

## Desiderata for a theory of harm

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- (1) Have a strong connection to the intuitive cases of harm.
- (2) Give us a way of thinking about harder cases.
- (3) Illuminate why harm is so special.

## 3 Asymmetries

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- (1) Harm and prospect of harm provide a greater reason to act and refrain from acting than the provision of benefits.
- (2) Asymmetries in the non-consensual infliction of harms and harms inflicted to provide benefits.
- (3) 1<sup>st</sup> versus 3<sup>rd</sup> person asymmetries

## Puzzle cases

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- Moral harms
- Other-regarding interests/ vicarious harms
- Death and posthumous harms
- Doomed interests/ dating harms
- Birth and prenatal harms
  - Fetus and contingent harms
  - Harms before conception
  - Harmful life
  - Wrongful conception

## Feinberg

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Setback to interest  
+ Rights violation

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= Harm

## Features of Feinberg's theory

- (1) States of a person are of primary significance.
- (2) States of harm may not result from human actions
- (3) Involves some kind of comparison—a harmed person is made worse off.
- (4) Measurement is based in interests
- (5) Legal and moral rights violation = Any setback of interests

## Interests

- **Ulterior interests**
  - A person's more ultimate goals and aspirations
  - E.g., producing good novels, achieving political office, ameliorating human suffering
- **Welfare interests**
  - "These are interests in conditions that are generalized means to a great variety of possible goals and whose joint realization...is necessary for the achievement of more ultimate aims....they are the most important interests a person has." [17]

## Wants and interests

- "it does not seem likely that wants, even strong wants are *sufficient* to create interests." [42]
- (Very) minimal conditions for wants making interests:
  1. Associated with realistic hopes and expectations
  2. Objects of desire are desired for own sake
  3. Can be promoted by human effort

## Unhappy states and interests

- **Hurts**
  - Physical pains (minor and/or temporary)
  - Mental suffering
- **Offenses**
  - Non-painful mental states
  - E.g., unpleasant sensations, irritation, shocked sensibilities, frustration, boredom.

## Hurts and harms

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- “A hurt is serious enough [to be a harm] if and only if it is either a symptom of a prior or concurrent harm of another order (as a pain the arm may be the result and sign of a broken bone) or else it is in itself the cause of a consequential harm (e.g., mental breakdown).” [48]
- Intense pains: An interest in not undergoing torture even when the experience is not harmful.
  - Mere hurt torture case [49]

## Welfare interests

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- “people tend to want...what they believe they have a stake in, at least insofar as they are minimally rational.” [41]
- “what promotes [welfare interests] is good for a person *in any case*, whatever his beliefs or wants may be.” [40]

## Being made worse off

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Counterfactual account: One is harmed if one is worse off than one otherwise would've been

Historical account: One is harmed if one is worse off than one was before

## How much worse off?

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Baseline view: Harm occurs only when your interests are set back below a normative baseline.

Movement view: Harm occurs only when your interests are set back any amount.

## Problems for Feinberg

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Problem 1: This moves the point of a harm theory to rights—leaves 'harm' an empty concept. Rights will be doing a lot of the work that we thought harm did.

Problem 2: The fact that some setbacks don't violate rights doesn't tell us much about consent.

Problem 3: Rights violations depend on wrongs; that raises the danger of circularity when the relevant wrong is harm.

## General problems for comparative harm theories

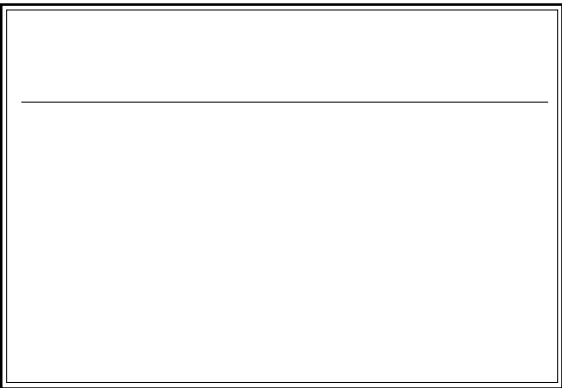
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Worry 1: The role of consent and autonomy and agency in harm is puzzling on these theories.

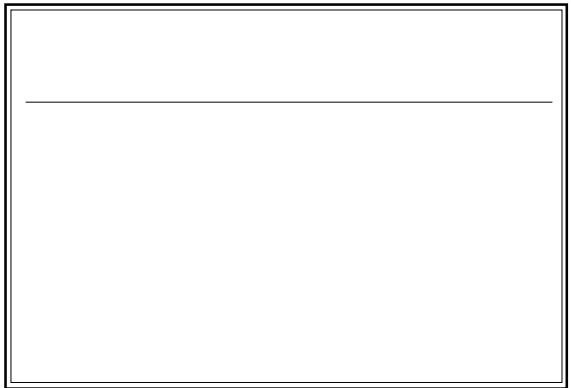
Worry 2: How is pain a harm?

Worry 3 (the big one): Why are comparisons of states the foundation for our understanding of harm?

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## Harm Principle and Drugs

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## Can the Harm Principle justify LAD?

### Bennett

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"Drug users make inattentive parents, bad neighbors, poor students, and unreliable employees --quite apart from their common involvement in criminal activity."

### James Q. Wilson

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"[even if the state] should only regulate behavior that hurts other people, we would still have to decide what to do about drug-dependent people because such dependency does in fact hurt other people....These users are not likely to be healthy people, productive workers, good parents, reliable neighbors, attentive students, or safe drivers. Moreover, some people are directly harmed by drugs that they have not freely chosen to use. The babies of drug-dependent women suffer because of their mothers' habits. We all pay for drug abuse in lowered productivity, more accidents, higher insurance premiums, bigger welfare costs, and less effective classrooms."

## Harms to others

Crime	Health care premiums
Economic productivity	Welfare costs
Bad neighbors	Other public monies
Bad parents	Bad drivers
Poor students	Crack babies
Unreliable employees	Bad relationships
	Moral harms

## Questions about harm

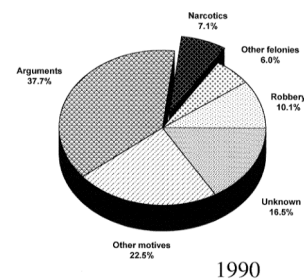
- Q1: Who is harmed?
- Q2: Are drugs really harmful in this way? How much?
- Q3: Does the state have a legitimate interest in protecting people/groups/et cetera from these harms?
- Q4: What are the costs of criminalization?  
Economic? Political? Moral?
- Q5: Are the harms outweighed by any benefits?  
Should they even be compared?

## Direct Harms

1. Crime
2. Economic productivity
3. Bad neighbors
4. Bad parents
5. Bad relationships
6. Poor students
7. Unreliable employees
8. Crack babies

## HOMICIDE MOTIVES

Reasons for Murder  
in the United States



1990

Source: Statistical Abstract of the United States, 1992, Tab. 281. Based on police investigations.

## Indirect Harms

1. Health care premiums
2. Welfare/other public monies
3. Bad drivers
4. Poor classrooms/ general education
5. Quality of entertainment

## Annual Causes of Death

<b>Tobacco (2000)</b>	<b>435,000</b>
Poor Diet/ Inactivity (2000)	365,000
Alcohol (2003)	20,687
Microbial Agents (2000)	75,000
Motor Vehicle Accidents (2000)	26,347
Reactions to Prescription Drugs (2000)	32,000-106,000
Suicide (2003)	37,484
Incidents Involving Firearms (2000)	29,000
Homicide (2003)	17,732
Sexual Behaviors (2000)	20,000
Illicit Drug Use, Direct and Indirect (2003)	28,723
NSAIDs (1996)	7,600 (76,000 hospitalizations)
Injuries in home (1992-1999)	20,000 (average)
Marijuana	

## Moral Harms

- (1) Community standards of non-drug related behavior
  - Sexual ethics
  - Work-ethic
- (2) Traditional culture
  - Alcohol in Native American communities
- (3) Social structure
  - Mixing social classes
  - Destabilizing traditional institutions

(These needn't invoke Legal Moralism)

## Utilitarian Rationales for Prohibition

## The Utilitarian Goal in Drug Policy

Minimize the total disutility caused by the recreational use of drugs.

This does not necessarily entail:

- Reducing quantity of illicit drugs
- Reducing number of drug users

## Utilitarian Reasons to Criminalize

- (1) Direct health and social benefits
- (2) Deterrence of current and prospective users
- (3) Education:
  - (a) Criminal sanction can help demonstrate the wrongness of drug use.
  - (b) Criminal sanction to encourage respect for the law in general.

## Utilitarian Reasons Not to Criminalize

- (1) Millian Harm Principle
- (2) Direct benefits of drug use
- (3) Indirect benefits of drug use

## What's the Role of Utilitarianism in the Criminal Law?

Husak: Utilitarian considerations are off the table once there are rights at stake.

If harms are by definition rights violations, then utilitarian considerations don't have anything to do with the Harm Principle.

Responses:

When do we know rights are at stake?

How to distinguish between *Malum In Se* and *Malum Prohibitum* without circularity (e.g., invoking rights to define the boundaries of the criminal law).