How to Limit Overextension of the Harm Principle:  
A Philosophical Response to Professor Epstein  

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I. Introduction: Epstein's Two Claims

Let me begin by saying that, while I am generally a critic of political libertarianism, I am quite sympathetic to Professor Epstein's concerns that the harm principle has been overextended by courts and legislatures in several contexts; his arguments that government easements and takings to address alleged social or generalized harms should be compensated also strike me as largely persuasive, up to a point. On the more philosophical side, Epstein's remarks on Mill are especially insightful and his worries about positive legal duties to rescue are well-taken -- though I would press a distinction between any legal duties of individuals to prevent some grievous harm (when they can easily do so at little cost) and legal duties to contribute taxes to fund, say, universal medical entitlements legally established by a duly elected legislature. This relates to two distinct roles that that the harm principle may play, as summarized in two theses:

(1) First Epstein clearly holds that the harm principle has been misused to claim actionable harms in a range of dubious cases, from failure to save a child to some environmental harms.\(^1\) But (2) second, he implies that only real harms can justify government action that limits the liberties of individuals by directly limiting their conduct (e.g. to prevent force and fraud), or by limiting uses of their property (e.g. prevent monopolies) or by taxing their property.\(^2\) Thus if I read him correctly,

\(^2\) For he says that "it is no accident that the vast expansion of state power in these cases dates from the moment that the judges said that a showing of common law nuisance is always sufficient but never a necessary condition for state
Epstein thinks that a properly delimited harm principle is *indispensible* to drawing red lines around government powers and thus protecting individual liberty from state intrusion. In my brief remarks on this, I will try to focus on a couple philosophically interesting problems with such a libertarian way of addressing the harm principle.

II. Perils for Libertarians in Mill's view of Harm as the Sole Basis for Burdening Liberty

While he is surely correct about its historical development, the idea that only “harm” understood in a particular limited way can justify government limitations of private liberty in use of one’s body, land, or other resources faces political and philosophical challenges. Politically, our Constitution arguably recognizes a general power to limit commerce, regulate land use, and tax citizens to support all manners of public goods even where no nuisance or other specific harms are alleged -- the object can be to *improve* the general baseline from which would start in judging whether citizens' normal conditions have been impaired. If the burden applies uniformly to everyone, perhaps proportional to ability to pay, then compensation requirements will not apply. This sort of reasoning seems likely to be the best justification for the constitutionality of our Health Care Affordability Act, even if failure to provide medical benefits should not count as a "harm" in Mill's intended sense. Underlying this political view that government can legitimately promote the “general welfare” within restrictions arising from individual basic liberties is the assumption that these liberties are not limited only by potential harms to others, and that is the issue at stake.

Philosophically, it makes sense that a utilitarian like Mill would develop the harm principle to determine when it is right to limit individual liberty because of the general goods that in the long run come from giving each individual certain assurances of protection in the form of rights, even if regulation on land use without compensation” (Ibid, p.403), and makes similar remarks about overextension of the commerce clause. I would need to read *Skepticism and Freedom* to confirm this interpretation.

3 Epstein writes: "During the nineteenth century the harm principle served as a bulwark of liberty and limitation on the scope of government power....The principle that was once the shield of individual liberty has been forged into a sword against it” (Ibid, p.371).
these are fairly modest. But this was probably never a good way to reach libertarian conclusions, because "harms" necessarily have "goods" as reciprocal their correlates, and so the harm principle leads us to consider a very extensive list of putative goods that different people regard as important or even vital, and which vary on several dimensions. We then have three ways of determining what sorts of goods could be deprived in harmful actions that government might need to prevent or rectify. (A) First, we can insist that harms are actionable in law only if they affect legally defined goods or interests that the law protects. But such derivative harms will not tell us anything about what interests the law may legitimately protect. Interestingly, the need for "injury in fact" for standing to bring some environmental suits may recognize this point at least implicitly.4

(B) The second alternative is to focus only on private consumer goods that neoclassical economic theory will recognize simply because people desire them (sans need for justification); the doctrine of revealed preference then claims to be neutral between substantive judgments about such goods. But far from being neutral about goods, the idea that liberal government can consider only frustrations of "surd" wants5 would beg the question against the entire republican and natural law traditions with their conceptions of common goods, which are also key parts of our heritage.6 It is makes democracy into pure tyranny of the majority preference by dogmatic insistence that every value must be measureable by market behavior, as in so-called "public choice" theories of government.7 It is also psychologically implausible: as Charles Taylor and Harry Frankfurt have each argued separately, human beings commonly make “strong evaluations” that cannot be modeled in a simple preference hierarchy, and these evaluations are often related to aspects of

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4 See Albert Lin, "The Unifying Role of Harm in Environmental Law," Wisconsin Law Review 2006: 897-985, pp.916-20. For the purpose of the injury-in-fact requirement seems to be to require some 'objective' damage or setback, in the sense weak sense of being independent of mere perceptions, though probably not of desires. My own sense is that harms as legally defined wrongs must trace at least partially to pre-legal harms in most cases.
5 I take this apt expression from Alasdair MacIntyre's essay, "How Moral Agents Became Ghosts," Synthese...
7 See Mark Sagoff, “At the Shrine of our Lady of Fatima: Or Why Political Questions are Not All Economic,” in The Economy of the Earth, 2nd ed. (Cambridge University Press, 2007).
personal autonomy in their agency. Finally, if the purely economic conception of human agents as mere maximizers of brute preference satisfaction were at all plausible, it would make harms as varied as the endless extremes of bizarre human desires, including even alienated ones. We could be accused of harming the phobic person by accidentally carrying a spider into his vicinity and thus causing a panic attack, are harming our neighbor by allowing moles in our yard to make their way into hers and destroy the mud she likes to eat. Can we even rule out ‘tuitive’ preferences (referring to others’ satisfactions)? If not, Biblo Baggins will have to accept that his envious Sackville relatives are harmed by his good fortune which pains them so. Moreover, in an initial situation of social contract-making, anything people desire no matter why will have to count as a good. A liberal theorist will pay very high conceptual prices by trying to understand harm purely in terms of subjective preferences, leads directly to over-extension of the harm principle.

(C) Third, there are many goods with alleged objective value, e.g. because they are essential to basic human capabilities including autonomy, or because they are crucial to any meaningful use of certain key rights such as democratic participation, or even because they are just intrinsically value-ladden – such as some alleged aesthetic goods of landscapes, or value in each species-line as a unique recipe for life, or inherent value in ecosystems sustaining complex networks of life. This may be the only viable option, but not for libertarians. If we had a generally acceptable doctrine of the objective goods, as Mill and the natural law tradition both aspired to provide, then we could confidently employ the harm principle to outlaw (or require compensation for) private acts that directly cause objective harms, at least where such acts are not better allowed by law for the sake of producing greater collective benefits accruing in part even to those harmed by them in particular cases (as Epstein has explained). But then we have to abandon a central hope of the liberal tradition

9 Clearly Feinberg thought this kind of good was central to a conception of just government. Lin glosses Feinberg’s view as follows: “Setbacks to interests, in contrast to the passing effects of hurts or offenses, are harmful because they involve lasting detriments to personal autonomy” -- see Lin, op. cit, pp.924-5.
10 See the work of Alan Carlson on aesthetic value in nature, and the work of Holmes Rolston III on intrinsic informational value in species that is analogous to artwork in its uniqueness and complexity.
in all its forms, including its libertarian wings: namely to justify government coercion or legal limitations of liberty (especially if uncompensated) solely by reference to thin considerations of basic morality on which reasonable people with very different conceptions of the goods relevant to a worthwhile life can all agree. The harm principle might have seemed neutral in this sense, but I think the history Epstein has traced shows that it never was and cannot be. Even the manifest desire to use distinctions like act vs omission and malicious intent vs negligence or mere oblivious ineptitude seems to be driven primarily by this continuing hope to find an axiologically neutral principle. As important as these distinctions are (as common law reflects) they cannot be made to do the job of distinguishing between truly vital, significantly important, and trivial goods, which the people collectively and their legislatures must often perform.

Thus I suspect that libertarians are more likely to be successful by starting with a moral doctrine of basic liberties grounded in claims about the fundamental conditions of personhood and any kind of meaningful life, e.g. Robert Nozick's strategy. I don't think this will ultimately succeed: as John Rawls's own efforts to determine the scope of basic liberties and priority relations among them shows, there is really no way to make sense of how extensive protected liberties should be and how they can fit together into one coherent scheme (which is to be prior to considerations of general public utility) without considering the goods that we use various liberties to pursue -- the purposes of liberties, if you like -- and the goods that can be prevented by misuses of them. But this strategy might still justify fairly strong property rights for many kinds of property, if some acceptable account of initial acquisition can be found; whereas relying on the harm principle as Mill did seems to lead into incoherence and theoretical morass in which libertarian and collective good intuitions get balanced by way of some thinly veiled rationalization that produce poor precedents, as I think several of Epstein's examples show.

III. Even After Eliminating Exaggerations, There are Many Significant Collective Harms
Still, even if harms identifiable on independently plausible principles cannot be made necessary to justify government action limiting free use of property or requiring tax revenue, Epstein is on stronger ground in attacking the opposite presumption that any sort of harm considered in extended use of the principle today may be sufficient to justify some law burdening liberty or taking property (esp. without compensation). Here cases involving "competitive harm" are the most intuitively powerful counterexamples: surely boatmakers could not sue the Wright Brothers for inventing the airplane and thus eventually reducing the need for boats in many sectors. Yet even profoundly insightful and influential philosophers like Jürgen Habermas sometimes proceed as if even such harms are fair game until proven otherwise. Following several neo-Kantian thinkers, Habermas has argued that the practices of argumentation imply that every justifiable norm (including legal norms) must be such that "All affected can accept the consequences and side-effects its general observance can be anticipated to have for the satisfaction of everyone's interests...." As several critics of this influential principle have argued, it obviously requires some background consensus on what counts as being "affected." I might be distraught by the thought that my hated rival is dating my former girlfriend now, and the mental suffering is real enough, but does that mean I have to agree to their relationship -- or to be fairer to Habermas, that I and others could debate and finally vote on whether past lovers (or parents, siblings, friends etc.) should ever have a veto on romantic pairings that could affect them? A hotel owner may be negatively affected if I give her establishment a bad review or if I open a better hotel near to hers -- but can these harms be valid reasons for a legislature taking account of all affected interests to limit the number of hotel licenses or set fines for unfair reviews?

Perhaps Habermas should say here that we have to come up with universally acceptable

11 Habermas, "Discourse Ethics," in Moral Consciousness and Communicative Action, tr. Christian Lenhardt and Shierry W. Nicholson (MIT Press, 1993), p.65. It is important to note that Habermas sees this universalizability principle (U) as a formal presupposition of practical argument, though it actually seems to embed some ideas about what counts as valid evidence in such debates. He also distinguishes it from the principle (D) of discourse ethics which is a substantive though most general moral principle rather than a principle of practical argumentation (p.93). But (D) also refers to "all affected" by the norm being tested.
second-order principles for drawing these lines, i.e. everyone should agree on what kinds of harms (or external benefits) count or can be cited as potential reasons for legal limits in more particular cases. But how could such consensus principles be justified without illuminating accounts of important goods, their potential relations and relative rankings, etc? At this stage I would turn to findings of empirical psychology about components of human happiness, phenomenological accounts of intrinsic goods in nature, and contemporary game-theory explanations of collective action problems that cause collective harms by preventing optimal outcomes for many goods, both of the mere-preference kind and the objective kind.

But these ways of reining in the harm principle will not ultimately help the libertarian cause; for they recognize many kinds of market failures beyond monopoly, force and fraud, and imperfect information: 'tuitive' preferences about others' satisfactions or desires for joint activities will often lead to sub-optimal outcomes if all parties just strategically pursue their advantage. In some of his work, Professor Epstein seems to think that such problems can always be overcome by trading, e.g. with side-payments; this is equivalent to the thesis that enforceable bargains can overcome a collective action problem, 12 which is generally true though there are exceptions for certain complex motives at odds with enforcement – consider a desire that another love you freely. 13 Yet the deeper problem concerns cases where ordinary market interaction leads to sub-optimal provision of an objective good, many of which are also objects of desires for coordination or joint enjoyment. If we say these goods can also be traded and try to create the "missing market" for them, we have to decide whether the neutral default from which people have to pay to depart should be the common provision of the alleged good or its absence.

12 Epstein, *Skepticism and Freedom*, ch.7, pp.166-69. Of course this solution depends on there being a party to enforce the trades, which there is not in many instances; e.g. see the examples reviewed in Todd Sandler, *Global Challenges* (Cambridge University Press, 1997), many of which concern environmental harms that are dispersed among nations and over generations, who cannot easily trade across lengths of time.

13 There are more cases like this in Jon Elster's works such as *Sour Grapes*; also see David Gauthier, *Morals by Agreement*, ch.3 on cases where the Nash-equilibrium is Pareto-suboptimal even when people are allowed to choose a lottery or make a bargain involving some lottery.
Issues involving the famous Lockean "proviso" on natural resources all involve this decision. If we say that people should be able to rely on the public good of fruitful lands and waters full of fish that they can use or claim, then they must be compensated for being harmed by the absence of these goods -- this is the baseline implied by Locke's suggestion that we should leave "enough and as good" of these resources for later people. But some Hobbesian might instead insist fertile lands, rivers, and seas are only goods because people prefer them to not having them, and those who got them first just got lucky (nothing wrong with that). If none are left to claim, then those without should pay the current owners for them; no compensation is needed, only trade.

This issue will come up whenever there may be an important objective good to which people may be entitled as a matter of basic right, as Locke held for natural sources of property. For example, what about a right to a playing field that is kept somewhat level by the absence of genetic engineering that enhances children's traits beyond the normal human range of functioning. Imagine the harm to people who oppose such trait-enhancing engineering if we were to legalize all forms of it that science can provide? Then competition would force conscientious objectors to such practices to choose between violating their deepest convictions or allowing their children to start life with severe disadvantages. The harm here is clearly competitive, but it does not derive from the single actions of this or that competitor; it arises from the collective act of allowing a free market in genetic traits, which destroys the common good (as the objectors judge it) of genetic stability and freedom from market pressures in this area. So what is the baseline -- should opponents of trait-enhancing engineering have to pay those who want to engage in it not to do so, or should those who want to engage in such engineering pay the rest of us for the collective harm they are imposing? It depends on whether we judge that there is an objective common good here to which we have a natural right. Note that similar arguments could be made against legalizing prostitution gives its collective effects (e.g. if paid sex were involved in many jobs for which objectors could now not compete). The harm principle may well extend to such collective harms if there is a
baseline common good that we all have an obligation to leave in place for others, or compensate them for degrading if we do not.

So there is no good alternative to allowing people as citizens and their legislatures to judge such common goods and to limit individual liberties that would otherwise create collective action problems that would destroy the relevant common goods (usually because this part of liberty would lead to an unfettered market in the relevant area of life), then the same logic will apply to cases where Epstein objects. Blocking views of beautiful rivers or mountains or forests, ruining of landscapes by ugly development, light pollution, noise pollution, trash and other nuisances, and the wholesale destabilizing of communities by too much fluidity in labor markets and too much freedom to move giant amounts of capital at will may all really be significant harms that need to be prevented by law. If people acquired the relevant land or other assets for uses that would lead to such harms but did so before any legal ban, then they should certainly be compensated. However, once these limits become a stable part of social expectations on what economic freedom includes, there is no further need for compensation. 14 (Even the offer of compensation can eventually create collective action problems of its own in the form of people taking up the to-be-prohibited activity in order to seek compensation; this can apply to compensation for prohibiting various sorts of risky behavior that impose external risk-costs on unwilling others, such as gun-ownership15).

Finally, even Epstein's proposed way of distinguishing between "cognizable and non-cognizable harm" by reference to a contemporary economic "conception of social costs" (in place of privileged harm-causing acts and malicious intent overriding privilege) 16 will not settle many questions. That is because often a social harm can be stopped by legal coordination of

14 I follow F.A. Hayek's view that stable expectations are essential to procedural fairness in a just society: whatever we decide the legitimate forms of government power and limits to liberty may be, they must be implemented in ways that make possible long-term planning and instrumentally rational policies --see Hayek, Law, Legislation and Liberty vol.1.
15 'Thus Nozick's solution to these problems in Anarchy, State, Utopia ch.4 have seemed woefully inadequate to many. As Epstein's analysis implies, he needed to consider possibilities of malicious intent in taking risks that others will have to prohibit.
missing markets in either of two ways: either (a) a cap-and-trade regime in which the government limits the collective amount of some product with previously externalized costs can be sold and then sells rights to produce X units of it at a price reflecting that externalized costs, or (b) allow those who will be negatively affected by some product or activity the right to pay for its banning or limitation. In such cases, we have to decide baseline rights (which in some cases is equivalent to ownership of some common good).

For example, we might think that if environmentalists want wetlands not to be drained because of their beauty, or the intrinsic value in the birds they sustain, or for the economic value of their ecosystem services (e.g. contribution to watersheds health), then those who care about such goods should pay for them -- let them each pay into a fund to compensate the landowners for the opportunity cost of not developing their wetlands. Then we will see how much they think these values are worth next to guns, butter, or whatever consumer goods they are giving up. But aside from treating capital assets as mere consumer goods and ethical judgments about the latter as if they could be measured by brute preference measured in market decisions, this assumes that land ownership included total control over their part of these wetland common goods. If instead the public in general starts out with non-derivative or 'eminent' ownership of the good of healthy wetlands etc. then it is the landowners who should pay them for destroying these goods (i.e. via a capped and traded right to drain and develop).

These baselines are matters of fundamental right, to be decided by a prevailing conception of autonomy, agency, property origination, and common goods. As a result, we cannot simply add up the "systematic gains and losses of all players and (bystanders)...") under one regime or the other and see which produces the greatest net gain; for this might not give us the morally right result. What if it turned out that it was more efficient to allow people to sell organs, or sex, or the right to reprogram their brain to hold certain political beliefs, and charge others who felt harmed by free

17 Mark Sagoff has shown in detail why these conflations are a fundamental mistake.
trade in such assets for the opportunity-costs experienced when they are banned? But this assumes that people start with a right to sell their bodies or their consciences and then must be compensated if deprived of the dollar value of these assets -- and that requires some arguments that the economic calculation cannot supply. Similarly, if risk-costs associated with sea-level rising 5 feet and half the ice melting off the Himalayas thus dramatically reducing river flows in India and China are really confronted, it might turn out that the price per unit of carbon emission or methane emission will be high enough to bring about great improvements in renewable energy alternatives. But this assumes that the global public has a basic initial right to a climate free from these sorts of dramatic human-induced changes, and that also needs an ethical argument. In sum, what the problems with the harm principle imply is that we need an adequate conception of baseline property rights at the global level, and robust democratic deliberation about common goods at all levels. Judges can only do a little bit of this for us, and then only to make temporary settlements to be decided by statute or constitutional amendments.