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Review Essay

The Limits of Liberalism: Wrong to Others

Patrick Baude


In his preface to this first of a projected four volumes on the moral limits of the criminal law, Joel Feinberg reports that his project began as one philosophical chapter promised for a book about victimless crimes. We can be grateful that his reflections on the impossibility of fulfilling that promise led him to undertake these volumes rather than forget the whole thing. Even so, the genesis of the work has influenced its shape: this is primarily a study of whether criminal law should extend beyond its core of the “harm to others” principle, not an exploration of how the criminal law should deal with philosophical issues arising within that core. Feinberg’s earlier Doing and Deserving (1970) remains an important contribution to those questions—for example, see his chapter “On Being ‘Morally Speaking a Murderer.’”

The object of his inquiry is the liberal position on the scope of the criminal law, which was given its classic expression by John Stuart Mill: “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”1 Feinberg’s purpose is to make that position as appealing as possible by discrediting the positions of legal paternalism (in vol. 3, Harm to Self) and of legal moralism (in vol. 4, Harmless Wrongdoing). One dilemma of that liberal position has been the question of the state’s power to protect individuals from the “offense” involved in acts such as pornography or the display of Nazi emblems. That controversy has volume 2 (Offense to Others) to itself. The foundation of the liberal position as Feinberg defends it is “the view that


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the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions" (vol. 1, at 14–15).

The defense of that position gives to this first volume its central mission of strengthening the concept of harm to others. Those of us who would stand with Mill if we can still have strong intuitions that certain not obviously harmful-to-others conduct should be punished. Examples of these test cases might include harming the dead, dueling between consenting adults, or the mere failure to provide life-saving assistance in an emergency. The mission of volume 1 is to convince us that these concepts can be found within the realm of harm to others, hence that we need not choose between liberalism and our humanitarian intuitions.

The author makes his method explicit. By clarifying fundamental concepts, working them through both clear cases and doubtful ones, modifying principles as necessary, and taking positions on concrete cases where he must, Feinberg aims to produce the most plausible case he can for the position that harms and some offenses to others are the only legitimate occasions for the use of the criminal law. He hopes that we will then be persuaded by this most plausible case, but whether we in fact are is our own business. His subsequent volumes will inspire more predictable resistance: the “extreme” liberal (Feinberg’s label) will resist the idea that offensiveness is enough for a crime, and the nonliberal will, because it is her or his chosen lot in life to do so, rise to defend legal moralism. The conclusions of volume 1 itself are less likely to stir political disagreement, since there is nearly total agreement that preventing harm to others is at least one proper end of the criminal law.

In many ways, then, the freedom from political controversy over prevention of harm to others makes this point the best place to dispute the concepts Feinberg means to clarify and refine. I remain unpersuaded for two reasons. First, Feinberg does not adequately account for important differences between the criminal law and other forms of governmental coercion. Second, his assumption that the concept of legitimacy is intuitively obvious obscures much that needs to be clarified.

Before I turn to my disagreements I should sketch the powerful positive accomplishments of the book. The structure of the four volumes provides a coherent framework for discussing the moral boundaries of the criminal law. The paternalist might challenge the division by arguing that harm to oneself necessarily harms others indirectly, just as the moralist might argue that immoral acts often end up in real but hard-to-trace damage. Even so, Feinberg's structure makes it possible to discuss the subject intelligibly.

"Harm" is of course a common sense concept, but Feinberg poses a number of "puzzling cases." Typical of these is whether one can be "harmed" after death. In Feinberg’s analysis, harm is what happens contrary to our "interests," not to our persons. In that light it seems natural to recognize that the interests one had during one’s lifetime can be set back by events that come to be known after one’s death. The interests of the unborn are more
difficult. If an injury is done to an unborn child who survives to suffer from it, it is not hard to say that the child's interests are set back by the injury. There are two harder cases. First, suppose the child is not born at all. This question, which encompasses abortion, is one Feinberg puts to the side of the present work by saying that the unborn are harmed only after they stop being mere "fetal prepersons," whenever that is. (Surely we must allow Feinberg the right to set the abortion issue aside in this volume, especially since he has discussed it elsewhere.) Second, suppose the only harm to the child is that he or she was born—for example, born with a severely disabling genetic disease following a recklessly performed sterilization of the mother. In this situation, according to the author, the child has a moral grievance (at 102) and even a civil action, but there can be no crime against the child (as distinct from the mother) because the child's interests have not been set back by being conceived.

This last illustration introduces another key step in the analysis of crimes. People can be "wronged" by a violation of their "rights" even though they have not been "harmed." One example, borrowed from Fried's Right and Wrong, is the failure to perform a gratuitous promise. If there has been detrimental reliance, there might be harm. Even without that reliance, though, there might be a "wrong" which the civil law could justly remedy (although ours mostly doesn't). Feinberg has thus created an area of immoral conduct which is the business of the state (wrongful conception, for instance) but only through the civil process, not the criminal law.

About one-quarter of the book is devoted to a painstaking demonstration that bad samaritans can be punished under the harm principle. The major philosophical obstruction to this abstract proposal is the showing that omissions can be causes. The thoroughness of Feinberg's treatment on this point is itself more than reason to welcome the whole book. One could profitably spend a long time pondering the hypothetical case of a lounger by poolside who finds himself equidistant from two drowning babies (only one of whom can be saved in the time available) but merely continues to lounge, making no effort toward either one (at 144). No doubt the best-known objection to criminal liability for failure to aid is Macaulay's concern, expressed in the drafting of the Indian Penal Code, with the practical difficulty of drawing a line between the redistribution of income (which we now think of, for better or worse, as the business of tax law rather than criminal law) and the more pressing case of giving aid in special situations. Feinberg answers Macaulay's concern with his belief that criminal statutes here can be written in relatively vague terms and juries can be allowed the "discretion to apply standards of reasonable danger, cost, and inconvenience. Juries in civil cases have long been entrusted with such judgments" (at 157). Juries do many things in civil cases that we have, at least traditionally, been reluctant to allow in criminal

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cases. Indeed, the void-for-vagueness doctrine, which would be the principal constitutional objection to Feinberg’s resolution of Macaulay's doubts, applies only in criminal cases.

Feinberg defines his audience as morally concerned legislators. American law being what it is, that is to say, legislative power being as diffused as it is between bodies called "legislatures" and other bodies that act the same way (especially constitutional courts, courts formulating common law doctrines, and juries in cases of vaguely worded rules), it is in fact rather difficult to figure out exactly what use to make of the ideas in this book. The author seems to recognize this point when he says that these "volumes might also be thought of (presumptuous as it sounds) as addressed to ideal constitution-makers in some hypothetical constitutional assembly" (at 5–6). American law being what it really is, the officials most likely to use this book, licensed or not, are constitutional courts. The United States Supreme Court has of course found unconstitutional several criminal statutes dealing with harmless wrongdoing. In some well-known cases the Court's decision has been explained by a right to engage in the conduct in question, cases such as the private possession of obscenity: in such cases, Feinberg's theory is unlikely to explain much, since these are, in form at least, cases about the affirmative right to do something, rather than mere statements about the limits of the criminal law. In other cases, however, the Supreme Court seems to find some distinctive limit on the criminal law's ability to reach harmless-to-others acts—for instance, the status of drug addiction cannot be made a crime, although there is no right to take drugs, or the failure to satisfy an unknown duty to register cannot be a crime, even though there is no right to remain unregistered. Even the present constitutional situation with respect to abortion invites an analysis as much in terms of the limits of the criminal law as in terms of the official rationale of the "right" to privacy. The Supreme Court has struck down criminal sanctions on abortion while upholding surprisingly aggressive restrictions on the actual availability of abortions—"surprisingly," that is, if abortion is really a constitutional right rather than merely something left outside the sweep of the criminal sanction.

It is unfortunately at this point—where philosophical illumination on current "legislative" issues in the limits of the criminal law is most needed—that Feinberg fails to realize the promise implicit in the title for his overall work. Much of his analysis is a plausible description of the moral limits of governmental action, but he does not give a coherent account of why the criminal law should be more limited in these matters than civil or administrative control from the government. His principal discussion is in a three-page section entitled "Alternatives to the Criminal Law," in which he makes the point that "penal legislation, on the whole, is a more drastic and serious thing than

its main alterantives, if only because criminal punishment (usually imprison-
ment) is a more frightening evil than lost inducements, increased taxes, and
various civil disabilities, and in a sense to be explained (ch. 23) more ‘coer-
cive’” (at 23). He then gives a specific justification of a tax on smoking (since
an actual criminal prohibition would be legal paternalism). He explains that
the tax is different for three reasons. First, there is “a difference in the mode
of coercion so significant that it amounts to a difference in kind as well as
degree.” Second, the suppression of smoking by the tax may be just enough
to keep the activity below “the threshold of harm to the public.” Third, the
tax can be explained on grounds of financing “social costs (lost productivity,
hospitalization, medical care, etc.).” I find this a convincing explanation of
taxation as a special case. But there are legal measures that are neither taxes
nor crimes.

There are, in other words, civil suits for damages. Indeed, at several key
points, Feinberg relies on the civil remedy to assure us that wrong will not be
left unrestrained. He argues that moral rights without harm may be the basis
of civil actions but not criminal punishments. In a significant passage involv-
ing liability for wrongful conception, he takes this position:

The harm principle does not permit criminal liability for “wrongful concep-
tion” since the act causing the conception does not cause harm in the special
narrow sense that requires both set-back interests and violated rights.
(Although there can be criminal liability for the sexual act insofar as it harms
and wrongs the sexual partner or third parties.) But since infant-rights are
violated in the case where inherited impairment is severe, there is no reason
why the wrongful progenitors (or other wrongful facilitators—doctors,
pharmaceutical companies, earlier partners transmitting venereal disease, etc.)
should not be held civilly liable to pay damages to the child. (At 102)

I am not intuitively drawn to Feinberg’s idea that injuries that merely violate
rights, without doing harm, should be beyond the reach of criminal law. My
objection here, however, is on the institutional ground that the way civil
remedies work will leave many rights without real legal protection. Civil
remedies for damages are by their nature merely instrumental. They can be
insured against, passed on as a cost to others, avoided altogether by the insol-
vent, and bargained away in advance. In fact, the very logic of the basic civil
remedy, “damages,” is a logic of harm. A tort suit where there is no harm
will either not be brought or else will result in something like a windfall
benefit for the plaintiff. Criminal convictions, on the other hand, can be
satisfied only by the “wrongdoer,” as we usually say, or by the “harmdoer,”
as we might say with Feinberg. I can get other people to pay tort judgments
against me—my customers or my insurer, or, most likely, I can get my
customers to pay my insurer to pay my plaintiffs. Unless I command im-
mense loyalty, I can’t get anyone else to go to jail for me. Even if a criminal
conviction does not produce a jail sentence, it is still the defendant personally
who will be disabled from voting, from practicing accountancy, and so on.
The personal nature of criminal liability makes it different from civil liability
because we make the criminal suffer. The key to that decision as a matter of justice should be his immorality. He should suffer for his wrongs and pay for his harms. Feinberg of course recognizes that crimes imply wrongdoing—the definition he uses of "harm" for purposes of the criminal law is this: "when we speak of 'harm' we shall refer to the effect on a person \( B \) when another person, \( A \), wrongfully harms \( B \)" (at 105). I still think this puts the situation backward. As Feinberg would have it, wrongs can be either torts or crimes: those wrongs which are also harms are crimes. As I would have it, damaging acts are either torts or crimes: those which are also wrong are crimes.

Obviously, my way of speaking would not suffice for a general theory of criminal law unless it too had four volumes of definitions and qualifications, and probably not even then. I think the central point remains, though, that the distinctive institutional features of criminal law cannot be explained by putting damage at the dividing line between civil and criminal. Let me put the same point positively rather than negatively. I have reasons of substance behind not wanting the state to interest itself in my books, my reproductive practices, my fondness for cholesterol: these reasons of substance suggest a vision of human freedom, autonomy, and dignity. I think that it is this vision of the good life that gives the liberal theory of the state its appeal. Let the state enter my library, my bedroom, or my kitchen, whether by civil or criminal regulation, and the positive case for liberalism is gone.

An abstract way to make my point is by a bastardized application of the Coase theorem\(^8\) to Feinberg's previously quoted example of wrongful conception. Remember Feinberg's basic conclusion that a child who has been wrongfully conceived cannot be the victim of a crime because the child has not been "harmed" by being conceived. Any lingering intuitions that might lead us to reject liberalism because of our concern for the "wrong" done to the child can be assuaged by the liberal's permission for a civil action on behalf of the child. The hypothetical case might run like this. A woman knows she carries a serious genetic defect which creates, say, a 1 in 64 chance that her child will be born terribly deformed and greatly retarded. She pays Dr. Sparks for sterilization. He accepts the fee but merely feigns the operation, in order to maximize his profits. The child is born in the worst possible condition. There is a crime against the mother but, according to Feinberg, not against the child. (The child has at most a civil action.) Assume the doctor was paid \$N for the operation and the child's civil damages are measured only by its medical expenses, which are \$M. If \( M \) is greater than \( N \) times 64, the doctor won't fake the operation, whether there is a civil action or not. If there is a civil action, obviously his profits are not maximized because he loses more than he can expect to make. If a tort action is not allowed, the child's insurer, if it knows everything, will maximize its profits by paying the

\(^7\) Or, of course, patent infringements, breaches of express trust, racketeer-influenced corrupt organizational activity, or what not.

\(^8\) Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).
doctor something less than $M$ not to fake the operation. On the other hand, if $M$ is less than $N$ times 64, the doctor will always maximize his profits and feign the operation, again whether he is civilly liable or not. So the rule of civil law has no effect on what happens where there are perfect knowledge and no transaction costs.

There are many practical objections to this example. The civil action might include a punitive damage element. The perfect foreknowledge it assumes will never obtain. The doctor's license will be revoked. He may even be stoned to death by legal moralists. As a practical matter, he would not engage in the transaction because it is a crime against the mother. But the abstract point remains. Rules of tort liability themselves will not make the doctor suffer or change his ways. Those results follow only because the legal rules alter the context of knowledge and transaction costs or because the doctor's conduct is made a crime. In fact, one particularly effective way to alter the transaction costs would be to invoke the institutions of the criminal law to subsidize the litigation and investigation of the case against the doctor, but that economist's point is not mine. My point is that the doctor should suffer and change his ways, whether $M$ is greater than $64N$ or not, whether transaction costs are negligible or not. Only the criminal sanction assures that in theory, and a theory that does not allow that assurance is incomplete.

Perhaps the reason this work fails to convince is that the limits of the criminal law, unlike its contents, are not really an issue for moral philosophy. The author devotes chapter 5 to what he calls “mediating maxims,” that is, to “guides to the application of a liberty-limiting principle in practical contexts.” But as George Fletcher observed in 1978, “Criminal law is a species of political and moral philosophy.” The interpretation of these “practical contexts” must in itself involve a substantial inquiry into the nature of state power and, as I have already suggested, some conception of what is distinctive about the criminal law. To allow political philosophy to play only a mediating role in defining the limits of the criminal law risks a serious failure. That failure is the blurring of what is philosophically just with what happens to be familiar belief in our particular version of a liberal society. This risk is great when the word “legitimacy” is given a central role to play, as Feinberg gives it.

Legitimacy has an everyday meaning of authorized by the boss, real rather than fake, with the approval of the owner of the credit card, and so on. In this usage, it refers to a basic question of fact—what did he say, what animal last wore this pelt, is your name Charles F. Frost? But legitimacy is also a political word, as in the legitimacy of primogeniture or of the government of Poland or of judicial activism. This political usage is never simply a question of fact: it is an appeal to some abstract theory of justice, the state, or the like.

At one point, Feinberg talks of “criminal statutes that are *legitimized* by valid moral principles” (at 6). This kind of legitimacy entails a political philosophy powerful enough to explain the authority of the community over the individual and the individual’s duty of obedience. Without some philosophical position on these issues, it is too easy to take them for granted by assuming the correctness of political institutions which are merely familiar. And the way to hide this jumping to conclusions is to use the word legitimacy at the same time at two different levels. Thus, Feinberg goes on to say that “The idea of legitimacy is not an invention of arcane philosophy. It is part of the conceptual equipment of every man and woman ‘on the street’” (at 6). If the street in question is governed and educated by the precepts of American constitutional democracy, then the case for the legitimacy of, say, the right of privacy, will be as intuitive, as inevitable, as the belief that a Big Mac is suitable nourishment for an adult. But this case will not be the same for the man who rides the Clapham omnibus with Baron Bramwell as it is for the man who rides the I.R.T. with Bernhard Goetz.