BOOK REVIEW

Harm to Others: The Moral Limits of the Criminal Law, JOEL FEINBERG, Oxford University Press, New York, New York, 1984, pp. 269.

Joel Feinberg,[1] in his new book entitled *Harm to Others*,[2] embarks upon a philosophical inquiry to discover what conduct the state may properly criminalize.[3] Feinberg explains, based upon what he calls the "harm principle," that state interference is morally justified only when it prevents harm to others.[4] This Review first summarizes Feinberg's formulation of a philosophical structure for treating criminal law problems, then briefly critiques his method of argument, and concludes with a more in-depth examination of a major issue which he tackles: whether there should be a general duty to rescue seriously imperiled persons when such rescue can be easily rendered.[5]

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[1] Joel Feinberg is a Professor of Philosophy at the University of Arizona. He has written three books in addition to this one: RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY (1980); SOCIAL PHILOSOPHY (1973); and DOING AND DESERVING (1970). He has served as an editor on major collections of philosophical essays, including REASON AND RESPONSIBILITY (1981) and PHILOSOPHY AND LAW (1980). He has also written several reviews and articles, including: *Abortion*, in MATTERS OF LIFE AND DEATH (T. Regan ed. 1979); *Harm and Self-Interest*, in LAW, MORALITY AND SOCIETY 289-308 (P. Hacker & J. Raz eds. 1977); *Duty and Obligation in the Non-Ideal World*, 70 J. PHIL. 263 (1973); *The Forms and Limits of Utilitarianism*, 76 PHIL. REV. 368 (1967).

[2] J. FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1984). Feinberg plans three additional volumes in his series on the moral limits of the criminal law. These later volumes will include a volume discussing offense to others (analyzing, *e.g.*, offensive nuisances and pornography); a volume discussing legal paternalism, autonomy, and voluntariness; and a volume discussing harmless wrongdoing (analyzing legal moralism). *See id.* at vii.

[3] *Id.* at 3. Feinberg restates his thesis at various points. *See, e.g., id.* at 7, 9.

[4] *See id.* at 11. Feinberg deals with a great number of very difficult subjects, including whether a dead person's interests survive his death, *see id.* at 83, whether a child born deformed should recover for "wrongful life," *id.* at 103, and whether the victim of a crime may recover from the producers of a film which the perpetrator of the crime may have imitated. *Id.* at 233.

Feinberg's original intent was to present a philosophical inquiry into prohibitions of victimless crimes, *id.* at 7, a subject to which the harm principle seems directly responsive. Feinberg soon found, however, that even this relatively narrow problem and proposed solution raised "a whole universe of problems that had never been systematically assaulted." *Id.* at viii.

[5] Feinberg strongly believes in the moral correctness of a general duty to rescue. *See id.* at 185-86 (summarizing his position). This issue is apparently a very important one for him, since he devotes 60 of his 269 pages to the subject.

I

Feinberg initially acknowledges that there exists a " 'presumption in favor of liberty,' requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices."[6] To overcome the presumption favoring freedom, according to Feinberg, there must be a legitimate "liberty-limiting principle." Feinberg defines this proposition as "one which states that a given type of consideration is always a morally relevant reason in support of penal legislation even if other reasons may in the circumstances outweigh it."[7] As a legitimate, liberty-limiting principle, Feinberg proposes the "harm principle," which is based on common acceptance of the criminalization of certain crimes. Willful homicide, forcible rape, and aggravated assault, he notes, are crimes everywhere in the civilized world.[8] He abstracts a common element from these universally criminalized behaviors: each involves "the direct production of serious harm to individual persons and groups."[9]

Although Feinberg briefly considers other potential justifications for a penal prohibition,[10] he ultimately concludes that the harm principle is the most legitimate.[11] Indeed, Feinberg's goal is to establish the harm principle as the central concern of criminal law, and he would "acknowledg[e] additional valid principles only if driven to do so by argument."[12]

Feinberg insists on a very precise definition of harm: "the thwarting, setting back, or defeating of an interest."[13] He defines "interest" by use of a familiar commercial model:

> [A] person has an interest in a company when he owns some of its stock. If I have an interest, in this sense, in the Apex Chemical Company, I have a kind of *stake* in its well-being. . . .

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6 *Id.* at 9.

7 *Id.* at 9-10.

8 *Id.* at 10.

9 *Id.* at 11.

10 *See id.* at 12-13. The other potential justifications Feinberg considers are: to prevent offense to others (the offense principle); to prevent harm to the person prevented from acting (legal paternalism); to prevent inherently immoral conduct (legal moralism); or to prevent moral harm to the person prevented from acting (moralistic paternalism). *Id.*

11 *Id.* at 15. Feinberg notes that "[p]aternalistic and moralistic considerations, when introduced as support for penal legislation, have no weight at all." *Id.*

12 *Id.*

13 *Id.* at 33.

> One's interests, then, taken as a miscellaneous collection, consist of all those things in which one has a stake, whereas one's interest in the singular, one's personal interest or self-interest, consists in the harmonious advancement of all one's interests in the plural.[14]

Using this model and definition, Feinberg proceeds to explain what is not a harm. There can be no harm, Feinberg asserts, to a person who freely consents to it.[15] Nor is mere unpleasantness harmful, because it does not permanently affect our interests.[16] Moreover, "[m]ere passing desire[s]" do not qualify — "some degree of ulteriority, stability, and permanence is necessary to the very existence of an interest."[17]

The remainder of the book is an effort to develop further the meaning of the harm principle by applying it to difficult problems. Feinberg considers, for example, whether a morally depraved person is harmed by the wickedness of his own character. According to Feinberg, "[i]f a wicked person has no ulterior interest in having a good character, and if such a character is not *in* his [other] interests, then his depraved character is no harm to him . . . and even if he becomes worse, he does not necessarily become worse off."[18] He also suggests the need for formulating "mediating maxims" for the assessment and comparison of harms.[19] Finally, he considers the problem of public harms, for example, pollution, where each individual contribution is "harmless" except that it moves the condition of the environment to a point closer to the threshold of harm.[20]

II

Most lawyers and legal academicians eschew philosophy except as one of many potential arguments — others include appeals to precedent, to public policy, or to concerns for judicial

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14 *Id.* at 33-34.

15 For example, "I have not wronged you if I persuade you, without coercion, exploitation, or fraud to engage in a fair wager with me, and you lose, though of course the transaction will set back your pecuniary interest and thus harm you in that sense." *Id.* at 35.

16 *See id.* at 45. "If these unpleasant experiences are intense or prolonged enough, however, or if they recur continuously or occur at strategically untimely moments, they can get in the way of our interests." *Id.* at 46.

17 *Id.* at 55. "A sudden craving for an ice cream cone on a hot summer day, when plenty of cold water is available, does not itself make it true that ice cream is 'in one's interest' at that time." *Id.*

18 *Id.* at 66.

19 *See id.* at 187-217.

20 *See id.* at 227-31.

economy — on any legal problem. Will they be convinced by Feinberg's reliance on philosophical arguments alone?

Feinberg does not propose a complete moral system,[21] but he does attempt to show the implications of fundamental moral convictions, which the reader is presumed to possess. He seeks to establish that these convictions support not only certain obvious judgments but also other, more subtle, judgments on controversial subjects, so that the reader realizes that, if he disagrees with the controversial judgments, he must also reject his already-accepted fundamental judgments.[22]

Feinberg recognizes that the clarification of concepts is one of the essential tasks of the philosopher.[23] Towards this end, a large portion of his work consists simply of defining terms.[24] This reliance on definitions in structuring his argument, however, subjects Feinberg's analysis to easy attack. One need only quibble with the definitions or provide counter-examples to defeat his argument.[25]

Feinberg's method also deliberately ignores the policy questions that are implicated by his philosophical inquiry,[26] for example, whether society needs the protection of the criminal statute at issue, or whether the drain on law enforcement resources necessary to implement the statute outweighs any of its potential benefits of it. Feinberg's failure to address these issues is, at times, quite frustrating.[27] His over-reliance on definitions in mak-

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21 *See id.* at 17-18.

22 Feinberg labels this method "*argumentum ad hominem*." *Id.* at 18.

23 *See id.* at viii.

24 Feinberg defines dozens of terms. His justification appears in his introduction:

> We cannot discuss the moral limits of the criminal law without heavy reliance on the concepts of harm, benefit, interests, wants, injuries, wrongs, action, omission, causation, offense, nuisance, obscenity, invective, harassment, liberty, autonomy, voluntariness, consent, risk, reasonableness, rationality, coercion, threats and offers, a community, a community's morality, manipulation, exploitation, welfare, and character — to name only some.

Id. at 17.

25 We might, for example, quibble with Feinberg's definition of harm, which excludes mere nuisance or annoyance, so long as it does not affect a greater interest. *See id.* at 45-46. Virtually everyone strives to rid themselves of nuisances, even when such nuisances do not prevent them from, for example, fulfilling their career goals or finding true love. Nor is Feinberg's position made much more forceful by his use of diagrams illustrating the difference between "harmful" and "disliked but not harmful" things. *Id.* at 47-48. The diagrams merely restate the definitions in visual form.

26 *See id.* at 16.

27 Lawyers and legal academicians may find themselves yearning for additional

ing his arguments and his refusal to address policy concerns are especially evident in his argument for a duty to rescue, which is discussed in the next Section.

III

Feinberg strongly believes in the moral correctness of "bad samaritan" statutes,[28] which impose a general duty to rescue. Under these laws, a person who sees another in serious danger is required to effect a rescue, if it can be accomplished safely and easily.[29] The criminal codes of sixteen European nations,[30] as well as those of Vermont,[31] Minnesota,[32] and Rhode Island[33] impose such a duty; the remainder of the criminal codes of the English-speaking nations, however, do not.[34]

Feinberg's case for bad samaritan laws rests on his interpretation of the harm principle. Imposing a duty to rescue, he suggests, will prevent wrongdoers from causing harm to others. The crux of his argument is that failure to rescue is a "harm" to the

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legal research to bolster Feinberg's argument. His discussions of the state of the law are almost exclusively second-hand. At one point, for example, he admits "I am told that old English law characterized surgery as 'justified grievous bodily harm,' but I have been unable to verify this." *Id.* at 254 n.4.

28 Statutes that grant immunity to rescuers for potential accidental injury caused by the rescue are commonly referred to as "good samaritan" laws. *See, e.g.*, ILL. ANN. STAT. ch. 111, § 4404 (Smith-Hurd 1978). For want of a better term, despite its biblical inaccuracy, Feinberg and other commentators refer to statutes that criminalize failure to rescue as "bad samaritan" laws. *See* J. FEINBERG, *supra* note 2, at 127 (introducing the term).

29 For example, the Vermont law which Feinberg appears to support, provides that:

> A person who knows that another is exposed to grave physical harm shall, to the extent that it can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

J. FEINBERG, *supra* note 2, at 127 (citing VT. STAT. ANN. tit. 12, § 519 (Supp. 1971)).

30 *See id.* at 256 n.2. These countries are Russia, Poland, Czechoslovakia, Romania, Hungary, Turkey, Germany, France, Italy, Portugal, Denmark, the Netherlands, Belgium, Switzerland, Finland, and Norway. *See* Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in THE GOOD SAMARITAN AND THE LAW 92 (J. Ratcliffe ed. 1966); *see also* Note, *The Duty to Aid the Endangered Act*, 7 VT. L. REV. 143 (1982) (summarizing developments concerning bad samaritan laws).

31 For the text of the Vermont statute, see *supra* note 29.

32 *See* MINN. STAT. ANN. § 604.05 (West 1984).

33 R.I. GEN LAWS § 11-56-1 (Cum. Supp. 1984). The Rhode Island law penalizes only those who fail to help the victim of a first-degree sexual assault. *Id.*

34 *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 660 (1982).

unrescued party.[35]

There are two fundamental problems with Feinberg's argument.[36] First, it is based on a rather strained use of the terms "harm" and "cause." He admits that citizens are only under a duty not to do harm; they are not required to confer gratuitous benefits on others.[37] He thus claims that failure to rescue is a harm largely because it is *not* a gratuitous benefit. According to Feinberg, a rescue does not confer a gratuitous benefit because it does not advance the rescued party's interest beyond a minimum level. He poses the case of a poolside observer who can easily reach in to save a drowning child. Feinberg claims that the rescue "is a benefit only in the generic sense of affecting the child's interest favorably, specifically by preventing a drastic decline in his fortunes from a normal baseline. . . . To escape with one's life [thus] is not to become better off than one was before one's life was imperiled."[38]

Too much of the foregoing argument hinges on the definitions of harm and benefit. Most people would probably say that

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[35] *See* J. FEINBERG, *supra* note 2, at 128-29; *see also id.* at 185-86 (summary of Feinberg's argument).

[36] Feinberg discusses four standard arguments that are used against bad samaritan laws:

> 1. *The enforced benevolence argument.* Bad samaritan statutes enforce a benevolent morality, making charity mandatory, and erasing the distinctions between harm and non-benefit, and between duty and supererogation.
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> 2. *The line-drawing argument.* If a general duty to rescue in some circumstances may be imposed on the public then there will be no principled way of drawing the line between aid in unanticipated emergencies near at hand, and aid to starving paupers or the distant needy who cannot be saved without extreme inconvenience, unfair sacrifice, or unreasonable risk.
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> 3. *The argument from undue interference with liberty.* Affirmative legal duties to render assistance are, in the very nature of the case, more serious interferences with liberty than negative legal duties not to harm others.
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> 4. *The argument from causation.*
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> a. *The restricted causation claim*: there is a clear conceptual distinction between causing and merely allowing harm, such that only active doings can cause harm whereas nondoings at most allow harm to happen, and
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> b. *The moral significance thesis*: there is a special moral stringency in the requirement that people be held responsible only for the harms they *cause*.

Id. at 129-30 (emphasis in original). My criticisms mainly concern arguments 1 and 4.

[37] *See id.* at 142 (distinguishing duties from gratuitous benefits or gifts).

[38] *Id.* at 136, 138.

it is the poolside observer's moral duty to rescue the child, but can we properly say that the child in this situation is not benefited by the rescue? Would we not say, by way of counter-example, that a millionaire who has become penniless would be benefited by having his former fortune restored?[39]

Feinberg seems to recognize the problem that any reader who disagreed with his definition of harm would have,[40] as he falls back on a "phenomenological test" to justify the duty to rescue.[41] This "test," however, only restates a conceded point — that most people would be morally outraged at the poolside observer's failure to rescue. Moral outrage, however, does not always imply a legal duty. Indeed, at least in our society, citizens seem unwilling to tell their legislators that their sense of moral outrage at failures to rescue should be translated into a legal duty.[42]

Similar problems of definition appear when Feinberg tries to prove that someone should be held liable for his failure to act even where the inaction did not *directly* cause harm to the victim. He suggests examples in which there appear to be no significant moral difference between action and inaction.[43] Finally, in a turn of questionable logic, he argues that a victim's injury is a consequence of a non-rescuer's decision not to act. Feinberg claims that the total set of circumstances — the victim's imperiled condi-

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39 One author has referred to a distinction made by most systems of morality between " 'conduct which is required and that which, so to speak, is beyond the call of duty.' " *Id.* at 149 (citing Epstein, *A Theory of Strict Liability*, 2 J. LEGIS. STUD. 200, 201 (1973)).

40 "There is no conclusive way of refuting the claim that the drowning child and the battered victim have no moral right to be rescued correlative to the moral duty that others have to rescue them." *Id.* at 148-49.

41 Feinberg states his application of the phenomenological test: "The parents of the drowned child will feel understandably and plausibly aggrieved, and we can share their indignation vicariously. We would not acknowledge that their child's right was infringed if we thought of the bad samaritan's neglected duty as something like a duty of *noblesse oblige*. . . ." *Id.* at 149.

42 This is evidenced by the general failure to enact bad samaritan statutes. Even where the duty is imposed, moreover, it is only lightly enforced. Vermont, for example, imposes a maximum penalty of only a $100 fine. *See* VT. STAT. ANN. tit. 12, § 519 (Supp. 1971).

43 Feinberg borrows one such example from Thomas Grey:

> B has a heart attack, and reaches for the bottle of medicine that will save him. What difference does it make . . . if (i) A pushes the bottle out of his reach or (ii) it is just out of his reach and A could easily give it to him, but does not?

J. FEINBERG, *supra* note 2, at 127 (citing T. GREY, LEGAL ENFORCEMENT OF MORALITY 159-60 (1983)).

tion plus the non-rescuer's decision not to act — is the cause of the injury. He notes:

> [A person's] decision to refrain [from rescuing] then *was* necessary to the sufficiency of the other conditions. In the circumstances, if he had decided otherwise the result [the other conditions] produced would not have happened. And if his decision to omit rescue was necessary for the drowning to occur, the other circumstances could not have been sufficient without it.[44]

Does this definition not mean, then, that virtually any number of nonoccurrences can be conjured up to serve as causal explanations for an injury?[45] The child who drowns would have survived had his parents insisted that he stay home, or had government officials insisted that all children take swimming lessons, and so forth. Feinberg's answer is to reformulate his definition of cause to exclude "trivial" factors.[46]

That Feinberg must so quickly distinguish between trivial and non-trivial nonoccurrences seems to illustrate the absurdity of defining nonoccurrences as causes in the first place.[47] He appears to recognize the weakness of his causation theory, as again he appeals to common understanding to support his views. Feinberg suggests that, if an ordinary person were asked to give the cause of death in the drowning child example, the poolside observer's failure to rescue would be cited.[48] Yet, this is no more than saying that most people would feel moral outrage at the failure to provide assistance, which, although quite true, is clearly not sufficient to justify imposing a legal duty to rescue.

The second flaw in Feinberg's case for bad samaritan laws is his failure to suggest any practical benefits of such laws, which would outweigh their interference with liberty.[49] Indeed, there is a strong

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[44] *Id.* at 174.

[45] *See* Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 241 (1980).

[46] J. FEINBERG, *supra* note 2, at 182.

[47] Feinberg's definition of causation also violates the common law rule that mere mental state cannot be punished. *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 259 (1983) (indicating that common law requires both actus reus and mens rea). Mere refusal to act involves only a mental decision, which Feinberg necessarily defines as an act in itself.

[48] J. FEINBERG, *supra* note 2, at 178.

[49] Feinberg admits that "bad samaritan statutes are more invasive than ordinary criminal prohibitions, for they limit our ability to anticipate occasions on which legal duties may drop on us out of the blue, and consequently, they weaken our control over our own affairs." *Id.* at 164. Objections based on liberty concerns are more than hypothetical. Professor Alan Dershowitz, for example, fears that a bad

reason to believe that such laws are completely unnecessary. Rarely, if ever, does someone deliberately fail to effect an easy rescue. Feinberg repeatedly emphasizes the moral revulsion with which most people would regard such a person.[50] Most people, acting on the strength of such moral convictions, would willingly provide aid. For others, the risk to reputation from failing to help another would prove a strong motivator.[51] For many others, a legal duty to rescue already exists.[52] These facts all help to explain why there are so very few reported cases of deliberate refusal to effect an easy rescue.[53] Even if there were many such cases, how many would a bad samaritan law prevent? Would the distant threat of a fine have any effect on a person who is caught up in the emotional turmoil that attends an emergency?[54] Our society also appears to resist strongly the idea of imposing a legal duty in this situation.[55] Given such attitudes, how often would offenders be prosecuted and convicted,[56] espe-

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samaritan law may be used for political purposes, for example, against everyone who has attended a demonstration. *See "Samaritan" Law Poses Difficulties*, NAT'L L.J., Aug. 22, 1983, at 5, col. 1 [hereinafter cited as *Samaritan Difficulties*].

50 *See, e.g.*, J. FEINBERG, *supra* note 2, at 149.

51 *See id.* at 246 n.2.

52 There are at least four situations in which the failure to act may constitute breach of a legal duty:

> [F]irst, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (citations omitted).

53 Feinberg suggests that "[n]ot only negligent but [also] wicked samaritans have escaped answerability to the law." J. FEINBERG, *supra* note 2, at 127. Feinberg, however, cites no statistics or examples. Indeed, even strong supporters of bad samaritan laws can cite only isolated examples of incidents potentially warranting criminalization. *See, e.g.*, N.Y. Times, Aug. 3, 1983, at A10, col. 1 (statement of sponsor of Minnesota bad samaritan law citing only two examples).

54 *Bad Samaritans*, Wash. Post, Mar. 10, 1984, at A19, col. 1 (" '[Bystanders] are not just callously viewing the situation. I'm quite sure that bystanders are going through tremendous internal conflict, but they can't bring themselves to do anything.' ") (quoting Dr. Charles Korte, Psychologist, North Carolina State University).

55 The debate over the moral validity of bad samaritan laws has continued for more than one hundred years. *See, e.g.*, J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 (1879) (suggesting that general duty of rescue should be imposed); Macaulay, *Notes on the Indian Penal Code*, in 7 WORKS 497 (1897) (suggesting unworkability of general duty of rescue). Despite this debate, our society has consistently refused to impose a general duty to rescue.

56 Minneapolis City Attorney Robert Alfton characterized the new Minnesota bad samaritan law as "relatively unenforceable." *Samaritan Difficulties*, *supra* note 49, at 5, col. 1.

cially when the narrowness of the duty under a bad samaritan law[57] and the evidentiary problems in establishing a violation are considered?[58]

Feinberg's effort to formulate a comprehensive philosophical structure to govern the criminal law deserves reading. He casts his argument in understandable language, with frequent summaries[59] and many examples, making the reader's task a pleasant one. Whether or not one agrees with Feinberg's conclusions, this work offers the reader a guide for expanded thinking about the criminal law. The reader, however, may find himself agreeing with Feinberg — that "[i]t is possible for philosophers to claim anything at all."[60]

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57 *See* J. FEINBERG, *supra* note 2, at 159-61 (suggesting limits on operation of duty).

58 *See Samaritan Difficulties*, *supra* note 49.

59 *See, e.g.*, J. FEINBERG, *supra* note 2, at 26-27 (summarizing definitions of preliminary terms).

60 *Id.* at 148.

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