprehensive principle is invalid. For it would limit criminalization to protection of sentient beings. Only sentient beings can be harmed and only sentient beings have sovereignty. Nonsentient beings, such as flowers or things of great natural beauty, can be damaged but not harmed. Perhaps it is legitimate for the criminal law to protect the value of nonsentient beings as well as sentient beings. I am not sure. I aim here to establish something more modest: that harm and interference with sovereignty provide independent sources of legitimate criminal prohibitions.

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