

Harm: An Event-based Feinbergian Account¹

The essays in this volume are concerned with free speech on college and university campuses. This is an immensely important and timely topic. On my own view, the simplest and clearest way to consider the proper moral limits of free speech on campus is to consider the proper moral limits of any sort of actions. Put differently, we can best address this issue by determining when interference with any given activity—including speech acts—is permissible. As I argue elsewhere,² such interference is *pro tanto* permissible when there is significant harm. When one agent harms another, there is *pro tanto* reason to think interference with the first permissible. This holds on college campuses as well as anywhere else. If that is right, though, we need a clear understanding of harm. The term is used in multiple ways, but when we are speaking of it as providing a normative limit to what must be tolerated, it has—or so I shall argue—a narrow and technical definition.

In this paper, I defend an account of harm as event-based but also in the mold of the account offered by Joel Feinberg in his magnum opus, *The Moral Limits of the Criminal Law*.³ The analysis I offer is meant, that is, to be serviceable in a project like Feinberg's—that is, it is one of normative political philosophy—and, importantly here, useful for determining when speech might rightly be limited. On the account defended here, *to undergo a harm is to be the subject of an event wherein one's interests are wrongfully set back and wherein the status of the undergoing of the harm derives from its being the sort of event that it is (namely, a setting back of interests), independently of the badness of any resulting state*. When harm in this sense is

¹ This essay uses the argumentation in chapter 3 of my *Toleration and Freedom from Harm* (NY: Routledge, 2018). I am grateful to Routledge for permission to use it here. I am also grateful to Chris Surprenant and Don Downs for the invitation to recast it for this volume.

² See my 2018 and my *Toleration* (Cambridge: Polity Press, 2014).

³ The first volume is *Harm to Others* (NY: Oxford University Press, 1984).

present, there is *pro tanto* reason to interfere with the actor. In the context of this book, this is when speech might be permissibly limited. Put differently, genuinely harmful speech (where harm is understood as just specified) is the only sort of speech that can possibly be rightly limited—on campus or elsewhere.

It is important to recognize a limit in what has just been said. On one's own property, one can prevent others from speaking even if their speech acts would not, in other ordinary circumstances, be harmful. This is part and parcel of the view that only harm justifies interference for if you enter my home and start a speech I do not want made therein, you set back my interest in controlling what happens in my home—and absent my permission or some other legitimate justification, you do so wrongly. Put simply, you harm me. This may be a *de minimus* harm that we would not want police to interfere with, but it serves as a limit to what you may morally speak nonetheless. When you act in this way, I can rightly insist we have a different sort of conversation, no conversation at all, or that you leave. On my property, I have the authority to make such rules.

Some colleges, of course, are also private property. The owners (or their agents) of those colleges have the same authority to disallow particular sorts of speech. Using such authority to thus limit speech on campus, however, would be extremely unwise. Private colleges—all colleges—have, as their *raison d'être*, to facilitate discussion, enlarge knowledge, and create well rounded and fully developed human persons. To do that well, colleges must have open and honest inquiry without limits determined by topic or viewpoint. Discussion of even offensive material is part and parcel of college life. Taking part in such discussion is never wrongful and hence never harmful—and so not the sort of speech that is rightly interfered with.⁴ Of course,

⁴ I develop this argument further in my "Psychological Harm and Free Speech on Campus" (*Society* Volume 54 No 4, 2017: 320-325).

such discussion should be polite and, one hopes, friendly, but open and honest inquiry is the coin of the realm. Some may feel hurt by such discussion, but they are not *harmed* and thus do not warrant protection from said speech. To show this more clearly, I defend the account of harm specified above.

I proceed as follows. In the first, brief, section, I introduce John Stuart Mill's harm principle in order to situate harm in normative political philosophy. In section two, I introduce some preliminary distinctions that will be useful later and introduce Joel Feinberg's influential account of harm. In section three, I flesh out Feinberg's account of harm as an event-based account of harm rather than a state-based account; I continue defending that account in section four. To be clear, while the conception of harm I defend is technical and I readily admit that people use the term in a variety of ways in ordinary usage, I do not shy from using intuitions about ordinary usage to make my case.

I. The Harm Principle: Harm's Place in Normative Political Thought

A useful place to begin is John Stuart Mill's *On Liberty*.⁵ Mill's famous harm principle reads "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection ... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill, 9). This can be read as a principle of non-interference—indeed, a principle of toleration. "Mill's contention is that the only limit to toleration, the only valid reason for not tolerating a kind of behavior, is that this behavior causes harm to people other than

⁵ Mill, John Stuart. *On Liberty*. Indianapolis, IN: Hackett Publishing, 1978 (originally 1859).

those who practise it.”⁶ So long as an agent does not harm a non-consenting other, she is not to be interfered with. This does not mean that we cannot try to dissuade the agent from her actions. It means only that power—taken as force or coercion—must not be used.

The harm principle indicates when it is permissible to interfere with an individual and does so with reference to harm.⁷ It does not say “do no harm;” it indicates that one may rightfully interfere with another only when the other does harm, is about to do harm, or has done harm.⁸ In other words, it is not a (mere) prohibition of harm, but a principle that grants *pro tanto* permission to interfere when (and *only* when) harm has been, is, or will be, present. It is a normative jurisprudential principle about what justifies a response (interference, whether by state actors or others) to actions, not a principle about the moral status of those actions. This should not prevent us from seeing that harm itself is what is important.

Harm is not a value. It is, rather, a *disvalue*—a disvalue of such weight that it everywhere makes interference *pro tanto* permissible.

There are two limits built into the harm principle: (1) it forbids only force or coercion, not persuasive rational argument and (2) force or coercion are legitimate in cases where an agent

⁶ Warnock, Mary. “The Limits of Toleration” (*On Toleration*. Ed. Susan Mendus and David Edwards. Oxford: Clarendon Press, 1987: 123-40), 123.

⁷ We can understand interference to be any act that has the effect of impeding or preventing—even partially—an agent from doing as they wish, intend, or will. That is, it is hindrance or obstruction.

⁸ The Millian text concerns harm prevention rather than rectification. I nonetheless assume rectification is permissible. If we can interfere with John to stop him from going to harm Bill (e.g., getting his gun), to interrupt his harming Bill (e.g., pulling him off Bill whom he is sitting on and punching), it seems reasonable to think we can do something if he has succeeded in harming Bill. The timing of the interference seems irrelevant (within limits). Of course, who has jurisdiction is an open question. We might agree that anyone can act to prevent a harm or to stop a harm in process, but think that jurisdiction once a harm is completed is limited to the state or some specific organization.

is harming or is going to harm a non-consenting other.⁹ These limits are important; we are not prohibited from trying to dissuade others of ill-advised actions, trying to persuade them of beneficial actions, or interfering with their attempts to harm non-consenting others. Thus, one commentator tells us that although we must allow individuals to pursue their own projects, these must “meet a threshold standard of moral justification” such that, for example, those projects do not require the agent to harm others.¹⁰ It is also important, though I will leave discussion of this until later, that the fact that interference is permissible (because there is or will be harm) does not mean interference is necessary. Harm provides a necessary, not a sufficient, condition for interference.

A problem with the harm principle remains: what exactly is ‘harm’?

II. The Nature of Harm, Preliminary Distinctions, and Feinberg’s Account

What is harm? Harm, as it is used in the harm principle, is conceptually distinct from pain. No one, after all, thinks the pain caused by a strenuous workout provides warrant for interference. (Who would we interfere with?) Nor is it reasonable to seek assistance to prevent such pain. Similarly, harm is conceptually distinct from hurt. I can’t, for example, demand interference with anyone because of the hurt of stubbing my toe on my desk when I got up to go to another room. The harm principle is not about all pains or hurts.

I take it pains are often negative—consider the pain of a broken leg or a broken heart—they detract from one’s well-being. I also take it, though, that some pains are positive—again,

⁹ Linguistic behavior can be coercive, but rational persuasion cannot. One only tries to rationally persuade another if one respects the other. Still, while Mill is concerned to allow demonstrations of moral disapprobation, he is opposed to many forms of social pressure—some of which may not be coercive.

¹⁰ Selznick, Philip. “Personhood and Moral Obligation” (*New Communitarian Thinking: Persons, Virtues, Institutions, and Communities*. Ed. A. Etzioni. Charlottesville, VA: University Press of Virginia, 1995: 110-125), 125.

consider the pain one feels with a good workout—they add to one’s well-being. I take it all hurts are negative. The pain from a good workout may not be a hurt (the pain from a workout gone wrong may well be). The pain of a broken leg or a broken heart is. The difference between a pain and a hurt is that the latter is *always* a setback to (at least some of) one’s interests.¹¹ While one may want the experience that comes with a hurt or some benefit that is expected if one endures the hurt, one never wants a hurt for its own sake. By contrast, one may want a pain for its own sake. Hence, masochists.

Pains and hurts may be involved in harms, but are neither necessary nor sufficient for harm. The harm principle indicates we can justly interfere with others only when they harm another. I have no claim of justice when I suffer a pain from a tree branch on my property falling on my head. Nor do I have a claim on others to prevent my suffering a hangover if I voluntarily drink too much this evening. I can be free of such suffering by making better choices, but I cannot insist others protect me from my bad choice. These are not harms as that term is used in the harm principle. This is not to deny, of course, that we often have “moral reasons to avoid and alleviate pain,”¹² but it seems clear that those reasons are different (and I think, less morally weighty) than reasons regarding harm—for the latter but not the former necessarily involve an injustice.¹³

¹¹ Again, some, but not all, pains are hurts. The pain of a good workout is not likely a hurt. Some, but not all, hurts are pains. A financial hurt is likely a pain only if the hurt party is aware of it. If Bob acts to prevent the raise I would have otherwise unexpectedly received, he hurts me, but causes no pain. Pains must be felt; hurts do not.

¹² Shiffrin, Seana Valentine. “Harm and Its Moral Significance.” (*Legal Theory*, Volume 18, 2012: 357-398), 371.

¹³ Shiffrin seems to think this does not make wrongful hurts more weighty than hurts; she also seems to think we ought not “commit[] to the more grand idea that the sufferer has a *stake* or *interest*, in the stressed senses, in not enduring pain” (Shiffrin, 371). I do not see why we should think this a “grand” idea nor why we should not accept it. It seems clear we have interests in not suffering pains.

According to Joel Feinberg, who has done more to further our understanding of harm than anyone,¹⁴ there are two basic forms of harm. In the first, “harm is conceived as the thwarting, setting back, or defeating of an interest” where to “have an interest” is to “have a kind of stake” (1984, 33). One’s “interest,” understood as well-being, requires that one’s “interests,” understood as those things one has an interest in, are not thwarted (1984, 34). In the second sense, harm is understood normatively such that “[t]o say that A has harmed B ... is to say much the same thing as that A has wronged B, or treated him unjustly” (1984, 34).¹⁵ Feinberg claims that the “sense of ‘harm’ as that term is used in the harm principle must represent the overlap of [these two] senses ... only setbacks of interest that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense” (1984, 36). We can thus say that a harm, as we use that term in the harm principle is a *wrongful setback of interests*. (A bit more needs to be clarified, as we will see.)

It should now be clear why the pain of a tree branch on my property falling on me and that of a hangover are not sufficient, according to the harm principle, to warrant even a pro tanto reason for interference. In neither case, can I claim to have any interests *wrongly* set back, so in neither case can I claim interference is warranted on my behalf.¹⁶

Wrongs, of course, are normative; hence, given what has just been said, normativity will necessarily enter into a proper understanding of harm. One of Feinberg’s examples makes this

¹⁴ See, for example, his 1984, p. 36. Some argue against Feinberg’s understanding of harm being in Mill’s work. See Dan Jacobson’s “Mill on Liberty, Speech, and the Free Society” (*Philosophy and Public Affairs* Volume 29 #3, 2000: pp. 276-309), Dale Miller’s *J. S. Mill* (Cambridge: Polity Press, 2010), and Piers Norris Turner’s “‘Harm’ and Mill’s Harm Principle” (*Ethics* Volume 124 #2, 2014: 299-326). I put this aside as I am not interpreting Mill. (Nor am I interpreting Feinberg.)

¹⁵ Feinberg identifies a third form of harm according to which *objects* can be harmed. Breaking a window harms the window’s owner, but it can also be said that the window is harmed “in a derivative and extended sense” (1984, 32).

¹⁶ Some advocate legal requirements and/or inspections to prevent pain, but a branch may fall no matter how well maintained. Some advocate catastrophic medical insurance. Arguably, such would protect us from extreme suffering that would be a harmed state.

clear: “the person who, figuratively speaking, can be blown over by a sneeze cannot demand that other people’s vigorous but normally harmless activities be suspended by government power” (1984, 50). We would not declare that the government should interfere with sneezing even if we knew of a particular individual who could be blown over by a sneeze. The individual would certainly suffer a setback of interests: being knocked down prevents one from accomplishing the (intermediate) goal one pursues. Just as clearly, this is unfortunate. We would not, though, say the “sneezer *wronged* the person blown down.” Clearly, defining wrongs involves normative reasoning. With Dees, we can add that because “we cannot define *harm* in a value-neutral manner ... the limits of [the harm principle and] toleration will be determined by the needs of a particular context. The demands of toleration must be balanced against other values in the society that help us define what constitutes a *harm*.”¹⁷ Some take this to be a criticism. John Horton claims “there is no uncontroversial way in which such a distinction [between harmful and non-harmful actions] can be drawn and, therefore, any attempt to justify toleration which relies on such a supposedly agreed distinction is likely to be seriously defective.”¹⁸ Even more forcefully, Ben Bradley argues that the existing definitions of harm are a “mess” so “it should be replaced by other more well-behaved concepts.”¹⁹ Needless to say I think Horton and Bradley mistaken.

¹⁷ Dees, R. H. “The Justification of Tolerance” (*Values and Public Life: An Interdisciplinary Study*, ed. G. Magill and M.D. Hoff. Lanham, MD: University Press of America, 1995: 29-56), 46.

¹⁸ John Horton, “Toleration, morality and harm.” (*Aspects of Toleration: Philosophical Studies*, ed. J. Horton and S. Mendus. London, England: Methuen, 1985: 113-135), 114.

¹⁹ Ben Bradley “Doing Away with Harm” (*Philosophy and Phenomenological Research* Volume 85 #2, September 2012: 390-412), 391. Bradley’s treatment of Feinberg’s definition is unsatisfying. In a footnote, he writes that “Like Feinberg,” he is not concerned with the “alleged sense of ‘harm’ where “x harms y iff x wrongs y” (395, footnote 10). This, though, is only one sense of harm that Feinberg discusses (1984, 34-35) and he claims the relevant sense—the sense he is emphatically *most interested in*—is the sense that is the overlap of this with the sense of harm wherein it is a setback of interests. (It may be that Bradley meant “Unlike Feinberg,” but this is not clear.)

Horton claims that “the cogency of the liberal’s position will depend upon the plausibility of an uncontroversial conception of harm” (1985, 116). His concern, though, is not with the *conception* of harm but with its extension. He cites J. R. Lucas as indicating paradigm cases of harm and argues that even these may sometimes be controversial (Horton 1985, 118). This, though, is not a fatal flaw, for surely there are paradigmatic instances of harm even if there may be other instances of the same sort of thing that would not uncontroversially count as harms; that is, there are uncontroversial tokens, if not uncontroversial types, of harms. There is no reason, then, not to accept that there is a normative component to harm and that this component affects whether tokens are considered harms. This means only that we will inevitably face some indeterminacy of scope regarding harm and thus that “the boundaries of tolerance are indeterminate.”²⁰ We can, nonetheless, use the harm principle as a normative principle of toleration. I do so here, not merely recognizing, but *embracing* the remaining indeterminacy.

Lest it be thought that the indeterminacy here is a drawback, I should make clear why I think it an advantage and embrace it. I believe that indeterminacy is precisely what pushes us to do the right sort of normative work that is required before determining if interference with another is permissible. Given the existence of uncontroversial tokens of harm (and lacks of harm), my Feinbergian account nicely tells us to use those to help in reasoning analogically (as one would expect in juridical situations) about cases that are controversial. It allows us to separate easy and hard cases and pushes us to do the difficult normative work in the latter before concluding that a harm is present and interference permissible. Consider that if you hear that Joe killed Nancy, you might be inclined to think state interference with Joe warranted. If you then hear that the reason Joe killed Nancy was because she was trying to kill him, you might—as I

²⁰ Scanlon, T.M. “The Difficulty of Tolerance” (*Toleration: An Elusive Virtue*, Ed. David Heyd. Princeton, NJ: Princeton University Press, 1996: 226-39), 236.

would—conclude that no interference was warranted. What looks to be a case of homicide turns out to be a case of self-defense. Of course, there will be harder cases, but that will be true no matter what one's theory.

The above discussion concerns primarily the indeterminacy of the wrongfulness element of harm, but much the same can also be said about the second element: the setback to interests. It is often clear when there is a setback to interests. If Nancy stabs Joe, she sets back his interests in bodily integrity, not bleeding, etc. If Miles steals Rachael's computer, he sets back her interests in controlling her property, being able to work, etc. There are times, though, where it will not be clear. In particular, cases where one agent refuses to help another. Imagine Sue is drowning in a lake and I am on a boat going toward her and thus able to forward her interests by saving her. Do I set back her interests if I turn away? Many believe I do, but others point out that her interests are set back *before I came on the scene*—so *I do nothing at all to her* if I turn away. Failing to promote her interests is not the same as setting them back. This is the baseline problem: if we are asking whether interests are set back, we need to know where they are first. Some insist that the zero line must be (something like) the statistical norm. If that is right, the normal baseline for Sue is presumably one where she is not in danger of drowning, but is on firm ground—in which case, my refusal to help counts as a setback to her interests, keeping them below the zero line. On my view, though, we must take agents *as they are*, not as we wish they would be. If that is right, the appropriate baseline in cases like this is the point at which the other is *when I happen upon them*. Sue's interests are already set back, so I do not set them back by refusing to help. I hence do not harm her.

I must stress here that it will not be a problem for my basic view if my response to the baseline problem is disputed. This too will count as a form of indeterminacy in hard cases that makes it necessary for us to engage in juridical reasoning to determine if a harm is present. I should also note that I agree it would be *wrong* to leave Sue drowning. But wrongs are not sufficient for harms.

As should be clear, I take Feinberg's account of harm to be basically right. There is indeterminacy of both wrongfulness and the concept of setting back of interests, but these simply allow us to know where further moral reasoning is needed. Nonetheless, further elaboration is needed in light of recent debates in the literature.

III. Feinbergian Harm as an Event-Based Account

Much of the contemporary debate about the nature of harm, in particular whether it is state-based or event-based, comes down to debates about which sort of account best handles possible cases. Theorists give counterexamples to particular forms of each theory and other theorists give responses to those counterexamples. It's not clear what other sort of defense would be possible. Nonetheless, we can take some comfort here in that, as used in the harm principle, what we speak of when we speak of harms are best thought of as events. We can see this by recognizing that what is at issue is the possibility of rightful intervention.

Imagine that Harold surreptitiously stole five dollars from Bill in order to benefit Bill by preventing him from buying a drink that Harold knows would make Bill extremely sick. Despite the good intentions, we would be justified in interfering with Harold's theft if we were to witness it (or in condemning him afterward). We might, all things considered, not suggest punishment for Harold, but only because, though he does harm Bill, it is a *de minimus* harm. If this is right,

it cannot be the ending state of affairs that matters. That state of affairs is, by hypothesis, good—Bill is not made sick. He is better off after the theft than he would have been had it not occurred—for then he would have bought the drink that would make him sick. This suggests that the harm is *independent of the final state of affairs*. It is an event.

Consider a slightly different case. If you have less money than you did a year ago, you are less well-off now. You are in a worse condition or state than you were. This is true regardless of how you came to be in this state. While we can reasonably say you are in a hurt state, on the Feinbergian account I am offering, we cannot say you are in a harmed state unless your condition is due to a wrong done you.²¹ If you have less money because of a wrong done to you, we can reasonably say you were in a harmed state, by which we mean *you were harmed and as a result are worse off*. It is the fact that you *suffered a harm event* that is relevant for the harm principle or the tasks Mill, Feinberg, or I, use the term.

Consider the financial example again. You have less money now than you did last year. Whether there is any moral or legal concern here depends on *why* it is you have less now. If, for example, you have less money because you chose to use 90% of your savings to buy a car (with rapid depreciation of its value), you are not in a harmed state. If, by contrast, you have less now because I stole your money, you are. When we say I harm you by stealing your money, it is *not* explained by the fact that you have less after the stealing. It is explained by that and the fact that *you have less because you were wronged*. How you got to the condition, in another words, matters for the analysis of the condition. The event causing the reduction in your financial well-being is fundamental.

²¹ Feinberg speaks of harmed and harmful states. He notes “the idea of a harmed condition seems more fundamental conceptually than an act of harming, since one must mention harm in the explanation of what it is for one person to harm another, whereas one can hope to analyze the idea of harm (harmed condition) without mentioning causally contributory actions” (1984, 31). As should be clear, I think this mistaken. Moreover, I doubt Feinberg is committed to it; the passage is very early in Feinberg’s four volume work.

Consider Bill's drink again. If Alan is the purveyor of the drink Bill would buy, Alan may do no wrong to Bill in the process of selling him the drink. He could believe the drink is healthy, that Bill will love it, and that he is merely engaged in an honest and fully ethical trade. Alan does no wrong to Bill, but (absent Harold's interference) Bill is made worse off. If harms were determined by the final state of affairs, we would say that Alan harms Bill. But we would not say that. We would not think any interference with Alan's selling of this drink was warranted. If this is not clear, imagine that there genuinely is nothing wrong with the drink and that it is healthy for 99.99% of those who consume it and that they also consider it delicious. Again, harms are independent of the states that someone might be in after they occur.

If this is not clear, consider a parallel: *falling* without hitting the ground. When this occurs, we do not refrain from saying there was a fall just because the end state is not one of hitting the ground. We say there was a fall, but that the agent recovered in time to steady herself without hitting the ground. The *falling* is independent of the end state. In the same way, harming is independent of the states that result from the harms. It's not the end state that matters. What matters, in the language we been using above, is simply whether or not the action that one takes wrongfully sets back the interests of the other. Setting back the interests of the other, wrongfully or not, is an action. When we say "Joe harms Fred," we use the word "harm" as a verb. The harm is an action or event. It takes time. It is not a state.

Because the harm is an event and not a state, one's interests might be set back while also being forwarded; this would count as a harm regardless of the state one ends in. To see this, imagine I am surreptitiously taking \$1 per day from your bank account. This would be an event wherein I wrongfully set back your interest in your property and in controlling your property. Now imagine that unbeknownst to both of us, Warren Buffett is simultaneously depositing \$100

per day into your bank account. After a week, I have taken \$7 and he has added \$700. You end with \$693 more than you started. It's still the case that I harmed you. That Buffett benefitted you far more than I harmed you does not mean I did not harm you. I take it all would recognize that my action is morally culpable and, indeed, that interference meant to rectify the harm I have done, is at least *pro tanto* permitted though you are already better off.²²

Despite what I have just said, most recent writers about harm have considered it to be a state. For these thinkers, *the activity* of harming is defined by the resulting state. They would point out that we say things like "Joe causes a harm to Fred," using the term as a noun, and perhaps less colloquially, "Joe causes Fred to be in a harmed state," turning it into an adjective. Consideration of the different parts of speech will not be of much help here. We are looking to determine the best conceptual analysis of harm.

My view takes a lesson from Matthew Hanser's defense of harms as fundamentally events rather than states.²³ There are two basic components of Hanser's view. First, "It holds that to undergo a harm (or benefit) is to be the subject of an event whose status as the undergoing of a harm (or benefit) derives from its being the sort of event that it is, independently of the badness (or goodness) of any resulting state" (2008, 440). This is the formal component of Hanser's understanding of harm. It leaves open the question "what sort of event?" His answer to that question is in the second, tripartite, component of his view:

²² To be clear, this is not because of a counterfactual analysis. It's not that absent Buffet's contribution you would be worse off. It's rather that what I am doing is setting back your interests even though your interests are overall forwarded at the end of the week.

²³ See Matthew Hanser's "The Metaphysics of Harm" (*Philosophy and Phenomenological Research* Vol. 77, 2008, 421-450). See also Judith Jarvis Thomson's "More on the Metaphysics of Harm" (*Philosophy and Phenomenological Research* Vol. 82, 2011, 436-458) for an argument against Hanser and, finally, Hanser's defense ("Still More on the Metaphysics of Harm," same volume, 459-469).

- (i) Someone suffers a level-1 harm with respect to a certain basic good if and only if he loses some quantity of that good. Someone receives a level-1 benefit with respect to a certain basic good if and only if he acquires some quantity of that good (441).
- (ii) Someone suffers a level-($n + 1$) harm with respect to a certain basic good if and only if he is prevented from receiving a level- n benefit with respect to that good. Someone receives a level-($n+1$) benefit with respect to a certain basic good if and only if he is prevented from suffering a level- n harm with respect to that good. ...
- (iii) Someone suffers a harm if and only if he suffers a harm of some level with respect to some basic good. Someone receives a benefit if and only if he receives a benefit of some level with respect to some basic good (442).

Simplifying, a person suffers a harm if she loses a basic good or is prevented from receiving that good. It is not that the harm is the having less of the good in question, which is the likely state after being harmed. Rather, *the losing of the good* is itself the harm.

Hanser's account has much to recommend it, but it cannot on its own serve the need of the harm principle. Consider that if I am at home in my house, playing with matches on top of a stack of dollar bills and they catch fire, I lose a good. This seems to be a harm on Hanser's account. If it is what is at stake in the harm principle, interference would be called for. Yet interference is not called for.²⁴ Consider another case: you and I are at my home and I ask if you would like to see a magic trick. You agree and I ask for a one dollar bill. You agree (perhaps, though, you only have a \$20 bill or a \$100 bill). I ask you to mark the bill and then I proceed to light it on fire. You gasp, but when it is completely burned, I go to pull the bill—with the same marking—from behind your ear, expecting you to be impressed with my magic. But instead, I pull out a piece of tissue. Here I have not wronged you, but I have caused you to lose a dollar (a basic good, let us assume). On Hanser's account, I have harmed you and interference is warranted. On my view, that is mistaken as you were a willing participant.

²⁴ On my account, that is because there is no wrongfulness and hence no harm. Properly speaking, on my view, I hurt myself but do not harm myself. Absent that distinction—and it is absent from Hanser's definition—the harm principle would seem to indicate interference is permissible unless self-harm is ruled out on an ad hoc basis.

To be clear: Hanser's account is purely descriptive and we need the normative element for the harm principle. Hence, rather than discuss Hanser's account further, I propose a synthesis of the first component of Hanser's definition with Feinberg's definition. On this account, *to undergo a harm is to be the subject of an event wherein one's interests are wrongfully set back and wherein the status of the undergoing of the harm derives from its being the sort of event that it is (namely, a setting back of interests), independently of the badness of any resulting state.* We could add that "someone suffers a level-1 harm with respect to a certain basic good if and only if he loses some quantity of that good" due to a wrong done him and that "someone suffers a level- $(n + 1)$ harm with respect to a certain basic good if and only if he is [wrongfully] prevented from receiving a level- n benefit with respect to that good." The italicized, though, will do the work we need. To be clear, on this account, harms are not symmetrical with benefits;²⁵ hurts (i.e., setbacks to interests) and benefits are symmetrical.

IV. More on Feinbergian Harm as Event-Based

I take it the account of harm just explicated accommodates all of the cases in which we believe the harm principle applies. Consider the following cases:

Murder: Nancy kills Bill, unjustifiably setting back his interest in continued living

Theft: Nancy takes the cash from Bill's wallet (or digitally empties his bank account), unjustifiably setting back his interest in controlling his money

In these cases, there is a harm because there is an event wherein the subject's interests are

²⁵ It's true that "familiar accounts portray harms and benefits as symmetrical" (Shiffrin 2012, 358), but such accounts work with harms as purely descriptive rather than normative. Shiffrin claims this is the dominant picture (366), but I am not sure it is. She seems to think Feinberg accepts it, saying that on his interpretation "One is harmed if one's overall interest has been set back, and benefited if it is advanced," but it's clear that this refers only to one sense of the term he considers, while it's the overlap of that and wrongfulness (the other sense) that he takes to be relevant to the harm principle. Shiffrin recognizes this in her footnote 22, but follows Feinberg in his unnecessarily narrow concern solely with legally criminal harm.

wrongfully (or unjustifiably) set back. Of course, there could be similar cases that had no harms. I consider two in a moment, but first, it is worth considering *Murder* further. Some worry that dying cannot be a harm because it does not result in a bad state. With Michael Rabenberg, I think that worry is misguided. He writes “if we do exist at the moments of our deaths, then I see no barrier to calling death a historical worsening – a crash to axiological absolute zero, as it were.”²⁶ That seems basically right though I would say it is a “historical setting back of my interests to axiological absolute zero.” I would also, though, only call it a harm if the dying is caused by wrongful actions. The dying itself is an event, but what sort of event it is will depend on various factors. If I die because I am 102 and have not been able to eat or drink, my interests may be set back but non-wrongfully—hence, my dying would not be harm. But *Murder* is not like that.²⁷

Now let us consider two cases that are importantly related to yet different from *Murder* and *Theft*.

Euthanasia: Jill kills Frank, because he rationally requested it to avoid further pain and suffering from a condition that could not be cured.

Repayment: Jill takes the cash from Frank’s wallet (or digitally from his bank account), per their prior agreement, as a means of collecting what he owes her.

In both pairs of cases, we get the conclusions we would expect: murder and theft are harms; euthanasia and repayment are not. In *Euthanasia*, arguably, there is no wrong and no setback of interests. In *Repayment*, there may be a setback of interests (Frank would rather keep the money), but there is no wrong.

It’s worth considering two more sorts of cases:

²⁶ Rabenberg, Michael. “Harm” (*Journal of Ethics and Social Philosophy*, Volume 8, 2015:1-32), 22.

²⁷ If I am murdered, my interests are wrongfully set back. It's true, I think, that once dead, I am not in a harmed condition. But the ante-mortem me was/is harmed. This is Feinberg's answer to the quandary; I accept it.

Rape: Bill rapes Nancy, unjustifiably setting back her interests in controlling her body, choosing who can touch her, etc.

Trespass: Bill trespasses on Nancy's property (perhaps leaving nothing disturbed), unjustifiably setting back her interests in controlling who enters (sees, uses, etc.) her property.

In these cases, there is a harm because there is an event wherein the subject's interests are wrongfully (or unjustifiably) set back. Now compare these two:

Sex: Jill has intercourse with a sleeping Frank, per their previous agreement

Visit: Per their previous agreement, Jill enters Frank's property and takes a nap before he returns home, when they will start their vacation together.

In *Sex* and *Visit*, there may be interests set back (Frank generally prefers not to have someone nap in his house when he is not present, etc.) but there are no harms.

The last four examples (*Rape*, *Sex*, *Trespass*, *Visit*) are useful for us as so-called "harmless trespass" cases seem to confound a variety of thinkers. A.P. Simester and Andrew von Hirsch,²⁸ for example, discuss Feinberg's answer (see his 1984, 107) and claim it "tends to collapse the distinction between harms and wrongs, since individuals can always be said to have an interest in not being wronged." They go on to insist that the "very reason bare trespass is a difficult case is that the wrongdoer's action violates the landowner's right but causes no harm" (284). But Nancy's interest in *Trespass* is not an interest in not being harmed, nor an interest in not being wronged—it is an interest in not having others enter her property without her consent, wrongfully or not. Consider that Bill would enter Nancy's property innocently if he did so solely to save the life of Nancy's dog, who, he could see through the window was stuck inside in the burning home. In that case, Nancy may still have her interest set back (as might Frank in *Visit*),

²⁸ Simester, A.P. and Andrew von Hirsch, "Rethinking the Offense Principle" (*Legal Theory*, Volume 8, 2002: 269-295). See also Tadros Victor Tadros' "Harm, Sovereignty, and Prohibition" (*Legal Theory*, Volume 17, 2011: 36-65), 46 ff and James Edwards' "Harm Principles" (*Legal Theory*, Volume 20, 2014: 253-28), 272, for better views about this (and so-called "pure" rape).

but not wrongfully. By contrast, if he entered her home to smell all of the rooms, and then left—never having her permission to enter—the fact that he causes no damage to the home is simply irrelevant; he has wrongfully set back her interest in controlling who enters her home.²⁹

Consider also that taking Simester and Hirsch’s line leads them to conclude that rape need not be a harm, though they agree it is a wrong that should be criminal.³⁰ The idea here is that as with so-called harmless trespass, there could be (so-called) harmless rape.

Consider that if Jackson entered your home while you were away and without your permission but leaves everything exactly as it was before you left, you would not be aware that he was ever present and would not suffer as a consequence of his trespass. He did not take anything of yours or dirty anything—indeed, he left it *exactly* as it was. His trespass is supposedly harmless, even if wrongful. Now consider a parallel instance of rape. Imagine that the rape victim is completely unaware of the rape—both during and after, perhaps through hypnosis or the use of some nefarious drug (and assume the rapist left his victim exactly as he found her). As she is unaware of the incident and has no remaining physical duress, she is not—on this mistaken view—harmed (though she would be wronged).

The idea that rape could fail to be a harm seems to me both conceptually mistaken and morally unacceptable. In normal parlance, I think the linguistic intuition is very clear: any instance of nonconsensual sex is a harm. In terms I am using, it would be a wrongful setback of at least the victim’s interests in bodily integrity and personal autonomy. While certain cases of

²⁹ Some may worry that this allows for too much interference since anytime P has even a slight interest it could be wrongfully set back. I am not sympathetic to this concern. It’s important that the harm principle provides only a necessary and not a sufficient condition for interference. *De minimis* harms are not likely such that there should be interference but that need not lead us to think they are not harms. Indeed, interference in the form of a prohibition regarding a type of *de minimis* harm designed to prevent their frequent occurrence may well be justifiable even if punishment for causing a specific token of that harm is not.

³⁰ Simester, A.P. and Andrew von Hirsch, “Remote Harms and Non-constitutive Crimes” (*Criminal Justice Ethics*, Volume 28, 2009: 89-107), 104. See also John Gardner and Stephen Shute, “The Wrongfulness of Rape” (in *Oxford Essays in Jurisprudence*, 4th series, 2000, J. Horder, ed.: 193-217), 196.

rape may be completely undetected, they are nonetheless not only wrongful and punishable, but also harmful. Part of the problem is that Simester and Hirsch have a state-based account of harm and since there is no bad state after the supposedly harmless act, there seems to be no harm (see their 2002, 280-281). On my Feinbergian event-based account, by contrast, we get the proper conclusion that rape and trespass are always harmful. What distinguishes so-called “harmless trespass” cases from *Visit*, on this account, is that in the former but not the latter, there is a wrong (in addition to an event that is a setting back of the interest in controlling who enters one’s property and when—which may or may not be present).

On my account, “harmless trespass” is impossible—it would be a “harmless harm.” Similarly, what distinguishes so-called “harmless rape” from *Sex* is that in the former but not the latter, there is a wrong (in addition to an event that is a setting back of the interest in controlling who enters one’s body, who can touch it, etc). “Harmless rape” is impossible—it too would be a “harmless harm.” (Violent rape includes harms in addition to those present in so-called “harmless rape” cases.)

In none of these cases, are the harms involved states or conditions, though there are *harmed states*—states wherein one *has been harmed* and has not yet recovered. The harms themselves are the events: Nancy’s murdering Bill, Nancy’s stealing from Bill, Bill’s raping of Nancy, Bill’s trespassing in Nancy’s home. In all of these events, there is a wrongful setting back of the other’s interests.

Some may question what I have said above, indicating that when they talk of “harmless trespass” or “harmless rape,” they do not mean to belittle the wrongfulness of the acts in question, but adding that it makes little sense to call such things harms as they are not *experienced* and harms must be experienced. I think this is straightforwardly misguided.

“Harmless trespass” may not result in the homeowner experiencing any physical harm, but there are other sorts of harms, including psychological harms. If Nancy finds out that Bill trespassed on her property a week after the fact, she may rightfully feel distressed and violated—and this setback to her interest in mental calm would have been wrongfully brought about by Bill’s act. One might say “OK, but then she is experiencing the harm.” Still, if we ask when the harm occurs, it seems clear to me (ignoring the debate in action theory) that the event occurs when Bill trespasses, not when Nancy finds out—i.e., not when it is experienced. Indeed, it seems reasonable to say that an *additional* harm occurs when she finds out. The first harm is the setback to Nancy’s interest in controlling who enters (sees, uses, etc.) her property; the second harm is the setback to her interest in mental calm. The first harm may, I should note, go forever undetected. (Remember that some harms will not be sufficient for interference.)

As a final response to the worry that one cannot suffer a harm without experiencing it, I should note that this is entirely obvious in other sorts of cases. Consider, for example, that if Lou has kidnapped Gary and thoroughly anesthetized Gary’s leg—imagine Gary seated, unable to see his legs, and unaware that they have been anesthetized—Lou or his accomplice might stab Gary’s leg without Gary knowing it. He would be harmed nonetheless. Perhaps they even show Gary a monitor with the action occurring, but tell him this is someone else’s leg. He might cringe when he sees it and cry out “why are you doing that?” All without knowing it is his leg. The harm to him is still clear.³¹

³¹ (a) Hanser agrees (2008, 421). So does Thomson (2011, 436-7). (b) I may be eliding awareness and experience. My intuition—admittedly uncertain—is that Gary does not experience the stabbing. I tend to think one must be aware of X in order to experience X, but that one need not experience X in order to be aware of X.

Let's now consider the understanding of harm I am discussing against some problematic examples from the literature. The understanding of harm, again, is that *to undergo a harm is to be the subject of an event wherein one's interests are wrongfully set back and wherein the status of the undergoing of the harm derives from its being the sort of event that it is (namely, a setting back of interests), independently of the badness of any resulting state.*

Consider Thomson's example of *Gene-paraplegia*, wherein an individual is "genetically programmed to be paraplegic by about age 10" (2011, 446). We could ask if Jean, the agent with gene-paraplegia, is in a harmed state and we can ask if she has been harmed. Imagine that before her conception, Jean's potential parents have been told that if they conceive a child within the next month, it will be born with gene-paraplegia and that they then ask themselves if they should try to have such a child. They agree that they should, agreeing that it would be fun to have a child that they could tease about becoming paraplegic and that they could then torment as a paraplegic. As I described the case, it seems that these potential parents act wrongfully, but there is no subject of the event that has interests to be setback as a result of the gene-paraplegia until after the child is conceived.³² As such, Jean is not harmed by the act of conception and so is not in a harmed state, though she is in a state that will cause her difficulty. Of course, should her parents carry through with their horrible plans for (what they consider) parenting, they would be harming the child, but that is a separate issue.

Now consider *gene-paraplegia* with different, kinder, potential parents. These parents agree that it would be better if they could have a child without gene-paraplegia, but for other

³² Obviously, my account has implications for discussions of abortion—some abortions will be harms and some not. Whether any are harms to the potential child is an interesting question. In cases like gene-paraplegia, where there is an issue of wrongful life, it may be that the child has interests set back by the wrongful event that occurs before their birth. This may parallel Feinberg's discussion of anti-mortem harm. Call it *ante-vitam* harm.

reasons, that is impossible. They seek to have a child to shower with love, knowing that their offspring will have significant difficulty after it is ten years old and becomes a paraplegic. Here, I think, there is no wrong—I won't try to defend that here—and there is, again, no subject with interests to be setback until after conception. The child is born, loved, and cared for. Perhaps these parents are research scientists and they use the 10 years looking for a cure to paraplegia. They do no harm done to Jean; she is not put into a harmed state.

Some may think that intuitively, Jean is in a harmed state, but I see no benefit to saying that instead of simply saying, what seems more straightforward, that Jean is in an unfortunate state or that she would be better off if she were her without gene-paraplegia. In any case, we must remember that what matters is whether interference with the parents would be *pro tanto* permissible according to the harm principle. I think it clear that it would not. (Those that might think interference with them is permissible are more likely to seek support in some form of legal moralism.)

Consider now *dim vision*:

Suppose villain C threw acid in A's eyes, to cause him to be blind. The acid began to affect A's eyes, but before it could complete the process of blinding A, bystander B intervened—he used a neutralizer on A's eyes, thereby causing A to be in a state short of blindness, namely [A] 'has dim vision'. We must surely accept that each of C and B caused A to be in 'has dim vision', and yet that C harmed A but B did not (Thomson 2011, 447-448)

Thomson correctly notes that while we would say that C harmed A, we would not say that B did so, even though both C and B caused A to have dim vision. On the account offered here, this is because whereas both B and C contribute to how the event resulting in dim vision unfolds, only C wronged A and only C acted in a way that brought about the event that set back A's interests in her vision. (B did no wrong and acted in a way to end that event.) Again, the real question here is whether interference is *pro tanto* permissible according to the harm principle and it seems

clear that interference with C would be and interference with B would not. (We might think B should be rewarded!)

It's worth considering that when the child in *gene-paraplegia* turns six years old, they will still have gene-paraplegia—that is, they will be in a state that will result in their being paraplegic in four years. Similarly, six years after the event, A in *dim vision* will have dim vision. In neither case, though, are the relevant parties now suffering a harm. In the first case, there was no harm; in the second case, there was. In both cases, though, the event is in the past. Despite Thomson's protestation to the contrary (2011, 456) this seems entirely right. A was harmed when C threw acid at her. A now has dim vision as a result of that harm, but she is not now being harmed or suffering a harm. Of course, she may be in what we call a *harmed state*—i.e., a state wherein she has not yet recovered from the harm—that likely depends on the seriousness, degree, and intensity of the harm as well as factors about A's life.³³ She likely suffers more if she were an art critic, for example, than if she was a singer.³⁴ Thomson seems to think A is still suffering the harm (2011, 456), but suffering the results of the harm and suffering the harm are clearly distinct. (Moreover, it seems plausible to say both are events rather than states.)

Consider now a rescue case.

Revive: Rebecca gives CPR to unconscious Randy, saving his life, but in the process breaking one of his ribs.

I take it as obvious that in the normal variation of this story, Rebecca does not harm Randy even though what she does results in his having a broken rib. That is, there is no cause for interference with Rebecca according to the harm principle. She *hurts* him, but does so in the

³³ When the harms take place is clear in these cases, but admittedly less clear in other cases.

³⁴ Cf. Hanser's response in 2011 at 466-467.

process of saving his life—neither setting back his (overall) interests nor wronging him.

Sometimes, one hurts another in the process of helping them.³⁵ There is no reason to think of that hurt as a harm. Of course, the judgment may be different if Randy was known to have a *do not resuscitate* order; there it may well be that Rebecca wrongfully set back his interests.

Michael Rabenberg provides a more troublesome rescue (or quasi-rescue) case:

Broken Arm. Jim breaks my arm, but if Jim had not broken my arm, then Joe would have torn it off at the exact same time (Rabenberg 2015, 10).

Rabenberg thinks it is absurd to say that in this case I was benefited. He claims “My arm’s getting broken is an instance of my getting harmed in Broken Arm, even if I ought to be somewhat glad that I am harmed in Broken Arm as I am” since having one’s arm torn off is far worse than having one’s arm broken (Rabenberg 2015, 10). This is somewhat unclear to me and depends, I think, on why Jim breaks my arm. Rabenberg provides this as an example of preemptive harm in the course of discussing the counterfactual view of harm (a state-based view of harm). If Jim breaks my arm at my request because we know that Joe will otherwise tear it off, I am inclined to think Jim does not wrong me and so, on my account, does not harm me (or, if I am harmed, it’s by Joe, whose threat resulted in my arm being broken). Of course, if Jim breaks my arm maliciously, he at least wrongs me. Indeed, in that case, I think he harms me—he may not set my interests back as much as Joe otherwise would, but that has no bearing on my account since my account is event-based and not a state-based counterfactual account. (On a counterfactual state-based account, because I would be worse off if Jim did not break my arm, we cannot say he harms me.) Here, I think my account aligns with common sense; interference with Jim is permissible.

Consider another case from Rabenberg:

³⁵ Similarly, one may harm another in one way while benefiting them overall.

Sniffles. Bob is sick with a cold. He will get well today unless I increase the temperature in the room by a few degrees, for in so doing I will prevent the cold germs in his body from dying for another day. I do so. However, it is not the case that, as a result of my action, Bob's cold germs get stronger or that his cold gets worse (Rabenberg 2015, 18).

Rabenberg thinks that intuitively, I harm Bob. My account gives that result. One might think that what happens in Sniffles is that I *fail to harm* despite trying to. Certainly, If Bob got better despite my wrongful act, we would say I tried, but failed, to harm him. But Bob did not get better and his not getting better was due to my wrongful action. What we should say here, I think, is that I wrongfully set back Bob's interest in recovering quickly. This might be less of a setback to his interests than if I had managed to make him worse off (making the cold last longer or worsening the symptoms Bob manifests), but it is a setback nonetheless.

Finally, consider preventative harms, with an example from Seanna Shiffrin, similar to my drowning Sue case but with an additional party involved:

Suppose I am drowning, Harry is about to save me, and you obstruct him. There I remain, drowning. I am not left in any worse a position than I was before, but still, I have been harmed by your action (Shiffrin 2012, 368).

If I do not harm Sue when I decide to turn away from her, can you be doing harm here, as Shiffrin thinks? Had you merely decided not to help, you would not do her harm because you would not do anything to her. Shiffrin disagrees (see 369). This case, though, is different: you do something and arguably, do it to Shiffrin (in the example). If that is right, we can say you harm her: you wrongfully set back her interest in being saved by Harry. This is in agreement with Shiffrin's claim that "If efforts to remove me from harm are stymied, I think it is fair to say that I am harmed by the obstructions even if I am not made any worse off than I was" (368-369). The state she finds herself in after the obstruction may be no different than the state she was in before it, but there was nonetheless an event wherein her interests were set back. This is contingent, though, on the event being a wrong to her—as seems likely when you prevent Harry

from saving her. (If Harry is prevented from saving her because he responds to Lucy's honest call for help in a nearer emergency, there would be no wrong and hence no harm. If you prevent Harry from saving her but do so without realizing she is in danger—you wish only to obstruct Harry from swimming, say—there would be a wrong, but not to Shiffrin. In this case, you harm Harry but not Shiffrin—alternatively, we might say you inadvertently cause Shiffrin a harm since you should have seen that she was in danger.)

Consider how our event based account handles these cases. On Hanser's view, preventative harms are derivative of ordinary harms, which are losses of some quantity of a basic good. When someone prevents you from gaining some quantity of that good, they derivatively cause you not to have the quantity of good in question and we say that person causes you a preventative harm (see, Hanser 2008, 240-241). On the Feinbergian event-based account, things are similar: when Harry interferes with your saving Shiffrin, he sets back her interest in your saving her. When Harry does this wrongfully, he harms Shiffrin.

Advantage: Feinbergian event-based account of harm.

By repeatedly hearkening back to John Stuart Mill's harm principle, I have shown that *to undergo a harm is to be the subject of an event wherein one's interests are wrongfully set back and wherein the status of the undergoing of the harm derives from its being the sort of event that it is (namely, a setting back of interests), independently of the badness of any resulting state.*

This is a Feinbergian event-based account that seems to have advantages over Hanser's initial event-based accounts as well as state-based accounts.

While individuals can be harmed by speech—slander and libel are likely events that cause their victims to be subjects whose interests are wrongfully set back regardless of any

resulting state (perhaps the victim is made more famous and wealthy by the attention after being harmed by the slander)—speech on college and university campuses that cause students to think, even if they are offended, is not harmful.³⁶ It may set back a student's interest in maintaining psychological comfort, but it does not do so wrongfully. It thus must be permitted.

³⁶ Of course, students can be slandered or libeled and I would not deny that there are other ways students might be harmed on a college campus by speech acts. This is not what occurs, though, with academic discourse, no matter how unsettling or offensive it might be.