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OPEN PEER COMMENTARIES

The Nature of Harm: A Wine-Dark Sea

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In "Harmful Choices, the Case of C, and Decision-Making Competence," Pickering and colleagues advance an argument in favor of *externalism*, a view in which the competence of a decision maker is judged relative to factors external to their cognition (Pickering, Newton-Howes, and Young 2022). In advancing this argument, Pickering and colleagues focus on the external factor of *harm*: In their view, it is the *harmfulness* of a considered or chosen action that provides evidence against the competence of the decision maker. However, the proper identification of harmful choices and outcomes remains a demanding task, largely because our understanding of what harm *is* remains deeply incomplete. Despite 50 years of tempestuous debate, the metaphysics of harm remains an unsettled question. The existence of such a debate does not, in and of itself, provide evidence against the externalist position; rather, it is the theories of harm themselves that pose meaningful challenges for the externalist. Our purpose, here, is to illuminate these challenges.

The canonical theories of harm can be divided into two opposing schools of thought: *Comparitivism*, in which facts about harm involve comparisons to past or potential states, and *non-Comparitivism*, in which facts about harm do not involve such comparisons. We begin by surveying these schools in turn, using the case of *C* to illustrate their judgments.

The classical Comparitivist position, advanced by Joel Feinberg, centers on comparisons to counterfactuals: In Feinberg's theory, one is harmed when one is made to be worse off than one otherwise would have been (Feinberg 1986). In the case of *C*, then, it is arguable that, following her refusal of dialysis, the worsening of *C*'s well-being constitutes a harm. A similar sort of analysis is offered by another Comparitivist position, advanced in Thomson (2011), which includes the consideration of prevention: by Thomson's theory, C's decision would constitute a harm to her insofar as it prevents her from being in a better state.

The non-Comparitivist school, in contrast, rejects the relevance of such comparisons to determinations of harm. The classical non-Comparitivist view, advanced by Seana Shiffrin, holds that harm involves incongruency between one's present state and what one wills (Shiffrin 1999). If you were to accidentally fall and break your arm, for example, Shiffrin's theory holds that you are harmed insofar as you enter into a state that is incongruent with your will: You *did not* will to have your arm broken, and likely *did* will to do things that you now cannot. In the case of *C*, however, it was never in question that *C willed* to refuse dialysis and embrace the consequences thereof. She told the court that "they [the doctors] are doing their best … and unfortunately that is not what I want," and one of her family members told the court that *C*'s decision was "not only fully thought through, but also entirely in keeping with her value system and her personality" (Pickering, Newton-Howes, and Young 2022, 43). By Shiffrin's theory, one is only harmed when one enters into a state that is incongruent with one's will, entailing that a willed outcome *cannot*, by definition, constitute a harm to the decision maker. In the case of *C*, then, Shiffrin's theory holds that *C* is *not* harmed by her decision, contrary to the judgment of Pickering and colleagues.

A similar line of argument can be constructed using the non-Comparitivist theory briefly outlined by James Woodward: that harm to a person involves the violation of either a right possessed by that person or an obligation owed to that person (Woodward 1986). If

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you were to be discriminated against (and thereby have a right violated) or have a promise to you broken (and thereby have an obligation go unfulfilled), for example, Woodward's theory would identify harm.[1]

In the case of *C*, the analysis offered by Woodward's theory is multifaceted. It is quite plausible that *C* has some right to live a life congruent with her value system, and it is equally plausible that *C*'s physicians are obligated to provide the best care possible. If these rights and obligations were both to hold, then *each* possible outcome in the case of *C*—the provision of dialysis against her will, and her death after the refusal of dialysis—constitutes a harm to *C*: In the former, her right of self-determination is violated, and in the latter, the obligation owed by her physicians goes unfulfilled.

This brief survey of theories brings to the foreground a distinct practical challenge for the externalist. Suppose that the judge in the case of *C* were to have fully embraced Pickering and colleagues' externalism while preparing their judgment: Appraising the facts of the case, they must determine whether the choice that *C* made constitutes a harm to her. We see very clearly, however, that this is no simple task: Feinberg's and Thomson's theories disagree with Shiffrin's, and the judgment of Woodward's theory disagrees with all three. All four have been the subject of intense scrutiny and meaningful counterarguments, and any one of these theories may or may not go on to be completely discarded—or refined into the best analysis of harm available. The externalist judge, then, finds themselves unable to answer the very question at the heart of their analysis.

The problems presented for externalism by these theories, however, go deeper than merely practical concerns. Perhaps the most serious arises from a more careful examination of the non-Comparitivist theories. By Shiffrin's analysis, a "harmful choice" is one in which *A* wills *X*, but chooses not-*X*. Externalism, on such a definition, would be forced to abandon its central thesis—that the determination of a person's competence is directly tied to factors external to their cognition—as facts about the harmfulness of an action would supervene on facts about the will of the actor. If Shiffrin's theory holds, a form of externalism that references harm ceases to be externalist.

Further, we can consider the intersection of Woodward's theory with externalism. Recall that in the case of *C*, Woodward's theory would claim that both potential outcomes would constitute a harm, as either her rights or the obligations owed to her would be violated. An externalist theory that operationalizes Woodward's theory, then, becomes incoherent by virtue of overextension: If all possible options constitute distinct and meaningful harms, then externalism will *always* provide evidence against the competence of the decision maker.[2]

Both Woodward's and Shiffrin's theories, then, not only pose practical challenges to the externalist but question whether the position is even coherent. The externalist, in response, may be tempted to say that the incompatibility of these non-Comparitivist theories with externalism is a weakness of the theories, rather than externalism. This position may be further bolstered by the fact that the Comparitivist theories, prima facie, agreed with the assessment of the case of *C* offered by Pickering and colleagues.

But such an argument comes with metaphysical costs. Feinberg's theory of harm, as argued in Hanser (2008), improperly identifies *non*-harms in cases where the counterfactual world is worse: For example, when the negligence of a physician injures a patient, but the counterfactual world involves another physician's negligence causing a worse injury.[3] Similarly, Thomson's theory improperly identifies harms in cases where one willingly chooses a lesser benefit for the sake of some other end: for example, where one chooses a slightly less efficacious drug with a much better side effect profile (Rabenberg 2017). Furthermore, it has been argued that the Comparitivist theories are incompatible with the notion that death is a harm—the very harm that Pickering and colleagues find in the case of *C* (Hanser 2008).[4] The externalist does not find a significantly safer port by choosing to wholeheartedly embrace Comparitivism.

There are, of course, other theories of harm, such as those advanced by Matthew Hanser, Elizabeth Harman, and Michael Rabenberg, but all have their share of weaknesses and challenges.[5] All told, the metaphysics of harm remains obscured—to borrow a phrase from the Poet Sovereign—by a tempestuous and wine-dark sea. Given these conflicting accounts and the incoherency of externalism on at least two of them, the acceptance of Pickering and colleagues' argument must be tempered. Before we can accept the notion of externalism and seek to implement it, we

[1]It is unclear whether Woodward takes these conditions to be necessary or merely sufficient. This does not, however, impact the analysis offered here.

[2]A defender of externalism may, in response, be willing to assert that the harm of death is worse than the harm of having one's rights violated. This makes three important and questionable assumptions: (i) that the harm of death is comparable to the harm of having one's rights violated, (ii) that there is a way to determine which harm is objectively "worse," and (iii) that death is a harm.

[3]Klocksiem (2012) disagrees. Rabenberg (2017), however, agrees.

[4]Thomson (2011) disagrees, though a rejoinder is offered in Hanser (2011).

[5]See, respectively, Hanser (2008), Harman (2009), and Rabenberg (2017).

must first seek to truly understand the nature of harm—lest we be thrown against the rocks of our own metaphysical ignorance.

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REFERENCES

Feinberg, J. 1986. Wrongful life and the counterfactual element in harming. *Social Philosophy & Policy* 4 (1): 145–78. doi:10.1017/s0265052500000467.

Hanser, M. 2008. The metaphysics of harm. *Philosophy and Phenomenological Research* 77 (2):421–50. doi:10.1111/j.1933-1592.2008.00197.x.

Hanser, M. 2011. Still more on the metaphysics of harm. *Philosophy and Phenomenological Research* 82 (2):459–69. doi:10.1111/j.1933-1592.2010.00477.x.

Harman, E. 2009. Harming as causing harm. In *Harming future persons: Ethics, genetics and the nonidentity problem*, ed. M. A. Roberts and D. T. Wasserman, 137–154. Dordrecht: Springer.

Klocksiem, J. 2012. A defense of the counterfactual comparative account of harm. *American Philosophical Quarterly* 49 (4):285–300.

Pickering, N., G. Newton-Howes, and G. Young. 2022. Harmful choices, the case of C, and decision-making competence. *The American Journal of Bioethics* 22 (10): 38–50. doi:10.1080/15265161.2021.1941422.

Rabenberg, M. 2017. Harm. *Journal of Ethics and Social Philosophy* 8 (3):1–33. doi:10.26556/jesp.v8i3.84.

Shiffrin, S. 1999. Wrongful life, procreative responsibility, and the significance of harm. *Legal Theory* 5 (02):117–48. doi:10.1017/S1352325299052015.

Thomson, J. J. 2011. More on the metaphysics of harm. *Philosophy and Phenomenological Research* 82 (2):436–85. doi:10.1111/j.1933-1592.2010.00418.x.

Woodward, J. 1986. The non-identity problem. *Ethics* 96 (4):804–31. doi:10.1086/292801.

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Against Externalism in Capacity Assessment—Why Apparently Harmful Treatment Refusals Should Not Be Decisive for Finding Patients Incompetent

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INTRODUCTION

Pickering et al. (2022) argue that patients who refuse doctor-recommended treatments should in some cases be deemed incompetent to decide about their own medical care—in part because of their decision to refuse treatment—even if they would otherwise have been considered competent. This, then, would allow doctors to override the patients' will and to enact the treatment against their wishes. Such a proposal should be rejected. Among other problems, Pickering et al. fail to distinguish the "apparent" self-harmfulness of a decision (i.e., based on the judgment of an outside party) from the actual (net) self-harmfulness of a decision based on the patient's own distinctive worldview and values. They also rely on a false equivalence between dissimilar approaches to decision-making to dismiss the dominant anti-paternalist paradigm. Pursuing their suggestion would thus foster morally objectionable paternalism in medicine. It could lead to the imposition of genuinely unwanted treatments on non-consenting patients, and to the wrongful infringement of patients' bodily integrity.

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