

# Andrew Jason Cohen Pre-Published “Response to Emily Crookston and David Kelley”

Response to Emily M. Crookston and David Kelley

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## 1. Introduction

To begin, I must express my gratitude to both Emily Crookston and David Kelley for their excellent commentaries on my book.<sup>1</sup> Non-academics often don’t understand this, but it is always an honor to have colleagues criticize one’s work. I am honored.<sup>2</sup> I hope my replies here do justice to their concerns.

Crookston begins her commentary by noting that *Toleration*<sup>3</sup> would have been better with answers to “the following three questions: (1) Why is the harm principle the right principle upon which to base a theory of toleration? (2) How is Cohen thinking of the concept of *volenti*? (p. x) Is interference (i.e., the abandonment of toleration) ever morally required by the harm principle?” (p. x). She is right, and I address these questions below in Sections 2, 3, and 4.

Responding to Crookston’s questions takes up the bulk of this essay. While she and Kelley both offered compliments and encouragement for further thought, Crookston’s direct questions demanded substantial responses. By happy contrast, my response to Kelley can be briefer. This is at least partly because I agree with much of what he says, and the way he frames

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<sup>1</sup> Emily Crookston, “Comments on Andrew Jason Cohen’s *Toleration*,” *Reason Papers* 38, no. 2 (Winter 2016), pp. x-xx; David Kelley, “Comments on *Toleration*, by Andrew Jason Cohen,” *Reason Papers* 38, no. 2 (Winter 2016), pp. xx-xx. Hereafter, all citations to these articles will be parenthetical in the text.

<sup>2</sup> I am also grateful to Shawn Klein and Jen Baker for asking me to participate in an author-meets-critics section at the 2016 Central Division American Philosophical Association and to Shawn and Carrie-Ann Biondi for asking Emily and David to write up their commentaries and for allowing me to reply. Again, it is an honor. Finally, I appreciate useful feedback from Daniel Shapiro, who read a draft of my replies.

<sup>3</sup> Andrew Jason Cohen, *Toleration* (Cambridge, UK: Polity Press, 2014).

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the three issues he raises leaves me pleased that the book was so well understood (by both he and Crookston). His three issues have to do with “the link between toleration and relativism,” the way I distinguish “the concepts of toleration and endurance,” and a “question about moral toleration” (p. x). Despite much agreement, there are points of contention and I try to make my position clearer by responding below to Kelley in Sections 6, 7, and 8.

### **2. Why Is the Harm Principle the Right Principle?**

Regarding Crookston’s first question, it’s important that “there is no denying the intuitive force of harm or a threat of harm as a reason to interfere with the actions of others” (p. x). This means defense of that claim is not what is at issue. What is at issue is showing that *only* harm or threat of harm is a reason to interfere. Perhaps more importantly, Crookston is right that my view will leave us tolerating immoral behavior (p. x). She likely thinks that this implication is more problematic than I do. I think there are all sorts of immoral behaviors we ought to tolerate. For one simple example, I think it is immoral for individuals to waste their lives (perhaps by abusing drugs every day or spending their lives counting blades of grass instead of being productive), but I think we must tolerate such behavior unless it harms another.

Crookston’s concern with my example of Floating Flo is fair and common, but absent further argument that we must not tolerate someone’s non-harmful failure to save Flo, I cannot endorse coercion of Samaritan behavior. My leaving Flo in the water—by clear contrast with my causing her to be in the water—does not, I think, set back her interests but leaves them set (back) where they were. I agree that doing so is likely wrongful, but as I don’t set back her interests, I don’t harm her, and hence interference with my (admittedly immoral) behavior is unwarranted. As Crookston notes (p. x), Kit Wellman’s arguments for the Samaritan principle are persuasive,

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but they are not definitive, in my view.<sup>4</sup> Of course, I agree we should act as Samaritans, but that is not the issue here; rather, at issue is whether we can be forced to act as Samaritans (or punished if we do not). I think we cannot.

Importantly, one need not endorse the Samaritan principle to think interference is permitted when “social ills like poverty are . . . the result of wrongful behavior by individuals or sets of individuals” (pp. x-x).<sup>5</sup> When poverty—clearly a setback of interests to the impoverished individual—is the result of such behavior, the harm principle allows interference to rectify that harm. That rectification will benefit the person who is impoverished, but that does not mean—in contrast to what Crookston suggests—that a benefit-to-others principle or a Samaritan principle is at play. To be clear, where poverty is not caused by a harm—whether intentional or not<sup>6</sup>—interference with others to eliminate it would not be warranted, though of course those others can choose to give charitable assistance. Nonetheless, on my own view—which I will not defend here—much of the poverty that exists in the U.S. is caused by harms; if I am right about that, interference to eliminate it would be warranted.

Nothing I have said thus far really answers Crookston’s query. What I hoped to do in the book was, in fact, a bit less ambitious than proving that “the harm principle [is] the right principle upon which to base a theory of toleration.” My aim was only to demonstrate the desirability of endorsing the strict harm principle over a less strict version that would incorporate one of the other standard jurisprudential principles I discuss: the offense principle, the principle

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**I find Wellman’s view on this more persuasive for the topic he addresses—state legitimacy—than when applied to other topics.**

<sup>5</sup> I assume that the concern is with absolute poverty. That is, the concern is with people not having enough to live, not with their having even substantially less than others (i.e., relative poverty).

<sup>6</sup> On p. x, Crookston suggests that all immoral behavior is intentional. I do not think this is the case, though whether it is may depend on what intentionality is. I cannot address that here.

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of legal moralism, the principle of legal paternalism, and the benefit-to-others principle (of which the Samaritan principle is a version). However, showing that X is preferable to Y is not conclusive reason to adopt X. While I think I show that the strict harm principle is preferable to those other principles—by describing what each would commit us to—and I hope that many will follow me in adopting it, Crookston is right to want a more definitive defense of the principle. I offer that in a new book in progress, tentatively titled *Toleration and Freedom from Harm: Liberalism Reconceived* (Routledge Press). The defense is two-pronged; the first prong is more original and, I think, more definitive. It is the explication of a better understanding of freedom than heretofore has been defended—an understanding of freedom as *freedom from harm*, which is conceptually connected to the harm principle such that endorsing the latter is protecting and promoting the former. The second prong makes use of Ricardian economics to show that accepting the harm principle as the sole normative principle of toleration benefits us all. I hope Crookston and our readers will await that work for a final response.

### **3. *Volenti***

When Crookston moves to consider her second issue, it becomes clear that she is less concerned with how I would flesh out the concept of *volenti* than she is with two other issues, both of which I find unproblematic. The first issue is simply that in some cases, it may be easiest to reduce or avoid harms in a society by making an activity illegal even if some people could genuinely consent to the activity and thus not be harmed by it. Here, Crookston considers cases of voluntary cannibalism (p. x; looking at p. 83 of *Toleration*) and cases of risky behavior like riding a motorcycle without a helmet (p. x). The second issue here is about how I would respond to cases where the consent or voluntary participation comes about because of how an individual

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is raised. If an individual is raised to see herself as subservient and then consents to lead a life of subservience, some—perhaps including Crookston, though this is not clear—will deny that her consent should be taken as removing whatever wrongfulness is otherwise involved. Those taking such a view do not (usually) deny the importance of *volenti*; instead, they deny that the individual in question is capable of giving genuine consent because of how they were raised.

To take the first issue first, I offered a response to this sort of worry in an earlier paper on the topic: for some sorts of activities, where an agent is likely to risk danger to herself, “a test of competence would be mandatory. I do not think such a test is completely implausible. . . . Still, if the test is impossible or too expensive, that might justify legal prohibition.”<sup>7</sup> Putting the point differently, because law is a blunt instrument, we may find that efficiency concerns push us to permit interference in types of activities that we should otherwise tolerate in at least some cases. This is not a concession I would make lightly, if ever. I am not at all persuaded we should make it for the sorts of cases Crookston discusses.

Regarding the second issue here, Crookston says that her “concern . . . is that the origin of our interests matters when deciding whether someone has been harmed. A discussion of mixed or impure cases of consent, like . . . [the case of polygamy], would clarify Cohen’s view of *volenti* and how it removes wrongfulness” (p. x). I think Crookston is mistaken here to think this is about how I construe *volenti*—or, if it is, she seems to be asking whether I would endorse a view of *volenti* such that only fully rational consent matters, where “fully rational consent” is the sort of consent that a fully rational agent, shorn of any empirical limitations, would be capable of. Here I rely on work in progress, where I defend my view of freedom from harm mentioned above. Simply put, I am concerned to protect individuals *as they are* and not *as they*

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<sup>7</sup> Andrew Jason Cohen, “What the Liberal State Should Tolerate Within Its Borders,” *Canadian Journal of Philosophy* 37 (2007), pp. 491-92.

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*might be thought to be or as they (supposedly) ought to be.*<sup>8</sup> While some political philosophers today rely on a notion of ideal rational consent—think of the consent one might find provided behind John Rawls’s “veil of ignorance”<sup>9</sup>—my concern is with actual people. On my view, respecting freedom from harm requires respecting persons *as they are*. This means my liberalism *requires toleration of people acting on their own actual wishes, not ideal wishes* (that is, wishes determined by some fully rational agent which they are perhaps capable of being, but are not). To be clear, then, I do believe we must tolerate polygamy and many other practices that people engage in willfully, even though we believe (perhaps correctly) that at least some of them would not do so if they were raised in more reason- and autonomy-conducive ways.<sup>10</sup> What matters is only whether they—as the actual persons they are—rationally consent. (That is a question for positive psychology, not normative philosophy.)

### 4. Does the Harm Principle Ever Require Interference?

Now to consider Crookston’s last question: Does the harm principle ever *require* interference? My inclination is to answer in the negative; indeed, I take it that my stance that the harm principle provides only a necessary and not a sufficient condition for interference is standard among Mill scholars. There is one limit to that negative answer, namely, because the harm principle indicates that an individual can be interfered with—that is, have his freedom limited—if he harms another, anyone endorsing the principle has *prima facie* reason to cause no harm. That is, since I believe I can be interfered with should I cause harm to another, I ought not

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<sup>8</sup> Peter Balint takes a similar stance in his *Respecting Toleration: Traditional Liberalism and Contemporary Diversity* (New York: Oxford University Press, forthcoming).

<sup>9</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971).

<sup>10</sup> This response is also present in my 2007.

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harm another, because I do not want to be interfered with. Hence, the harm principle indirectly, and as a practical matter, offers each of us (and governing bodies) a practical injunction to do no harm. This is an old principle in practical ethics: *primum non nocere* (first do no harm). Some might think of this as an interference with individual freedom. More precisely, it is a normative limit to descriptive freedom and no limit to normative freedom properly understood.

Crookston suggests there may be times when “two people’s interests conflict and non-interference is simply not an option” (p. x) and that while I claim that “justice requires that we never interfere where toleration is mandated” (p. 51), it may instead be “the other way around . . . that justice requires that we interfere where there is wrongdoing and toleration is not mandated” (p. x). I gather that what Crookston has in mind here is the perennial worrisome sort of case where a governmental body must favor one party over another—where doing nothing is itself taking a stance. Perhaps the most discussed case of this sort is a law allowing abortions. Such a law is tantamount to the government siding with pro-choice advocates over pro-life advocates. The latter, after all, do not merely think abortion is wrong *for them*, but that it is always and everywhere something that must not be permitted. They do not get their way if abortion is legally permitted. Some may think, moreover, that abortion is wrongful even if no one is harmed and also think that toleration is not mandated. The latter, of course, is inconsistent with the harm principle; if there is no harm, toleration is mandated. Let’s look, though, at Crookston’s example.<sup>11</sup>

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<sup>11</sup> The most likely candidate for a harm in abortion is the fetus. Yet a fetus cannot have the sort of interests you and I have, and so has far fewer interests to be wrongfully set back. I would grant that the fetus has an interest in not suffering. That interest can presumably be wrongfully set back—there would then be a harm that *prima facie* warrants interference. If abortion could be made such that the fetus did not suffer (or suffer wrongfully), it would not be harmful and interference would not be warranted. Of course, it may be that in some cases someone *else* is harmed—if, for example, the mother is a contractually obligated surrogate.

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Crookston does not raise the issue of abortion. She discusses slavery, instead. She writes that “Cohen would argue that slavery is a quintessential case of where toleration should not be tolerated, since slaves’ interests are wrongly set back” (p. x). In fact, though, I have previously defended the claim that voluntary slavery must be tolerated<sup>12</sup>—that is, if someone with full information genuinely consents to be enslaved, the enslavement must be tolerated even if her interests are (or appear to be) set back. In such a case, the enslavement must be tolerated.

Of course, the real concern is not with voluntary enslavement but with involuntary enslavement. In the American case, for example, it would be absurd to think that the people kidnapped from their homes in Africa, taken from their family and friends, shipped to the Americas and sold to the highest bidders, consented. It would be equally absurd to think that their children, born while they were slaves, consented to be slaves. In the American case, that is, enslavement was quintessentially not voluntary. It was harmful and ought not to have been tolerated. Thinking about it that way, interfering with slavery is akin to interfering with murder. It’s true that in both cases someone’s interests are being set back—the slaveholder and the murderer. In neither case does that raise a serious objection. In both cases, it is simply a recognition that the harm principle indicates that interference is warranted when there is harm. This is actually too quick.

Crookston rightly points out that ending slavery benefited (at least) one group—those formerly enslaved—and cost another group—the former slave owners. That second group does have their interests set back, because they suddenly do not have legal property they previously had. I just said that this doesn’t raise to the level of a serious objection, but I was being too quick because the situation in the U.S. was not merely one set of persons enslaving another then

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<sup>12</sup> See my 2007, esp. pp. 485 ff.



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being forced to release them. The situation, rather, was one wherein the entire legal system was complicit in the system of slavery. Not only would a slaveholder not have been forced to release a slave, but he would have found help from government agents in regaining a slave who ran away. The legal system promoted buying and selling human beings. What this means here—and I take it that this gets to Crookston’s point—is that the slaveholders had genuine *legal* property removed from their possession when slaves were emancipated. They thus suffered a setback to interests—immoral though they be. We could say the state set back the very interests of the slaveholders that it previously promoted. Some might think this was also wrongful—not because emancipation was wrongful, but because the state allowed slave-holders to develop expectations that they would retain legal property in other people.<sup>13</sup> If this is right, it may well be that the state should compensate the slaveholders. It does not mean that the system of slavery should have been continued. As with the murder case and simple (non-governmentally endorsed) enslavement case, ending harms is permissible.

### **5. Transition**

I should admit, before turning in the next section to David Kelley’s comments, that my view does not provide answers to all of the questions Crookston raises. She wants to know how we are “ever to justify interfering with one group’s interests in order to promote the others, if there is no consensus about whether some action is wrong.” As I say in the new work, we should admit that it is often difficult to determine whether a wrong is present or if interests have been set back, but we should also realize that there are tokens of obvious wrongs and obvious cases of

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<sup>13</sup> These expectations would be illegitimate, but because of state involvement, would seem to the slave-holders as legitimate. In any case, because the state was responsible for the presence of those expectations, it bears responsibility. David Boonin’s *Should Race Matter* (Cambridge: Cambridge University Press, 2011) provides an excellent discussion of these issues.

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interests being set back. Perhaps more importantly, we should not shy away from the difficult work. We can use the tokens of obvious harms (and tokens of cases obviously lacking harms) to help by reasoning analogically (as one would expect in judicial cases). Given that there are many easy cases (with tokens of obvious harm and obvious lack of harm), it is a virtue of my (Feinbergian) account that it allows us to separate the easy from the difficult cases and pushes us to do the difficult normative work in the latter before concluding that a harm is present or absent.

### 6. Toleration and Relativism

Taking Kelley’s first point first, as I understand him, Kelley and I agree that belief in relativism is a problem. He may think I offer toleration as a solution to some problems that relativist thinking causes. I didn’t intend to do that, but I think it does. In fact, I think it does more, as I explain here.

Kelley thinks we do not need toleration—he often uses the term “tolerance”<sup>14</sup>—to deal with “those who differ from us in race, sex, ethnicity,” etc. Instead, he says, we need rationality (p. xx). He makes something of a case for this claim by noting that “[t]here is nothing for a white person to tolerate in one whose skin is black” just as there is nothing to tolerate in someone who is blond (p. xx). At root, I agree. To tolerate X, there must be something about X that one opposes, and to oppose someone because of his hair or skin color seems clearly irrational. I would very much like to live in a society where people were always rational about such things. Unfortunately, we don’t live in that world. In the world we do live in, some people will be rational about such things and some will not. My hope is that until we live in a world where

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<sup>14</sup> Indeed, he misquotes me as using the term (e.g., Kelley, “Comments on *Toleration*,” p. xx, quoting my *Toleration*, p. 2). On my view, as Kelley notes, toleration is a behavioral matter; tolerance is a virtue or attitude. See Andrew Jason Cohen, “What Toleration Is,” *Ethics* 115, no. 1 (2004), pp. 76-78.

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everyone is rational about such things, those who are not will tolerate those they irrationally oppose. Toleration can be used by those who are less than rational. Even those who are irrational about something can tolerate it.

Now step back from this point and reconsider the issue of relativism. Kelley and I both oppose relativism, as should all critical thinkers. However, toleration as an important moral and political project well pre-dates the rise in relativist thinking. Toleration, to my mind, is central to the Enlightenment project of classical liberal thought, a project that I think is inherently opposed to relativism. Indeed, its roots go back to Saint Augustine, hardly an advocate of relativist thinking. However, Augustine gave up on toleration because he saw what he thought of as the Catholic Church’s successful ending of the Donatist heresy by means that did not require toleration.<sup>15</sup> It may well be that Augustine and the Catholic Church were not being rational, but if so, such a claim needs defense. (Whether they were rational or not depends, I believe, on what their goal was. If the goal is to rid the world of a religious sect, non-toleration may be rational.) Importantly, they took themselves to be rational and objectively—even absolutely—in the right; they would have no truck with relativism. That makes my point: toleration is not merely opposed to relativism. It is also opposed to objectivist and absolutist thinking that leads to harm (whether such thinking is correct or mistaken).

The ideal world that Kelley and I both seek is a world wherein all think and act rationally and where this never leads one to harm another. In that world, identity politics and toleration will not be important. Indifference to things that do not (objectively) matter to us will rule.<sup>17</sup> Unfortunately, that world will not emerge in our lifetimes.

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<sup>15</sup> See my *Toleration*, pp. 134-35.

<sup>17</sup> See my *Toleration*, pp. 155-56.

## **7. Toleration and Endurance**

I have very little to say in response to Kelley’s thoughts regarding the relationship between toleration and endurance. I agree with much of what he says, but would caution that even if it’s true that his analysis of endurance “subsumes” my analysis of toleration (p. xx), there are instances of human persons *enduring* others that are different from persons *tolerating* others. With Kelley, I would tolerate the relativist egalitarian. Perhaps I would also endure him. By contrast, though, a prisoner likely endures his jailor but does *not* tolerate her. He would escape if he could, but cannot, and so endures. Perhaps toleration is a specific type of endurance. We might even say, for example, that “while the prisoner merely endures his jailor, we do not merely endure, but also tolerate, the relativist egalitarian.” To return to my 2004 article that Kelley cites, the difference seems to be that “toleration is something we must do for the right reasons such that one endures what one (believes one) has to; one tolerates what one (believes one) should.”<sup>18</sup> When we merely endure, we are like the shade-tolerant plant in Kelley’s example or the concrete on my driveway, which is also shade-tolerant. When we tolerate, by contrast, something more—our reason—is involved.

## **8. Moral Toleration**

Finally, with respect to the issue of moral toleration, Kelley asks two clarificatory questions. First, he asks whether moral condemnation amounts to interference. To know whether it does, though, we must know what it is. I know various people who I think hold morally bad ideas but who I do not seek to correct. The ideas I am thinking of are widely

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<sup>18</sup> Cohen, “What Toleration Is,” pp. 72-73.

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accepted and I reasonably believe that my explanations as to why they are bad will make no difference, so I (usually) keep my condemnation to myself. I think it’s clear that my condemnation in such cases is not interference. In other cases, it is possible that someone might state condemnation forcefully and in a way that embarrasses the condemned person and stops him from doing as he would. That may well be interference, and may thus be impermissible according to the harm principle.<sup>19</sup> In between, of course, are cases where I present my condemnation calmly and the other person is persuaded by my arguments not to do as he would have; in those cases of rational persuasion we may want to say that I interfered or we may not. I take no stand on that issue; it is a question of conceptual analysis only. If it counts as interference, it is permissible nonetheless; rational persuasion is always permissible.

Kelley’s second clarificatory question here is whether disliking Sam’s views amounts to disliking Sam. Here, I tend to agree (once again) with Kelley: “I cannot justify that judgment solely on the basis of what he believes.” I would note, though, that many people would make that judgment nonetheless. I would also add that one might dislike someone even when one does not dislike or disapprove of that person’s views. Indeed, one may find oneself in complete agreement with another person and still dislike that person. I would not claim that this was fully rational, but it is not necessarily irrational.

Kelley next asks whether we should tolerate his denouncing and ostracizing Sam, whose views Kelley dislikes. He also correctly anticipates my answer: mere denunciation is to be tolerated, but ostracizing need not be (assuming that it is harmful). Kelley thinks this view mistaken because “such actions [the ostracism] are grounded in the moral judgment” and the “purpose of moral judgment is to guide our actions toward other people, so it is not clear why we

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<sup>19</sup> *Ibid.*, pp. 85-87.

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would refrain from” the ostracizing action. My view here is simple: Even if the purpose of moral judgment is to guide our actions toward others—on my view this is only one purpose of moral judgment—it would not entail that just any action we choose as a result of that judgment is permissible or such that it must be tolerated. If Kelley decided to water board Sam, we would have reason to interfere. My view makes sense out of both; harm is the only thing that justifies interference. Waterboarding harms, so interference is permissible. If ostracism harms, interference is permissible. (Whether ostracism harms, in different sorts of cases, I can’t take up here.)

It may be that Kelley believes that certain sorts of actions—ostracism in some cases, for example—are rationally connected to a moral judgment such that failing to take that action indicates one did not actually have the morally condemning judgment. If this were true, then rationality might be thought to require the actions in question—that is, non-tolerating actions like ostracism—must be permissible. This line of argument might be thought a problem for the harm principle, but I do not see why. First, even if the action is rationally connected to the judgment, the two are clearly conceptually distinct and we can fail to tolerate one without even considering the other. Second, I admit to difficulty understanding why failing to take a particular action would indicate one did not actually have the morally condemning judgment, especially where the action in question would also cause harm (which one opposes) or where one is akratic. Perhaps this brings us back to Crookston’s point that there are times “where two people’s interests conflict and non-interference is simply not an option.” Here we either tolerate Sam or we tolerate Kelley’s non-tolerating of Sam—doing both is impossible. Of course, that is not quite right: it may be that we can tolerate both, though that would also leave one of the two getting what he wants and the other losing out. If Kelley has the power to ostracize Sam and we tolerate

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both, he gets what he wants and Sam does not. Still, if what Kelley proposes would harm Sam, we may not need to tolerate his actions.<sup>20</sup>

### **9. Conclusion**

Writing this response has been helpful. It serves, for me, as a bridge between *Toleration* and *Toleration and Freedom from Harm*. I did not anticipate that, but probably should have. Crookston and Kelley rightly pushed me on issues that I either failed to address at all in *Toleration* or did not address clearly enough. Hopefully, what I say here will help with the latter and also whet everyone’s appetite for what I will say about the former in *Toleration and Freedom from Harm*.

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<sup>20</sup> See my *Toleration*, pp. 89ff. See also my “What the Liberal State Should Tolerate Within Its Borders,” pp. 479-513.