

## Introduction: Feinberg's *Moral Limits*, and Beyond

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Joel Feinberg's epic work, *The Moral Limits of the Criminal Law*, consists of four closely reasoned, marvelously inventive, and deeply humane volumes, in which the author sets out to describe the moral conditions necessary to justify coercive legislation in a liberal society.<sup>1</sup> In its impact on contemporary analytic philosophy, few works can compare. Practically everyone who thinks or writes about liberalism, legal moralism, autonomy, paternalism, coercion, and a host of other concepts in moral, legal, and political philosophy owes a debt to Feinberg's *Moral Limits*.

Despite its influence in philosophical circles, however, Feinberg's magnum opus seems less well known than it should be among legal academics and lawyers—even including those with a special interest in criminal law. This is unfortunate, for *Moral Limits* offers an almost endless source of insights into matters that are of central concern to the criminal law—including the prohibition of various kinds of supposedly immoral private consensual activity, the enactment of bad samaritan laws, assisted suicide, obscenity, insider trading, environmental crime, and the supposed paradox of blackmail, to name just a few.

The purpose of this special issue of the *Buffalo Criminal Law Review* is to provide a forum for considering

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1. Harm to Others (1984) seeks to define the complex concept of harmfulness, focusing particularly on difficult questions about posthumous and prenatal harms, vicarious and moral harms, minor and aggregative harms, and failures to prevent harm. Offense to Others (1985) explores the concept of harmless offense, focusing primarily on the concept of obscenity in its many different forms. Harm to Self (1986) deals with the concepts of legal paternalism, autonomy, and voluntariness, and considers the criminalization of acts such as assisted suicide and voluntary slavery. Harmless Wrongdoing (1988) takes up the question of legal moralism and the use of criminal law for certain kinds of non-harmful, but nevertheless "immoral," forms of conduct.

Feinberg's *Moral Limits* not only within the realm of theory, but also as it applies to the real world of criminal law legislation, doctrine, and practice, and to do so in a comparative context. The issue brings together a distinguished and diverse group of contributors from the United States, Canada, Germany, England, Scotland, and Wales. Some are philosophers who write about legal issues. Others are academic lawyers whose work is informed by philosophical analysis.

What all of the papers presented here have in common, roughly speaking, is an interest in extending Feinberg's analysis beyond its current boundaries. The eight essays, collectively, address four basic questions: First, exactly how do we distinguish between harmful conduct that is appropriate for criminalization and harmful conduct that is not? What Feinberg means when he talks about "harming as wronging" is the subject of essays by Antony Duff and Hamish Stewart. Second, under what circumstances can omissions satisfy the requirements of the harm principle? This is the question addressed by Patricia Smith. Third, what exactly is the relationship between Feinberg's conception of harmfulness and the use of punitive, criminal law sanctions? This is the subject of the contributions by Hugo Bedau and Bernard Harcourt. Finally, how should the analysis developed in *Moral Limits* be applied to the real world of criminal law legislation, including legislation not expressly dealt with by Feinberg in the book? This is the subject of papers by Paul Roberts, Tatjana Hörnle, and Peter Alldridge.

#### HARMING AND WRONGING

As Feinberg explains in some detail at the beginning of *Harm to Others*, merely causing "harm," at least in the limited sense of what he refers to as a "setback to interest," is not enough to justify the use of criminal sanctions. A defendant who acts out of necessity or pursuant to a victim's consent may cause harm, but it is not likely to be

the sort of harm we would want to criminalize. In order to be criminalized, a setback to interest must be accompanied by some form of “wrongfulness”—defined as an unjustifiable violation of another’s rights. Feinberg’s attempt to define “harm” to include a sense of moral wrongfulness is the subject of essays by both Antony Duff and Hamish Stewart, although the two authors treat the subject in quite different ways.

Duff, in his essay,<sup>2</sup> argues that Feinberg’s account of the harm principle distorts the character of the relevant criminal harm by artificially separating setbacks to interest from wrongdoing. Imagine that a burglar and a tornado cause precisely the same physical damage to one’s house. Although the setbacks to interest suffered are the same, the “harm” suffered by the burglary victim is very different from the “harm” suffered by the victim of a natural disaster. We cannot, Duff says, simply identify some group of acts as harmful in morally neutral terms, and then proceed to make a moral determination as to which subclass of harms should be eligible for criminalization. Moreover, says Duff, the tendency to separate the concepts of setbacks to interest and wrongfulness leads to other problems as well. Consider the familiar hypothetical of gladiatorial contests in which contestants volunteer to fight to the death in front of paying spectators. Does the criminal law have a proper role to play in prohibiting such contests? Because the gladiators voluntarily consent to be injured, Feinberg would conclude that no legally cognizable wrong occurs—at least to the participants in the contest. The same principle of *volenti non fit iniuria* (a person is not wronged by that to which he consents) would seem to apply as well to the consensual sado-masochistic activities at issue in *R. v. Brown*.<sup>3</sup> According to Duff, however, Feinberg’s account of

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2. R.A. Duff, *Harms and Wrongs*, 5 *Buff. Crim. L. Rev.* 13 (2001). Duff is Professor of Philosophy at the University of Stirling (Scotland), and the author, most recently, of *Punishment, Communication, and Community* (2001).

3. *The Queen v. Brown*, 2 All E.R. 75 (1993) (Eng. C.A.) [All England Law Reports] (upholding conviction under Offences Against the Person Act of 1861 for

harmfulness proves inadequate to explain what is truly wrong in the gladiator case (and perhaps the *Brown* case as well). Feinberg's account fails not only to explain the way in which the parties deny each other's "humanity," but also the specifically "public" aspect of the wrong involved.

Like Duff, Hamish Stewart focuses on problems related to the "wrongfulness" element in Feinberg's conception of criminal harm.<sup>4</sup> But, unlike Duff, who thinks that Feinberg runs into trouble by trying to *separate* out harms and wrongs, Stewart believes that Feinberg's real difficulty lies in his tendency to *conflate* the two concepts. As one of several examples, Stewart considers Feinberg's treatment of the effect of fraud on a defendant's liability for rape.<sup>5</sup> The traditional rule is that fraud in the factum nullifies a woman's consent to sexual intercourse, while fraud in the inducement does not.<sup>6</sup> Feinberg explains the traditional rule by suggesting that fraud in the factum involves a greater harm than fraud in the inducement. But Stewart asks, what exactly does Feinberg mean when he says that fraud in the inducement is "not very harmful"? Does he mean "not very wrongful" or "not a serious setback to interest"? According to Stewart, Feinberg's analysis of what kinds of conduct should be eligible for criminalization would be clearer if he were clearer about the difference between setbacks to interest and wrongfulness, and particularly about the role that rights play in determining the latter.

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various forms of private, consensual, homosexual, sado-masochistic acts).

4. Hamish Stewart, Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law, 5 *Buff. Crim. L. Rev.* 47 (2001). Stewart is Associate Professor of Law, University of Toronto.

5. Feinberg, Harm to Self 391-400 (1986).

6. Fraud in the factum occurs when the fraud goes to the "nature and quality of the act"—e.g., when a doctor tricks a woman into having intercourse by telling her that the act she is engaging in is a non-sexual, medical procedure. Most other kinds of misrepresentations—e.g., that the parties will marry after the act, or that the woman will receive some form of compensation—are considered fraud in the inducement, and, under the traditional rule, do not vitiate consent. *Id.*

## CAUSING AND ALLOWING

Under what circumstances, if any, can one justly be held criminally liable for failing to prevent harm? Are “bad samaritan” statutes, which require persons to undertake “easy rescues” under threat of legal sanctions for failure to do so, consistent with the harm principle, or must one resort to legal moralism to justify them? In Chapter 4 of *Harm to Others*, Feinberg responds to many of the arguments made against bad samaritan legislation, drawing a distinction, among other things, between legal duties of aid that require only minimal trouble and those that require unreasonably difficult rescues. He concludes that requiring people to help prevent harms can be, in appropriate circumstances, as reasonable a legal policy as preventing people from actively causing harms.

Patricia Smith, in her paper, uses Feinberg’s discussion of failures to prevent harm as a jumping off point for a more detailed exploration of the causal status of omissions.<sup>7</sup> Smith questions the assumption that omissions are less likely to be held legally responsible because they are less causally potent. In fact, she says, many of our common, unreflective intuitions about allowing and causing and controlling turn out to be wrong, or at least misleading. For example, rather than being its opposite, “allowing” is actually a subset of “causing things to happen.” And, although we tend to think of acting as being more causally potent than not acting or not intervening, the fact is that we tend to underestimate the significance of our omissions. Smith shows, for example, that while causing an act does not necessarily imply control over it, allowing an outcome always does, since saying that one allowed something to happen implies both that the thing allowed actually happened and that one could have prevented it. She then

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7. Patricia Smith, *Legal Liability and Criminal Omissions*, 5 *Buff. Crim. L. Rev.* 69 (2001). Smith, a former graduate student of Joel Feinberg’s, is now Professor of Philosophy, Baruch College and Graduate Center, City University of New York. She is the author of the forthcoming book, *Omission, Law and Responsibility*.

goes on to sketch out some of the implications of this account for criminal law, including the reasons why liability for omissions is generally limited to those cases involving “distinct duties” (e.g., doctor-to-patient, parent-to-child).

#### FEINBERG AND PUNISHMENT

How does the theory developed in *Moral Limits* relate to the question of punishment more generally? Two issues seems particularly worth considering here. First, on what basis should we decide between criminal sanctions (whatever exactly they are) and other forms of state coercion, such as civil fines, injunctions, taxes, and license fees? At times, Feinberg’s project seems like it is concerned more with the moral limits of “government prohibition” generally than it is with the moral limits of “criminal law” per se. Second, what exactly is the purpose of criminal sanctions? Feinberg’s focus on the criminal law as a means for preventing harm seems to suggest that he regards deterrence as the paramount purpose of criminal law. Yet, elsewhere, most prominently in his 1965 essay on the “Expressive Function of Punishment,”<sup>8</sup> Feinberg is very much concerned with at least one form of retributivism. So the question naturally arises, what exactly is Feinberg’s theory of punishment?

Curiously, as Hugo Bedau points out in his contribution to the symposium, the only way to discover Feinberg’s theory of punishment is to survey scattered references throughout his very considerable published *oeuvre*, rather than any one or two definitive texts.<sup>9</sup> What

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8. Joel Feinberg, *The Expressive Function of Criminal Punishment*, in Joel Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility* 95 (1970).

9. Hugo Adam Bedau, *Feinberg’s Liberal Theory of Punishment*, 5 *Buff. Crim. L. Rev.* 105 (2001). Bedau is the Austin Fletcher Professor of Philosophy Emeritus at Tufts University and the author or editor of numerous books, including *The Death Penalty in America: Current Controversies* (1997) and *Making Mortal Choices: Three Exercises in Moral Casuistry* (1997).

Bedau's survey reveals are Feinberg's views on crucial questions concerning the meaning, purpose, and types of punishment, the apportionment of punishment, and the persons upon whom and by whom it should be imposed. (Among other things, Bedau's essay provides a useful overview of the elements any comprehensive theory of punishment should contain.) Like Hamish Stewart, Bedau explores the tension in Feinberg's thought between the idea of punishment as a means of expressing moral condemnation of the offender and his purportedly non-moralistic focus on punishment as a means of deterring harmful conduct. In the end, Bedau concludes, Feinberg's embrace of retributivism is only halfhearted; his primary commitment is to deterrence.

Like Bedau, Bernard Harcourt is struck by the apparent anomaly that *Moral Limits* contains no real theory of punishment.<sup>10</sup> *Moral Limits*, Harcourt says, is about defining what conduct should be prohibited; it is not about deciding what the remedy should be when rules are broken. For that, we need to look to Feinberg's "Expressive Function" piece. The most influential aspect of that piece is the descriptive claim that punishment has an expressive dimension. But, Harcourt reminds us, the piece also contains an important normative claim—namely, that the amount of punishment inflicted (expressed primarily in terms of social disapproval) should be determined in proportion to the *harm* caused. And, indeed, Harcourt says, this normative claim provides a crucial link to *Moral Limits*. Without an account of "harm," we cannot consider the question of when punishment is warranted (since the idea of punishment is premised on the notion of harm). Thus, in order to understand Feinberg's theory of

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10. Bernard E. Harcourt, Joel Feinberg On Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment, 5 *Buff. Crim. L. Rev.* 149 (2001). Harcourt is Visiting Associate Professor of Law at Harvard Law School and Associate Professor of Law at the University of Arizona College of Law. He is the author of *Illusion of Order: The False Promise of Broken Windows Policing* (2001).

punishment (as contained in the “Expressive Function” piece), we need to read into it the account of harm contained in *Moral Limits*.

#### THEORY AND PRACTICE

To what extent can *Moral Limits* be expected to serve as a guide to real-world reform of the criminal law? Recall that Feinberg’s project is not to determine whether the various offenses he discusses should actually be criminalized, but only whether they satisfy the necessary conditions imposed by the harm (and offense) principles. As ambitious a philosophical project as this is, it obviously leaves a great number of questions unanswered. For example, how are we to determine whether the harm (and offense) principles are satisfied with respect to conduct that is never expressly dealt with in *Moral Limits*? Moreover, exactly what kinds of additional factors—apart from harm and offense—should a legislature consider in determining whether to make some particular kind of conduct criminal?

From the perspective of the criminal law reformer, Feinberg’s work can seem elusive. Imagine if one were to construct a criminal code that contained only the offenses that (1) Feinberg discusses in *Moral Limits* and (2) satisfy the harm or offense principle. Such a code would consist primarily of a number of philosophically interesting, but admittedly rather exotic, offenses, such as ticket scalping, blackmail, extortion, commercial fortunetelling, usury, insider trading, some forms of drug use, self-mutilation, riding a motorcycle without a helmet, certain kinds of profoundly offensive behavior, and certain failures to rescue. What a strange looking code that would be! My point is not, of course, that Feinberg views these as the only kinds of offenses worth criminalizing. Rather, the point is that, from the perspective of the pragmatic criminal law scholar, Feinberg’s account seems curiously incomplete, inasmuch as he omits to deal not only with such presumably uncontroversial crimes as murder,

manslaughter, negligent homicide, rape, theft, robbery, and burglary, but also with much more problematic crimes such as racketeering, bribery, fraud, false statements, and a vast range of regulatory offenses—offenses for which philosophical guidance might well be useful.

The contributions of Paul Roberts, Tatjana Hörnle, and Peter Alldridge all struggle—in quite different ways—to show how Feinbergian principles might be applied to the real world of criminal lawmaking.

While serving as a consultant to the Law Commission for England and Wales, Paul Roberts had occasion to bring Feinberg's methodological approach to bear directly on some very real and pressing issues in criminal law reform.<sup>11</sup> The question Roberts was asked to consider was whether, and under what circumstances, English law should recognize consent as a defense to assault charges involving actual physical harm. Traditionally, the consent defense has been applicable to only certain recognized exceptions such as lawful medical treatment and certain dangerous sports (like boxing). In the wake of the *Brown* case, mentioned above, the question was whether the consent defense might be expanded to apply to cases involving, say, consensual sado-masochistic activities.<sup>12</sup> In his "philosophical appendix" to the Law Commission's report on *Consent in the Criminal Law*, Roberts drew directly on Feinberg's analysis.<sup>13</sup> In his essay here, Roberts reflects on the process of English law reform, the circumstances surrounding the Commission's consideration of the defense of consent, and the possibility of using philosophical methods as a means to meaningful reform. Among other things, Roberts finds Feinberg helpful in conceptualizing consent less as providing an affirmative defense than as

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11. Paul Roberts, Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform, 5 *Buff. Crim. L. Rev.* 177 (2001). Roberts is Reader in Criminal Justice at the University of Nottingham School of Law.

12. See *The Queen v. Brown*, 2 All E.R. 75 (1993) (Eng. C.A.).

13. See Great Britain: Law Commission, Consultation Paper No. 139, *Consent in the Criminal Law* app. C (1995).

negating an element of the offense.

A somewhat more speculative project is contemplated in Tatjana Hörnle's paper on Feinberg and German criminal law reform.<sup>14</sup> Hörnle suggests that German penal theory could benefit from closer attention to *Moral Limits*, particularly in determining whether various forms of offensive (as opposed to harmful) behavior should be criminalized. Like the conduct considered by Roberts, the kinds of conduct Hörnle has in mind—the dissemination and display of pornography, incest, offensive statements about various minorities, Holocaust denial, desecration of graves, and mistreatment of corpses—are very much within the scope of Feinberg's concerns. What Hörnle finds is a considerable conceptual gap between Anglo-American scholars such as Feinberg and prevailing German penal theory. Echoing a theme sounded in Antony Duff's essay, Hörnle points out that, unlike the individualized concepts of harm and offense that appear in Anglo-American criminal law theory, the concepts of harm and offense that appear in German penal theory represent a more abstract, more generalized, and more collectivized legal good. Hörnle's strongest reservations concern the application of Feinberg's argument regarding the criminalization of certain profound offenses (such as insults against religious denominations, pornography, and Holocaust-denial)—certainly one of the most controversial parts of *Moral Limits*.

Our symposium concludes with a contribution from Peter Alldridge.<sup>15</sup> As he has done elsewhere, Alldridge here seeks to broaden the perspective of criminal law theory to address newer, and less conventional, forms of offenses—in this case, money laundering. Here again, the Feinbergian approach serves primarily as a jumping off point, since Feinberg himself never mentions this offense. Is money

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14. Tatjana Hörnle, *Offensive Behavior and German Penal Law*, 5 *Buff. Crim. L. Rev.* 263 (2001). Hörnle is Habilitandin, Universität München.

15. Peter Alldridge, *The Moral Limits of the Crime of Money Laundering*, 5 *Buff. Crim. L. Rev.* 289 (2001). Alldridge is Reader in Law at Cardiff Law School. He is the author of *Relocating Criminal Law* (2000).

laundering the sort of conduct that the state may legitimately make criminal? Does it satisfy the harm principle? Would the criminalization of money laundering be effective in preventing (eliminating, reducing) harm to persons other than the actor, and are there other means that would be equally effective at no greater cost to other values? In addressing these questions, Alldridge offers a useful summary of the supposed policy justifications for money laundering legislation, such as that it removes incentives to commit predicate offenses, provides a more effective form of imposing accomplice liability, helps protect financial markets and the banking system, and helps prevent tax evasion. But despite the potential seriousness of at least some of these harms, Alldridge is deeply skeptical of the idea that the criminal law provides an appropriate response. In particular, he questions whether the causal relationship between money laundering and such harms is strong enough to justify criminalization. He finds that there would have to be a great deal of money laundering by a great number of offenders before financial markets would begin to be adversely affected. Under Feinberg's harm principle, Alldridge concludes, such impact is simply too remote and too diffuse to justify the use of criminal penalties.

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In the summer of 2000, while preparing to edit this special issue, I sat down and read *Moral Limits* from beginning to end. Although I had dipped into it on many occasions before, this was the first time I had encountered all 1300 or so pages at once. It seemed to me a work of quite profound significance—of vast learning, remarkable inventiveness, and an almost literary quality. I had absorbed so much Feinberg over so little time that he had become a part of my consciousness. I was thinking, talking, probably even dreaming *Moral Limits*.

The next winter, while spending the semester at the University of Arizona, I finally had the chance to meet

Professor Feinberg in person. He proved to be at least as engaging and generous as I had hoped, and I was fortunate to have the opportunity to spend time with him on several occasions. During the course of lunch one day, he expressed some apprehension at the prospect of having an entire issue of this journal devoted to the critique of his major work. What, he wondered, would be left of *Moral Limits* after all of the critics had had their say? As it turns out, he need not have worried. The eight essays collected here attest—above all—to the continuing value and relevance of his great work. They will, I hope, encourage those who have not previously encountered *Moral Limits* to do so, and those who have encountered it before, to do so again and again.