In the most influential passage in *On Liberty*, John Stuart Mill introduces the “harm principle,” according to which "The only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others." Mill goes on to gloss the principle, writing "The only part of the conduct of anyone, for which is he is answerable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign." My aim is to argue that a commitment to individual sovereignty within a sphere of action in which you are answerable only to yourself requires that we abandon the harm principle.

The only way to unseat a time honoured principle is to provide a superior alternative. Following the sentence of Mill just quoted, I will call the alternative “the sovereignty principle.” Liberalism is fundamentally a doctrine about the legitimate uses of state power, and the sovereignty principle articulates the basis for those limits in terms of ideas of individuality and independence. It provides a narrow rationale for the legitimate use of state power, and precludes other proposed bases. I will explain its

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conception of freedom—which I will call “freedom as independence”— according to which a person is free if she, rather than anyone else, is one who gets to decide how to use her powers. Insofar as another person decides for her, she is dependent on that person, and her sovereignty is compromised. I will explain why violations of equal freedom, rather than harm, provide the legitimate basis for criminalization, and why the idea of equal freedom is not subject to the familiar objections that have historically driven some to embrace the harm principle. Before doing so, I will show that narrowly construed, the harm principle fails to account for a significant class of wrongs that most liberals would agree merit prohibition despite their harmlessness: namely, harmless trespasses. I begin with an example of a harmless trespass, and will explain why the harm principle has so much difficulty with this type of example. In introducing the example, I will depend on its intuitive force. When I go on to develop the sovereignty principle, I will vindicate the intuitions that underwrite the example. Mill is right to insist that there is a sphere in which the individual is sovereign “as a matter of right”, but wrong to suppose that it can be identified with the prevention of harm.

The harm principle has had many defenders since Mill’s time, and I cannot examine all of their positions in full detail. For some of its defenders, the harm principle

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1 The greatest defenders of the harm principle in each of the 19th and it 20th centuries were drawn to the sovereignty principle. Mill himself expresses its core idea, and H.L.A. Hart articulates something close to it in an early paper. See "Are There Any Natural Rights?" The Philosophical Review 64: 2 (1955) 175-191. The sovereignty principle also bears some affinities to the account of equal freedom defended by Hillel Steiner, An Essay On Rights. (Oxford: Blackwell, 1994). The most forceful expression of it is found not in these works, but in Kant's political philosophy, particularly in the Doctrine of Right, Part One of the Metaphysics of Morals. In explicating the principle, I will draw on Kant's ideas, although I will try to avoid his vocabulary.

I am not the first person to offer a Kantian interpretation of the spirit of Mill’s argument in On Liberty. In “A Theory of Freedom of Expression”. Philosophy and Public Affairs Vol. 1, No. 2 (Winter, 1972), pp. 204-226, T.M. Scanlon appeals to a Kantian idea of individual sovereignty in explaining what he calls the “Millian principle.” Scanlon’s account focuses on sovereignty in deciding what to believe; the account developed here focuses on sovereignty in deciding what to do.
operates as a constraint on the legal prohibition of moral wrongs that have been identified independently of it. For others, such as Joel Feinberg, harm is neither a necessary nor a sufficient condition for criminalization, but "always a good reason" in favor of it. The core difficulty for the harm principle cuts across these differences. A defender of the harm principle can avoid uncomfortable implications by appealing to the implications of some other principle that the harm principle only applies in conjunction with. I cannot show that this strategy must fail with respect to every possible interpretation of the harm principle, but my case against it makes all such strategies unpromising. The core difficulty is that there are wrongs that any plausible version of liberalism will treat as appropriate objects of criminal sanction, but that are not harmful on any plausible conception of harm, in particular, those that infringe a person’s independence. Once these wrongs are brought properly into view, other familiar difficulties with the harm principle come into sharper focus.: it cannot explain the distinctive status that it assigns to harm: why harm matters, when harm matters, or why harm, in particular, would be especially relevant to the criminal law.\(^2\) Nor can it explain the familiar classes of cases in which harm does not seem to matter at all: the harm a person visits on him or herself, harm at the hands of others that it is voluntarily undertaken or risked, and harm resulting from a fair contest, including market competition, even if the contest was not voluntarily

\(^2\) The harm principle probably gets some of its intuitive appeal from the thought that, because punishment harms the criminal, it can only be justified if it prevents greater harms. Bentham takes makes just this point when he writes “But all punishment is mischief: all punishment in itself evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. A Fragment of Government with an Introduction to the Principles of Morals and Legislation (Cambridge, Cambridge Univ. Press 1988) at 281. Mill echoes him: “all restraint, \textit{qua} restraint, is an evil.” (\textit{On Liberty} chapter 1, paragraph 13.) This way of thinking about the harm principle attaches special significance to harm that is much less plausible outside the criminal law. Defenders of freedom usually think that private persons can engage in a wide variety of self-serving behavior that will cause losses to others, such as the harm I suffer when you get the last ticket to the concert I had hoped to attend. The infliction of such harms is sometimes said to be justified by the benefits brought by market provision of scarce goods. The claim that the infliction of harm can be justified by the provision of benefits already requires going beyond this "harm for harm" rule.
undertaken in any straightforward or self-conscious sense. These exceptions either rest on supplementary principles, or on the claim that certain benefits “outweigh” the harms they inevitably cause. I will show that the sovereignty principle explains the exceptions in a more powerful way, because the supplementary principles presuppose the sovereignty principle.

Harmless wrongdoing: an example.

Suppose that, as you are reading this in your office or of the library, I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic and lint-free pyjamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent. By any ordinary understanding of harm, I do you no harm. If I had the same effects on your home in some other way, nobody would suppose you had a grievance against me, let alone that you should be able to call the law to your aid. You objection is to my deed, my trespass against your home, not to its effects. The example may seem artificial, but, as I shall explain, examples parallel to it historically provided part of the impetus for the harm principle.

The harm principle cannot provide an adequate account of either the wrong I commit against you or the grounds for criminalizing it. I will explain why the standard strategies for assimilating this example to more familiar types of harm are unsuccessful, and in so doing show why the harm principle is forced to focus on how my deed affects you, rather than on what it is that I do to you. Setting things up in this way may seem to prejudge the case by denying that using your property without your consent is harmful,
simply as such. I set things up in this way for two reasons. First, prominent defenders of the harm principle have followed Mill in assuming that harm can be identified independently of knowing how it came about. The causal idiom of "preventing harm" is not accidental. Defenders of the harm principle deny that either the intrinsic character of an act, or what people take to be its intrinsic character, is ever a sufficient ground for criminal prohibition. The whole point of the harm principle is to show that bad intentions and actions must be connected to bad effects to merit prohibition. Second, and more significantly, I will go on to argue that the only way to articulate the interest that my nap violates is by appeal to the sovereignty principle, because only it can explain the sense in which my nap violates your entitlement to exclude me, rather than your ability to actually control what goes on in your bed. As I will explain, any attempt to turn the violation of

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3 The extended defense of the harm principle by the late Joel Feinberg, in his multivolume work *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, Various Dates) provides a clear model for the narrow construal. Feinberg explicitly defines harm as to "setback to an interest." This formulation appears to leave room for a broad interpretation of harm according to which a violation to a property right would qualify, even if it was not harmful in any more colloquial sense. Feinberg's own text makes it clear that this is not the way in which he understands the principle. For example, on page 31 of the first volume of the set, *Harm to Others*, Feinberg says that his aim is to analyze the idea of harm without "mentioning causally contributory actions." On this understanding, although interests may be complex, it must be possible to identify them independently of what violates them. He talks about "preventing (eliminating, reducing) harm" as a legitimate purpose of the criminal law. These are all, non-accidentally, causal concepts, precisely because the effect is supposed to be identifiable apart from the harmful cause.

Because Feinberg says things up in this way, unauthorized use of your property only qualifies as a setback to your interests if it has effects on you that can be identified independently of how they come about. On this understanding, you do not have "stake" (to use Feinberg's preferred term) in excluding others. Any complaint you might have would have to fall into the category of things that are "Disliked but Not Harmful." (*Harm to Others*, p. 47)

Feinberg's discussion of insider trading, on page 222 of volume three, *Harmless Wrongdoing* makes it clear that this is how he thinks about harm. In the Introduction to *Harm to Others*, Feinberg introduces the notion of a stake by talking about the "stake" investors have in the stocks they own – an interest in the stock doing well. (*Harm to Others*, page 33). Insider trading has the formal structure of my napping your bed. An insider sells stock based on confidential information, and, as traditional legal analysis would have it, breaches a fiduciary obligation owed to shareholders, that is, uses his office for purposes that they, the owners of the stock, have not authorized. Feinberg rejects the traditional legal interpretation, arguing instead that the only grounds for prohibiting insider trading is that its general practice would be disastrous in its effects on the liquidity of equity markets. He tries to identify a negative consequence, because mere advantage taking falls outside the notice of the harm principle unless it has bad consequences.
this interest into a special sort of harm saves the harm principle by turning it into an empty format in which the sovereignty principle is stated.4

Before defending my claim that the harm principle cannot accommodate the example, I will clear away a few side issues. First, critics of the harm principle sometimes contend that the criminal law must be concerned above all with character, 5 or what a wrongdoer’s deeds express.6 Such a critic might suggest that my action must be prohibited because of the attitude of disrespect it expresses, or the bad character it reveals. It certainly expresses and reveals these things, but that is not why it should be prohibited. I could show the same meanness of character and lack of respect by preparing to nap in your bed while you are out, but get lost on my way to your home, and fail to get started on my deed. Or I might arrive at your home, but fail to get the locks open. If so, I will have attempted to get into your home to take a nap, but failed. If I attempt and fail, my conduct may fall within the criminal law’s purview, but it is also less

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4 There is a familiar Reading of Mill’s own development of the harm principle that might seem to make it into a format in which the sovereignty principle is stated. John Rees and John Gray have both argued that Mill intends a narrow conception of harm. Both point to Mill’s remark, in Chapter Four, of On Liberty, that “This conduct consists, first, in not injuring the interests of one another, or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights.” Rees proposes to identify the narrow range of interests recognized as central to the possibility of a decent life in a particular society, while Gray suggests that relevant interests include only security, understood as reliable expectations, and autonomy, understood as the conditions for imaginative consideration of alternatives and selection of a plan of life. See John Rees, ‘A Re-reading of Mill on Liberty’, Political Studies 1960, pp.113-129, reprinted in Alan Ryan, Mill, New York, Norton, 1997, pp.294-311, and John Gray, Mill on Liberty: A Defence, Routledge, 1996, pp.48-57. These limitations protect the harm principle against the familiar charge that it is overinclusive, and would license a wide variety of illiberal prohibitions. As described, however both interests seem vulnerable to many factors, not just the deeds of others, and so to be ones that can be identified without reference to things that interfere with them. Perhaps the categories of security and autonomy can be expanded to the point of including the independence from the choice of others that is at the heart of the sovereignty principle. If so, Mill turns out to be a defender of the sovereignty principle after all, and the language of harm is just a misleading gloss on another principle.


serious than the central case, in which I actually lie in your bed. The intuitive reason you have a grievance against me is not what my nap expresses or reveals about me. It is what I do to you.\(^7\)

Second, it won’t work to claim that I harm you by upsetting you when you learn of my deed, or by leading to fears that people will do this sort of thing to others. As a liberal principle, the harm principle cannot allow this move. If my act itself does no harm, then your fear that I will do it cannot bootstrap it into one, any more than your fear that I will corrupt your character can count as a harm for purposes of criminalization. Too many illiberal consequences would follow if harms could be manufactured in this way.

The third side issue concerns the possibility that I harm you by failing to consult you before using your bed. Normally, I only need your permission to do something if it would be wrong for me to do it otherwise. Suppose I admire your flowers as I walk past your garden. I do not ask for permission to view them, or pay you for my pleasures. I don’t harm you.\(^8\) My nap seems different, but it can’t be because I haven’t consulted you, since I only need your permission to do something that is otherwise impermissible. Nor have I harmed you simply because I did something that you didn't want me to do.

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\(^7\) The way that the standard criminal law distinctions between preparation, attempt, and completed crime apply in this example suggests that familiar puzzles about the moral difference between attempted and completed crimes that grow out of the role of chance in producing different amounts of harm, rest on a flawed conceptualization of the issues. The difference between what I do to you and what I have only attempted to do applies to this example, despite the fact that attempt and completed crime are equally harmless.

\(^8\) The more technical economic sense of opportunity does not help with the example either. In economic terms, someone has an opportunity if they are in a position to exploit it, and they choose to do so. You have passed up the opportunity to exclude me with better locks, or charge me by hiring a toll collector. Perhaps you did not want anyone to sleep in your bed. Since your "reserve bid" was higher than any bid you expected to receive, did not bother with a costly auction. If so, I did not deprive you of an opportunity. You simply declined to seize one. I have deprived you of nothing, and so done you no harm.
Your interest in being free of uninvited though harmless guests can no more be manufactured into a harm then your fear of them can.\textsuperscript{9}

Despite the obvious differences between these three side issues, they share a common theme. The basic case the criminal law takes an interest in is the one in which I actually do something to you, not the ones in which I want to do it, or you fear that I will do it, or you object to my doing it without consulting you. Intentions, fears and objections get their significance from their objects: my intention to do something to you, or your fear that I will do it, are only significant if my actually doing it is significant. And my failure to consult you before doing it is only significant if my doing it was itself significant. Part of the motivation behind the harm principle is to focus on what people do to each other. The problem with the harms of bad character, fears, and objections to a lack of consultation is not that they aren’t harms, but that if they fall under the harm principle, it isn’t a liberal principle. If those harms count, the harm principle underwrites many of the prohibitions it is supposed to exclude.\textsuperscript{10}

\textit{Indirect Strategies}

Most defenders of the harm principle will likely agree that the side issues fail to capture what is wrong with my nap. They are more likely to appeal to a different kind of strategy, focussing on the harm that can be prevented by prohibiting people from entering

\textsuperscript{9} I do not mean to deny that the wrongfulness of my conduct is connected to the fact that I have not consulted you. I will argue below that the only way to make sense of this wrong is via the sovereignty principle.

\textsuperscript{10} The wide scope of some recent uses of the harm principle and the lack of a clear way of distinguishing between them has led to recent arguments to abandon it altogether. See, for example Bernard Harcourt “The Collapse of the Harm Principle” \textit{Journal of Criminal Law and Criminology}. Vol. 90, Pp. 109-194, 1999; Richard Epstein “The Harm Principle – And How it Grew” \textit{University of Toronto Law Journal} Vol. 45, No. 4 (Autumn 1995) 369-417. Understood broadly to include the harm of bad influences, it turns out that even Aquinas endorsed it. On standard readings, he denied that virtue is a fit subject for direct coercive prohibition, but also argued that providing a proper moral climate to enable people to perfect themselves is a legitimate basis for the use of force. See John Finnis \textit{Aquinas} (Oxford) (page ref.)
other people's homes without their permission. Even if I don’t harm you in this case, it is plausible to suppose that a general rule giving people rights to exclude others from their property, especially their homes, prevents people from visiting harms on each other. Your right to exclude me is enforceable as a special case of a more general right that is justified by its prevention of harm, even if in the peculiar case I have described, no harm was done. Although the token is harmless, the type is harmful.

The challenge for this indirect strategy is to come up with the right way of articulating the harm that the prohibition is supposed to address. One possibility is that using someone else’s property without their permission is likely to cause harm. There certainly are examples that fit this characterization. Dangerous driving is usually harmless. The ground for prohibiting it is nonetheless based on the possibility of causing harm. The only practicable way of reducing the harm caused by dangerous driving is to prohibit it outright, rather than waiting for harm to actually occur. The regulation of pollution has a related structure: prohibiting pollution significantly reduces harm, even if any particular violation of pollution laws causes no measurable harm to anyone. In both of these examples, conduct that is sufficiently likely to cause harm can be regulated or prohibited to keep the risk of harm within acceptable levels. Not only is it more effective to have the decision made in advance, but, just as importantly, letting particular people decide how likely their conduct is to cause harm will lead to still greater harm, as people miscalculate in self-serving ways. When dealing with conduct that can be prohibited on the grounds of the harm it causes or is likely to cause, the sensible course is to refuse to consider particular cases.
Unfortunately, these examples have a very different structure than ours. General rules may be necessary, but the harm principle gets its critical edge from its demand that each prohibition be justified in terms of the harm that it prevents. That is what is missing in our example. Driving at high speeds or while impaired is dangerous by nature, because it subjects the safety of others to factors that nobody can control. Although nobody knows in advance which cases will or will not cause harm, everybody knows that many will, so nobody is entitled to an exemption after the fact merely because no harm was caused. Exemptions before the fact may be allowable – driving at high speeds on a closed track is permissible because it endangers nobody. Harmless trespasses have a different structure. Some trespasses are dangerous, even if they turn out to be harmless as a result of factors beyond the trespasser’s control. In those cases, the danger provides a harm-based reason to prohibit them. The fact that they trespasses provide no further harm-based rationale. Other trespasses, including my nap, pose no dangers, but merit prohibition even if I can show in advance that it won’t be dangerous.

Again, releasing toxins into the environment is harmful in the aggregate, and setting limits on particular instances prevents that harm. This model does no better with harmless trespasses. My nap is not one of many small contributing causes that combine to produce a serious harm. It is just as objectionable (or innocent) if one person does it as if many do.\footnote{ Tradable pollution permits share this structure: rather than prohibiting a fixed limit, polluting in excess of a granted or acquired licence is prohibited.}

Harmless trespasses fit neither of these models because they are not dangerous, either in their direct or their aggregate effects. Indeed, they don’t have effects in the sense that is pivotal to the harm principle. Some trespasses are in fact harmless but still
dangerous – I might run blindfolded through a china shop and miraculously damage nothing. But the rationale for prohibiting such acts is that they are dangerous, not that they are trespasses. The harm principle must be indifferent to trespass, except when dangerous or harmful, in the same way that it is indifferent to driving except when dangerous or harmful. Drunk or reckless driving can be prohibited, but driving cannot, even though unsafe driving is a type of driving. <sup>12</sup> Descriptions of an act as an instance of "driving" or "trespass" are very different, but, from the point of view of the harm principle, the fundamental question about both must be "how dangerous is it likely to be?"

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

The appeal to general rules can be developed a different way, on the grounds that my nap should be prohibited in order to protect property more generally. Allowing violations of the basic rules governing property will destabilize the institution of

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<sup>12</sup> Feinberg notes that alcoholic beverages have caused a great deal of harm, but that the appropriate response to such harm in a free society is to regulate or prohibit their dangerous use, not to prohibit them outright. (Harm to Others, p. 193). Although Feinberg does not argue that harm is always a sufficient condition for criminalization, he introduces the caution about overinclusiveness in this kind of example because the only rationale for prohibition in such cases is based on the harm it causes. Harm is not a threshold condition for criminalizing otherwise objectionable behavior in the case of alcohol consumption. It is the only reason the behavior is objectionable at all. So there is no other principle to appeal to.
property. Mill himself may have taken something like this view. In a strikingly contractarian-sounding passage, he includes among the constraints that those who receive the protection of society owes a return for the benefit, "in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury or molestation."\textsuperscript{13} Perhaps forbearing from using the property of others has this structure. Some familiar practices have something like it: People won’t sort their garbage for a recycling program unless they are confident that enough other people will do the same for their effort to provide the benefit it is supposed to. Unless counterfeiting in prohibited, people won’t have sufficient confidence in paper money to accept it in exchanges. In these examples, prohibiting the violation of the rules of a practice is the only way to ensure its sustainability, even if a variety of particular violations will make no real difference. The only way to protect the practice is though general enforcement of its rules.

Many recent writers have sought to understand property in something like this way: it is a conventional social practice, adopted because of the benefits it provides, and enforced so as to sustain provision of those benefits. This view finds clear expression in Hume’s discussion of the emergence of property. Hume suggests that people naturally converge on a convention of “abstinence from the possession of others” because of the advantages it provides to all.\textsuperscript{14} Given the scarcity and limited benevolence that characterize the “circumstances of justice,” that convention requires enforcement if it is to provide benefits. Even if my nap itself causes no harm, prohibiting it protects against considerable harm.

\textsuperscript{13} On Liberty, Chapter 4.
\textsuperscript{14} David Hume A Treatise of Human Nature Book 3 Section V.
Friends of freedom should be uncomfortable with the strategy for two reasons, one political, the other conceptual. The political reason for discomfort is that it is so easy to come up with parallel appeals to the vulnerability of beneficial practices. Religious conformity may be unstable without coercion. So too may the nuclear family. Perhaps Lord Devlin was right to contend that virtues of honesty, integrity or diligence depend on enforcing the right kind of moral climate. Although there may be dispute about the value of these practices, their vulnerability, or the likely effects of using force, sophisticated liberals will be wary of making their defense of liberty depend on any of these things.15

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

In the case of property, even if “abstinence” is the rule that makes up the practice, the harm principle demands a positive case be made to show that enforcing it is the only

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15 I am not suggesting that the political problem is decisive. Almost nobody thinks that that harm is always sufficient grounds for prohibition. A defender of the harm principle could contend that property is distinctive and must be treated differently from other social practices. For example, someone might claim that property rights are enforceable because of something like Hart’s “principle of fair play,” so that people can be compelled to do their part to sustain a worthwhile practice. (An account along these lines is developed by Richard Arneson in “The Principle of Fairness and Free-Rider Problems” Ethics 92:4 (1982) 616-633). Any successful demarcation of enforceable practices makes things worse, rather than better, for the harm principle. If some such account can be defended, it seems to explain the grounds for criminalizing violations without any reference to harm done to the practice.

There is a more general lesson here: provision of benefits is the mirror-image of the prevention of harm. Practices that provide benefits are not generally entitled to legal protection. We need some way of distinguishing among these, just as we need some way of distinguishing harms that merit prohibition from those that do not. The idea of harm to a social practice provides no traction on the issue, because it simply reproduces it.
way to protect the practice. Rules always prohibit their own violation – that is what makes them rules – and rules that make up a practice will “call for” enforcement even in cases where the institution is not in danger. Whenever the rationale for enforcing the rules of chess or baseball, it is not that otherwise chess or baseball would be vulnerable to collapse.\textsuperscript{16} The most that can be said about games and other purely conventional practices is that making the rules and prohibiting their violation comes down to the same thing. We do not need to look to the effects of violations, either in particular or in general, in order to recognize that the rules create the game by prohibiting their violation.

This is not the place to examine the idea that institutions such as property are best analyzed on the model of a conventional game. The problem is that there seem to be only two ways of understanding this idea, and neither of them is consistent with the harm principle. One says that the rules must be enforced on pain of collapse of the practice. But that just reintroduces the distinction between harm and wrongdoing that created the difficulty about our example. If a class of violations are harmless to the practice, the harm principle provides no rationale for prohibiting them. The other model says that the rules make up the practice. It makes no reference to the concept of harm, because it makes no reference to the effects of violations. The harm principle appears to have no way of engaging with the idea of a valuable social practice, and so cannot use it to explain why harmless wrongs should be prohibited.\textsuperscript{17}

\textsuperscript{17} Joseph Raz aligns rules practices with harms in a different way when he claims that the person who fails to hire someone with a disability despite the existence of a law requiring the hiring of people with disabilities harms the person he fails to hire. Raz glosses this as an example of harming someone by failing to give him something that is due to him. On this analysis, the existence of a rule determines what is “due” to a person, but it is the fact that the person’s prospects are worsened that brings it within the reach of the harm principle. See “Autonomy, Toleration, and the Harm Principle” in \textit{Issues in Contemporary Legal Philosophy}, edited by Ruth Gavison (Oxford: Oxford University Press 1987). Whatever its other merits or
The idea of harm to a practice gets murkier still in cases in which the wrong has the same structure but no candidate practice is in sight. Humean abstinence excludes using other people’s property even when no harm is done in a way that is parallel to the requirement of abstinence from the person of others. Even reputable newspapers sometimes carry shocking stories about medical experiments performed on unconscious patients. Usually these experiments are uncovered by accident, because they leave no trace and do no measurable harm to their victims. It seems desperate to claim in such cases that these acts should be prohibited in order to protect “our” “practice” of abstinence from other people’s bodies. It is much more plausible to recognize them for what they are—wrongs against their victims. The obvious explanation of what is wrong with my nap is parallel—I wrong you by using your home for a purpose that you didn’t authorize.

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

difficulties, Raz’s approach can only account for harmless trespasses but by stipulating that your expectation to be free of trespasses has been harmed. Such an approach saves the harm principle by emptying it of content.  

18 Sexual assaults on unconscious victims are another example. Dan-Cohen cites the example of State v Minkowski, 204 Cal. App. 2d 832; 23 Cal. Rptr. 92 (1962), in which a physician raped patients during what were supposed to be gynecological examinations. The victims were unaware of what was happening at the time. John Gardner and Stephen Shute try to explain the wrongness of such acts by appeal to the harm they do to the “practice” of sexual autonomy, as if rape would not be wrongful in a society that had not “adopted” such a practice. See “The Wrongness of Rape” in Oxford Essays in Jurisprudence Fourth Series edited by Jeremy Horder (Oxford: Oxford University Press 1999.)

19 Your sense of grievance can perhaps be dismissed as an illusion, something you have been unwittingly socialized into. Or maybe you attitude is just a result of “possessive individualism,” and you really should be delighted that I have found a use for your bed at no cost to you. Here as elsewhere, the only response to the suggestion that something is just a façade is to reveal the structure behind it. The sovereignty principle provides the structure.
enemies of liberty. The ways to bring our example within the indirect sweep of the harm principle run afoul of the liberal ideal of individual responsibility, which says that you cannot be prohibited from doing something that doesn’t interfere with anybody else, simply because prohibiting you from doing it makes you or someone else less likely to commit some other genuine crime. Absent very special circumstances, one person cannot be held criminally responsible for the acts of another. All of the harm-based responses to examples of harmless trespasses are in tension with this idea, because they all concede that those acts are not worthy of prohibition in their own right. They contend that conduct that is not harmful can be prohibited as a cost-effective way of prohibiting conduct that is. Even though none of them provides a particularly convincing account of the harms prevented by prohibition, a stronger basis would do nothing to repair the tension between individualism and indirect prohibitions.20

My nap is an example of a wrong that does no harm. Examples of harms that are not wrongful are no less familiar. Self-inflicted harms, both narrowly construed, and more broadly construed to include those the risk of which is voluntarily undertaken are excluded from its reach. So are the harms that are the result of what Joel Feinberg has referred to as "fair contests.” If you build a better mousetrap, I may lose customers; if you close your hotel my neighbouring restaurant may suffer; if you show up before me, their may be no seats left on the bus or milk left at the store. None of these activities can be prohibited, despite the genuine harms they cause. Both self-inflicted harms and those that result from fair contests are genuine harms, and are just as bad for those who suffer them as the same harms brought about in other ways. Someone might contend that such

20 It is unlikely that more convincing indirect evidence could be marshalled, since the application of the harm principle depends on the answers to factual question that nobody knows how to go about answering. Recent complaints that the use of the harm principle has gotten out of control underscore this problem.
harm that ensues is not an interference with sovereignty. Other harms do interfere with sovereignty, but it is that interference, not their harmfulness, that merits prohibition.

The sovereignty principle.

The sovereignty principle rests on a simple but powerful idea: the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other.

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

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way street to illustrate the difficulty with liberty-based accounts of justice. Writing from yet another tradition, Charles Taylor has emphasized the differences between freedom of religion and the freedom to cross intersections unimpeded. These critics of the principle of equal freedom differ in many ways, but are united in supposing that in a world in which one person’s actions affect another, liberty is not a self-limiting principle. Both societies and theories of justice that aspire to guide them must decide which liberties to favour, or how to weigh liberty against other values.

This objection was first put forward close to two centuries ago, by Samuel Taylor Coleridge. Like Cohen, he argues that property constitutes an external limit on freedom, rather than an internal one. Nearly a century later, Coleridge’s argument is endorsed by Frederick Maitland, to whom Hart referred in introducing his own version of it.22

All of the standard objections to the idea of equal freedom conceive of freedom as a person’s ability to achieve his or her purposes unhindered by others. This understanding of freedom, described as “negative liberty” in Isaiah Berlin’s essay “Two Concepts of Liberty,” characterizes any intentional actions or regulations that prevent a person from achieving his or her purposes as hindrances to freedom. Some critics have questioned the special significance of the actions of others in limiting freedom on this account – lack of resources, or internal obstacles may frustrate your purposes just as much as my deliberate actions. The difficulty for the idea of equal freedom is different. It comes from the role of successful attainment of your purposes in this conception of

freedom. If our purposes come into conflict, so too must our freedom. Any purpose, whether my private purpose of crossing your yard, or that state’s public purpose of coordinating traffic flow, can come in to conflict with some person’s ability to get what he or she wants. The closest such a conception of freedom can come to an idea of equal freedom is some distributive system that would be likely to equalize people’s chances of success.\(^{23}\)

The sovereignty principle conceives of freedom differently, in terms of the mutual independence of persons from each other. Such freedom cannot be defined, let alone secured, if it depends on the particular purposes that different people happen to have, because part of the reason freedom is important is that it allows each person to decide what purposes to pursue. Instead, equal freedom is understood as each person’s ability to set and pursue his or her own purposes, consistent with the freedom of others to do the same.

You are independent if you are the one who decides what ends you will use your powers to pursue, as opposed to having someone else decide for you. You may still mess up, decide badly, or betray your true self. You may have limited options. You remain independent if nobody else gets to tell you what to do. Each of us is independent if neither of us gets to tell the other what to do.

This interest in independence is not a special case of a more general interest in being able to set and pursue your purposes. Instead, it is a distinctive aspect of your status.

\(^{23}\) This is not the place to assess the prospects for such an account, or any other way of developing the idea of negative liberty into an account of equal freedom, but only to distinguish it from the sovereignty principle, which does not require interpersonal comparisons of particular liberties across persons, or estimate likelihoods of success. For the sovereignty principle, the morally and legally significant conception of freedom is identified with a system of mutual independence: each person is free to use his or her own powers, individually or cooperatively, to set his or for own purposes, and no one is allowed to compel another to use their powers in a way he designed to advance or accommodate any other person’s purposes.
as a person, entitled to set your own purposes, and not required to act as an instrument for the pursuit of anyone else’s purposes. You are sovereign because nobody else gets to tell you what to do; you would be their subject if they did.

Once freedom is understood in terms of people’s respective independence, one person’s freedom doesn’t conflict with another’s. Each person is free to use his or her own powers to set and pursue his or her own purposes, consistent with the freedom of others to use their powers to set their purposes. A system of equal freedom demands that nobody use their own powers in a way that will deprive another of theirs, or uses another person’s powers without their permission.

Each of these ideas requires filling out: the idea that people use their powers to set and pursue purposes; the idea that people have powers as their own; and the idea that the separate or cooperative exercise of those powers conform system of equal independence. Once the account of independence is in place, the sovereignty principle also provides an account of criminal wrongdoing as domination, that is, the violation of independence.

*Freedom and Choice*

The idea that powers that you have are fundamental to your freedom is familiar, common to Rawls's emphasis on the moral power to "set and pursue a conception of the good," and the distinction, common to Aristotle and Kant, between choice and wish. The ability to choose in this sense doesn’t depend on the ability to stand outside the causal world, or even to abstract from your own purposes in making choices. Instead, it rests on the familiar observation that if you choose to do something, you must set about doing it, which requires that it be within your powers to pursue.
There is a different image of choice that is sometimes prominent in philosophy, according to which people simply have certain purposes, and then select means to achieve them. On this understanding, people choose means, not ends. This image is exactly backwards. Even if your wishes are fixed by your biology and upbringing, you can only do something if you set out to do it, and you can only set out to do what you take yourself to have the power to do it. Without the powers, you can wish for anything – to walk on the moon and be home in time for dinner – but it is not a choice you can make. Your wishes may all come true, but you only do things by exercising your powers.

The sovereignty principle says that each person is entitled to use his or her own powers as he or she sees fit, consistent with the ability of others to do the same. The consistency is achieved through the joint ideas of non-interference and voluntary cooperation. Nobody is allowed to use or damage another person's means without their permission. If everyone forebears from doing these things, each person is independent of all the others.

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

25 You might be mistaken about what your powers can achieve, but your freedom to choose your own purposes just is your freedom to decide how to use the powers you have. Hobbes could set out to square the circle, even though he was mathematically doomed to fail, because he took himself to have the requisite means – a compass and straightedge and one of the best minds of the seventeenth century.

26 Freedom, understood as independence from the choice of another is thus not an interest in the sense that concerned even a broad understanding of the harm principle. My interest in being self determining inevitably comes up against your competing interest, and in the case of any such conflict, I would be a mistake to say that one of us has somehow harmed the other. The difficulty comes with supposing that each person's interest in freedom, autonomy, or self-determination can be specified separately. If they interests is specified in that way, it is inevitable that interest will come into conflict in just the way that Coleridge charges. That is why careful defenders of the harm principle such as Mill and Feinberg, resist the temptation to generate harms from invasions of autonomy. Too many things stop people from pursuing their own purposes, and so too many things would be harmful.
Domination

The sovereignty principle provides a model of interaction that reconciles the ability of separate persons to use their powers to pursue their own purposes. In so doing, it also provides a distinctive conception of the wrongs that interfere with this sovereignty. Wrongdoing takes the form of domination.

The idea of freedom as non-domination has a distinguished history in political philosophy. Recent scholars have pointed out that Berlin's dichotomy between negative and positive liberty leaves out a prominent idea of liberty, sometimes referred to as the "Republican" or neoRoman conception of liberty, according to which liberty consists in independence from others. These scholars argue that this conception was central to the political thought of the civic Republicans of the Renaissance, who were centrally concerned with the dangers of despotism. On this reading, the early modern Republicans did not object to despotism because it interfered with their negative or positive liberty (to use anachronistic terms they would not have recognized). A despot who was benevolent, or even prudent, might allow people, especially potentially powerful ones, opportunity to do what they wanted or be true to themselves.27 The objection was to the fact that it was up to the despot to decide, to his having the power, quite apart from the possibility that he would use it badly. Unless someone has a power, there is no danger of him using it badly, but the core concern of the civic republicans was the despot’s entitlement to use it, and the subjugation of his subjects that followed regardless of how it was used.28 Berlin is aware of this difference when he writes “It is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom.”

27 “Two Concepts of Liberty,” p. 129
The sovereignty principle carries this same idea of independence further, to relations amongst citizens. It insists that everything that is wrong with being subject to the choice of a powerful ruler is also wrong with being subject to the choice of another private person. As a result, it can explain what is wrong with the sort of harmless wrongdoing we saw in our examples. One person is subject to another person's choice; I use your means to advance purposes you have not set for yourself. Most familiar crimes are examples of one person interfering with the freedom of another by interfering with either her exercise of her powers or her ability to exercise them. They are small-scale versions of despotism or abuse of office.

Your powers can be interfered with two basic ways, by usurping them or by destroying them. I usurp your powers if I exercise them for my own purposes, or get you to exercise them for my purposes. If I use force or fraud to get you to do something for me that you would not otherwise do, I wrong you, even if the cost I impose on you is small. I have used you, and in so doing, made you choice subject to mine, and deprived you of the ability to decide what to do. If you did the same thing, even if I got the same benefit from it, but I had no role in making you do it, I haven’t wronged you; I just took advantage of the effects of something you were doing anyway.

I can use you in other ways as well. Suppose that you are opposed to the fluoridation of teeth on what you believe to be health-related grounds. You are mistaken about this, but committed to campaigning against fluoridation. As your dentist, I use the opportunity created by filling one of your (many) cavities, to surreptitiously fluoride your teeth, proud to have advanced the cause of dental health, and privately taking delight in doing so on you, the vocal opponent of fluoridation. In this example, I don’t
harm you, and there is even a sense in which I benefit you. I still wrong you because I draw you into a purpose that you do did not choose. You remain free to use your other powers to pursue other purposes. But part of being free to use your powers to set and pursue your own purposes is having a veto on the purposes you will pursue. You need more than the ability to pursue purposes you have set; you also need to be able to decline to pursue purposes unless you have set them. When I usurp your powers, I violate your sovereignty precisely because I deprive you of that veto. I am like the despot who uses his office for personal gain.

The other way that I can subject you to my choice is by injuring you, or in the limiting case, killing you, putting your powers to an end. If I break your arm, I destroy some of your powers, and in so doing limit the ends that you are able to set and pursue for yourself. The wrong does not consist in the fact that you no longer have those powers; I subject you to my choice because I take it upon myself to deprive you of them. I dominate you because I treat your powers as subject to my choice: I take it upon myself to decide whether you can keep them. If I usurp your powers, I decide what purposes you will pursue, and make you dependent on me in one way; if I destroy them, I may not set any particular purposes for you, but treat your means as though they were mine to dispose of.

This second category of wrongdoing enables the sovereignty principle to account for all of the core examples that make the harm principle seem plausible. Bodily injury reduces your powers no matter how it comes about, but it only violates your sovereignty if I deliberately inflict it on you. Any injury potentially reduces your ability to set and pursue your own purposes, but intentional injury does something more: If I set out to
deprive you powers you had, I subordinate your ability to use your powers to set and
pursue your own purposes as you see fit, to my pursuit of my purposes. I set myself up
as your master by deciding that you will no longer have them. For the sovereignty
principle, then, intentional injury is despotism by another name. Harm merits prohibition
when it is a manifestation of despotism, but not otherwise.

Use and injury exhaust the space of possible violations of sovereignty. Many
wrongs against persons combine them. Touching a person without her consent uses her
for a purpose she didn’t authorize; if she is also injured in the process, it may limit her
ability to use her powers, at least temporarily. But intentional touching is objectionable
even if harmless or undetected, or the injury is small. Your person—your body—is yours
to use for your own purposes, and if I take it upon myself touch you without your
permission I use it for a purpose you haven’t authorized. The problem is not that I
interfere with your use of your person or powers, but that I violate your independence by
using your powers for my purposes. The trespass against your person is primary, and any
consequent injury secondary to it. If I cause you minor harm, such as the distraction of
the few seconds of pain you experience when slapped, the small injury is serious because
it aggravates an unauthorized touching. That is why an unauthorized caress or kiss can be
a serious wrong, even if the victim is asleep or anaesthetized.

The sovereignty principle’s indifference to harm, considered as such, enables it to
explain the familiar exceptions to the harm principle. Self-inflicted injury involves no
despotism – it is not something that one person has done to another. Ordinarily, injury
that results from consensual undertakings will not involve despotism either. If consent is

29 The ways in which these exceptions follow directly from the sovereignty principle might lead some to
suspect that the harm principle is just façade for arguments that appeal to sovereignty rather than harm.
genuine, the person injured as a result of a voluntarily undertaken danger is not subject to another person’s despotism. Through the exercise of your sovereignty, you can turn an act that would otherwise be another person's despotism over you into an exercise of your own freedom.30

The sovereignty principle’s focus on voluntary cooperation also explains why other harms fall outside its scope. Voluntary cooperation enables people to use their powers together to pursue purposes they share. It can be made to look as though potential co-operators are always subject to each other's choice: unless you agree to cooperate with me, I can’t use my powers in the way I want to. But this is an example of our respective independence. Cooperation only contrasts with domination when it is voluntary on both sides. You get to decide whether to cooperate with me because you get to decide how your powers will be used. I can no more demand that you make your powers available to accommodate my preferred use of my powers than you can make that

30 Seeing consent as precluding despotism doesn’t commit the sovereignty principle to the extreme conclusion that that consent must be a defense to all crimes against the person. Critics of liberalism, such as Lord Devlin, and, more recently, Irving Kristol, seize on the widely held view that victim consent should not be defense to a charge of murder or maiming as proof that the criminal law is about protecting society’s sensibilities, rather than providing a space for individual liberty. (Devlin, The Enforcement of Morals; Irving Kristol “Pornography, Obscenity and the Case for Censorship” New York Times Magazine, March 28 1971. Kristol underscores his point by suggesting that everyone would want to ban public gladiatorial fights to the death, even if they were fully consensual. Defenders of the harm principle, including Joel Feinberg, argue that such contests should be prohibited because they are likely to make spectators more violent. (Feinberg, Harmless Wrongdoing pp. 128-9.)

The sovereignty principle provides a different account, one that takes off from the respects in which the familiar exceptions to the consent principle are distinctive. Because it regards independence as relational, the sovereignty principle must also regard consent as a relationship between persons, rather than as a sort of blanket abandonment of rights. If you court danger by walking alone through a dangerous neighborhood after dark, you don’t thereby give anyone who attacks you the right to do so; if you consent to my napping in your bed, you don’t thereby consent to anyone else doing so, even if I invite them to. The sovereignty principle dictates that consent be understood as a transfer of rights between two persons, and any such transfer is something the two of them do together. The idea of independent people doing something together precludes two people from jointly terminating the independence of one of them. The sovereignty principle has no resources to prohibit suicide, since it doesn’t involve domination. But it doesn’t need to prohibit suicide in order to deny that consent is a defense to murder. The problem is with one person giving another the power of life and death over them, not with the fact that the victim chooses to die.
demand of me. Each of us is sovereign over our powers, and the power to decide who to cooperate with is a basic expression of that sovereignty. That is why I wrong you when I use your powers for my purposes, even if it doesn’t cost you anything: in appropriating your powers as my own, I force you to cooperate with me.

Each person's entitlement to decide how their powers will be used precludes prohibiting many of the setbacks people suffer as effects of other people’s non-dominating conduct. People always exercise their powers in a particular context, but that context is normally the result of other people's exercises of their own freedom. To protect me against the harms that I suffer as you go about your legitimate business, perhaps because you set a bad example for others, or deprive me of their custom, would be inconsistent with your freedom, because it would require you to use your powers in the way that most suited my wishes or vulnerabilities. You do not dominate me if you fail to provide me with a suitable context in which to pursue my favoured purposes. To the contrary, I would dominate you if I could call upon the law to force you to provide me with my preferred context for those purposes. That would just be requiring you to act on my behalf, to advance purposes I had set. That is, it would empower me to use force to turn you into my means. Refusing to provide me with a favourable context to exercise my powers is an exercise of your freedom, not a violation of mine, however mean spirited you may be about that refusal.31

The sovereignty principle’s indifference to harm that is suffered as a result of one person's failure to provide another with a favorable context is just the flip side of the

31 If you can be required to perform acts for others, such as easy rescues, the rationale must have another source, since failing to rescue doesn’t usurp or destroy a person’s powers, it just fails to rescue them. I examine this issue in more detail in "Three Duties to Rescue" Law and Philosophy 19 pp. 751-779 (2000)
protections it does provide. That is the precise sense in which it articulates reciprocal limits on freedom: you would be wronged if I could prohibit you from doing something that doesn’t wrong me. You can be prohibited from dominating me, but the basis for that prohibition is also the basis for prohibiting me from calling on the state to make you provide me with favourable background conditions to use my own powers. Equal freedom and private wrongdoing form a closed set.

In the same way, if you defeat me in a fair contest, you do not deprive me of any of my powers. I merely failed at something that I was trying to do. That failure may disappoint me, but it doesn’t deprive me of means that I already had, it only prevents me from acquiring further ones. My defeat may change the context in which I use those powers in future: if you win the championship, other people may no longer hire me to endorse their products. But I had no entitlement against you to a favourable context or to have those other people enter into cooperative arrangements with me.

32 The fact that you have no entitlement that I provide you with a favourable context for pursuing your purposes does not preclude environmental regulations, for example. Clean air and water usually thought of as "common" resources of which each person can use as much as they like, and in which nobody had thought to assign property rights until recently. This way of understanding them treats them as common property. No member of the commons can trespass against another with respect to common property, but each can injure the powers of others, and so can be prohibited from doing so if it either damages the powers of others (using CFC’s with their health effects) or where it destroys things that are available for common use.

33 Interests can be set back in ways that are more closely connected to freedom when, for example, parents or guardians fail to see to the development of the powers of their children. Relations between children and their guardians are distinctive, because children are not capable of valid consent, either to their birth or to their ongoing relationship with their guardians. In such a case, the sovereignty principle requires that the Guardian forbear from using the child for his or her own purposes, and ensure that the child develop into a free and responsible being. The structure of the relationship requires that the parent provide the child with a suitable context. To derive benefits from such a relationship would be exploitation; to fail to advance the undisputed interests of the child, such as getting enough to eat, would be a violation of the relationship. This is not a case in which the parent or guardian is required to provide the child with a preferred context, but rather one in which the relationship requires that the parent see to the child's development. Absent such special relationships, however, no private party has an obligation to ensure that another develops his or her powers. I examine these issues in more detail in "Authority and Coercion" Philosophy & Public Affairs 2004.
This remains the case even if I use up my means, and so have less after the contest than before: I haven’t been deprived of them. I have just used them in trying to acquire something I didn’t get. The fact that this happened in the context of a contest with other people doesn’t make this expenditure any different from any other case in which I might expend my means while trying unsuccessfully to get more. They are mine to use, and as long as nobody forces me to use them one way or another, I am free to use them as I see fit. Conversely, if I squander them, I can’t say that anyone else deprived me of them. Reasonable people may disagree about what counts as a fair contest, or about the specific claim that economic competition is fair. But nobody can coherently dispute the claim that a fair contest is one that nobody is entitled to win in advance. No matter how significant the impact on those who lose at fair contests, the loss does not amount to the despotism of the winner over the loser.

Sovereignty can only be violated by the intentional deeds of others, because it is an interest in independence of those deeds. Thus it cannot be treated as just another vulnerability, to be added to the harm principle’s catalogue of protected interests. All of those interests can be set back by a variety of things other than intentional wrongdoing. If I wrong you intentionally, I do so culpably, because I have made my use or damage of your powers the means through which I pursue my purposes. I use you as a means, or make your means my own.

My use of you is objectionable even if you are merely incidental to my purpose: I grab you and push you out of the way, or vent my frustration by hitting you. In either of these cases, you are an unwilling party to the transaction: I force you to participate in my pursuit of my petty purposes, either by forcing you to stand where I want you to, rather
than where you were, or by volunteering you as my punching bag. Either way, subjecting your choice to mine is the means I use to get what I want; my act is objectionable because the means I use are properly subject to your choice, not mine. In so doing, I exercise despotism over you, and so treat you as though you were dependent on me. The sovereignty principle thus treats wrongdoing and culpability as expressions of a single idea. By contrast, if I use or damage what is yours by mistake or accident, you independence can be restored thought a civil remedy that requires me to restore your means, or the proceeds of their use.

Property

I now want to argue that the same ideas of independence and voluntary cooperation explain the example we began with of the harmless trespass. Prohibiting me from napping in your bed can be made to look like it interferes with my freedom, because it limits my ability to use my powers, including my body, as, and in this case, where, I see fit.

The sovereignty principle provides a different way of understanding the example. The basic idea is simple: I wrong you by using the powers that are external to your person – your property – without your permission. You neither wrong me nor limit my freedom by failing to make it available to me, because a system of equal freedom does not entitled me to demand that you provide me with a favourable context for my preferred purposes.

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34 Recent defenders of the harm principle, such as Hart and Feinberg, treat culpability as a separate requirement on criminal punishment, which requires an independent rationale. See Hart Punishment and Responsibility (Oxford: Oxford University Press 1968)
Property matters to a system of equal freedom in a way that is parallel, though not equivalent, to the way each of us has our own powers. Property is a way of having additional powers at your disposal that enable you to set a potentially broader range of purposes. That is why people can do, and aspire to do things, that earlier generations could only dream of. Technology and wealth bring power to those who have them by giving them means to use in setting and pursuing their own purposes, both individually and cooperatively. They also bring vulnerability, because just like any other powers you have, they can be taken from you or pressed into other people’s purposes.

The parallel between the powers you are sovereign over, simply as a person, and the external powers you have as property is not an identity. The most obvious difference is that you do not need to acquire your own personal powers (though you may need to develop them) but you must acquire any powers you own, creating them, appropriating them from an unowned condition, trading them for something, or accepting them from some person or organization that owns them. This difference reflects the further fact that the things you own can be physically separate from you. I can nap in your bed while you are away, but any wrongs against your person will be committed in your presence, though not necessarily with your awareness of them. These differences do not change the ways in which your property is vulnerable to wrongs by others, that is, through damage and trespass. The crucial issue concerns the ways in which other people are allowed to treat your property now that you have it. You are sovereign over it in relation to them. It

35 The possibility of a régime of equal freedom providing for its own limits does not depend upon any particular account of how property is acquired. For example, Mill’s own account sits better with the sovereignty principle than the harm principle. Mill writes “The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions or received either by gift or fair agreement, without force or fraud, from those who produced it. The foundation of the whole is, the right of producers to what they themselves have produced” See Mill's Principles of Political Economy (Toronto: University of Toronto Press) pp. 754-755. Mill’s emphasis on exclusive disposal sits uneasily with the harm principle.
is up to you to decide whether to make it available to others – your independence requires that you be the one who determines how your means will be used, and so who you will cooperate with. Others wrong you by intentionally damaging it or using it without your permission, by depriving you of the power to decide how it will be used.

Your property can be violated in two basic ways, parallel to the ways in which your powers in your own person can. It can be used for purposes you did not authorize, and you can be deprived of it. The most familiar crime against property, theft, combines these wrongs: the thief both deprives you of what is yours and makes it his own. The trespasser and vandal each do only one of these things, but all three violate your sovereignty over your external means. In doing those things, the violation of your freedom parallels the wrong of drawing you into their purposes without your consent, or injuring your person. In each case, someone else has either decided for you which purposes your powers will be used for or which of your powers will continue to be available to you to decide what purposes you will pursue. Your choices have been demoted to wishes. I wrong you if I nap in your bed even if I don’t harm you, because I deprive you of the veto that is essential to your ability to be the one who decides how your means will be used. It may be worse for you to have your person used without your permission than to have your property used. Both violate your sovereignty because your means are used for purposes you didn’t choose.

The sovereignty principle’s account of what it is to have something as your property can bracket many questions that preoccupy contemporary discussions of property. It leaves open such questions about whether forms of property can exist in
what seventeenth and eighteenth century writers called a "state of nature." Many forms of property presuppose complex institutions: If your home is a condominium, I wrong you if I enter it without your permission, even though condominiums require complicated legal arrangements. If, instead of invading your property in your bed, I embezzle money from your bank account and then repay it, I wrong you, despite the fact that you only “have” money in the bank in virtue of various forms of legal alchemy that transform contracts between various people into what amounts to a property right. It is your property right because it fits into a system of people having means subject to their exclusive choice. As a result, other people can wrong you by violating it.

The sovereignty principle is also consistent with a variety of views about the claims of the state to tax and redistribute property, even as it forbids private parties from taking it upon themselves to redistribute other people’s property. As a principle governing private interactions, it does not need to be hostile to public purposes. If those activities were nothing more than cases of some people using the law to force others to advance their purposes, they would be objectionable. But that isn’t the right way to think about them. The sovereignty principle articulates the idea of a system of

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36 The question of whether property is natural or conventional is sometimes supposed important to questions of redistribution, on the assumption that if it is conventional its obligations are subject to some sort of social calculus. But it has no more bearing on the bindingness of obligations than does the parallel question of whether promises depend on conventional practices. None of the participants in that debate imagines that it is somehow important to, say, the legitimacy of sales or excise taxes.

37 Defenders of the harm principle also appeal to further principles to justify affirmative obligations. Mill, for example, speaks of society’s legitimate claim “in each person’s bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury or molestation.” If the rationale is based solely on preventing harm one person visits on another, it would cover provision of national defense, police services and courts of law. Its application to other familiar public goods, such as roads, schools, and medical care would be covered depends on how broadly injury and molestation are construed, whether, for example, they include the injuries of disease, ignorance, and blocked realization of potential. An expansive reading of harm is possible here, though it does risk collapsing the distinction between preventing harm and creating benefits, and so potentially leads to a much less individualistic harm principle. “The only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm or provide benefits to others.”
equal freedom, in which no person is subject to another person’s choice. In so doing, it makes room for an account of distinctively public purposes, that is, those essential to the creation and maintenance of that system as a whole. It is not my purpose here to develop a full catalogue of just which purposes are properly public in this sense. It is clear, however, that the application of the sovereignty principle requires at least some public institutions. Consider the power to articulate, apply, and enforce laws, including the sovereignty principle itself. Private enforcement is sometimes said to be unreliable or harmful. These difficulties may be sufficient to underwrite public institutions, but from the perspective of the sovereignty principle there is another, even more serious problem: private enforcement is always a form of despotism. Whether someone can be forcibly prevented from interfering with another person’s freedom, or punished for having done so, depends on the enforcer’s strength and private judgment about such things as what actually happened, the precise contours of people’s respective rights, and the relevant standards of conduct and proof. Institutions and officials charged with articulating, applying and enforcing the law impartially preserve independence. You can describe the principles of a system of equal freedom without saying anything about institutions, but a group of people can’t live in equal freedom unless institutions to demarcate and

38 The most forceful defender of private rights of enforcement is A. John Simmons in his essay “Locke and the Right to Punish” Philosophy & Public Affairs (Fall 1991). Simmons argues that wrongdoers take unfair advantage of a system of mutual restraint, and thereby forfeit their right to be free of coercion. Having forfeited the right, Simmons suggests that the right to punish it is subject to the usual rules of "first possession" Just as the first person to claim a piece of land becomes its owner, so, too, the first person to punish a wrongdoer is entitled to do so, to the exclusion of all subsequent claimants. Putting aside the differences between the sovereignty principle and the unfair advantage account of crime that Simmons offers, the structural difficulty with a right of private enforcement can be put in Simmons's own terms: just as the rules of the system of mutual restraint must be fair to all, (be consistent with equal freedom) so must the rules for applying them. No system that allowed one person to be punished merely on the basis of another person's judgment about their guilt could satisfy this requirement.
guarantee that freedom is in place. Public taxation to support them provides the basic background condition for a system of equal freedom.

The sovereignty principle is also consistent with the broader republican idea that institutions can only avoid despotism – can only preserve their public character – by securing the basic conditions of citizenship for all who are bound by them. It is also open to the Rousseauian idea that laws and institutions are only properly public, and so only serve to create a system of equal freedom, if they guarantee that each citizen is able to engage in genuinely voluntary cooperation, and none is so desperate to be utterly dependent on the grace of the more fortunate. Insofar as public institutions require the provision of opportunities and resources to preserve their public character in either of these respects, the sovereignty principle is not only consistent with, but requires taxation to guarantee and them to all citizens. If such provision, in turn, requires public works – roads, parks, dams, government offices – the state will be entitled to exclude trespassers who seek to use them for unauthorized private purposes, and set rules that enable effective provision.

So the answer to Coleridge, Maitland, and Hart's objection is that crimes against property are prohibited because they interfere with another person’s use of his or her

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39 Dependency is also a barrier to a system of equal freedom in another way. If you are subject to my grace, you have no powers of your own with which to set and pursue your own purposes. Anything you do depends on my choice (assuming, for example, that you need my permission to occupy space.) The solution is not to say (with Coleridge) that property is a compromise with freedom, but to create a system of equal freedom through the provision of resources and opportunities sufficient to prevent dependence.

40 This familiar feature of public land reveals the confusions in one of the familiar challenges to the idea of equal freedom, noted above. Traffic laws are a favourite example of the abridgement of trivial freedoms for the sake of convenience. This way of setting things up provides an easy entry for the harm principle, because their enforcement can be dressed up as a way of preventing the harm attending co-ordination problems. But the setup gets things backwards: the coordination problem and the rules that solve it come as a package with the road. It is not as though roads exist in an imagined state of nature, and the state imposes a separate restriction on the ‘natural freedom’ that every person has to come and go on them. Instead, the state provides both the road and the rules governing, justified as part of the broader package of opportunities that the state provides to its citizens. Granting a right of way subject to specific terms designed to guarantee that others can enjoy it isn’t an abridgment of freedom at all.
powers. Property does not need to be thought of as a compromise with freedom
necessitated by conditions of material scarcity. The protection of property against
intentional invasion just is the protection of freedom. Although something like
Coleridge’s objection may have provided part of the impetus for the harm principle, it is
striking that the motivating example for the objection is not harm-based, but a matter of a
harmless trespass, the very example that caused difficulty for the harm principle itself.
The objection can be answered by the sovereignty principle.

**Conclusion**

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

Finally, the sovereignty principle gives defenders of the harm principle the thing
that they want most, protection of individual freedom from interference by the state. The
harm principle is often held out as a bulwark against paternalism, but the sovereignty
principle offers a better account of why it is objectionable. Paternalism is objectionable
when it is an exercise of despotism, in which one person sets limits on the purposes that
another can pursue except to protect against domination. The fact that the despots in question act through an elected legislature doesn’t solve the problem. It just serves as a reminder, in case anyone needed one, that legislatures are despotic if they advance private purposes rather than public ones. That possibility isn’t limited to paternalism: any criminal prohibition that doesn’t protect sovereignty is a despotic violation of it. Your neighbour cannot decide which ends you may pursue; nor can the majority of your neighbours, acting through the state. As a special case of this, they can’t act through the state to prohibit you from doing something that isn’t objectionable as a means of preventing you, or someone else, from doing something that is. That is liberalism’s core insight: Against the private choices of others, the individual’s sovereignty is, as Mill says, absolute.