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MORALISTIC LIBERALISM AND LEGAL MORALISM

*Robert P. George**

HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW. By *Joel Feinberg.* New York: Oxford University Press. 1988. Pp. xxii, 380. $32.50.

What may the criminal law legitimately do about vices that do not directly harm anyone not engaging in, or consenting to, them? In *Harmless Wrongdoing,* Joel Feinberg[1] defends what has become the orthodox liberal answer to this question, namely, that the law may take (limited) steps to prevent offense to nonconsenting parties, but may not forbid consenting parties from engaging in victimless immoralities.

Harmless Wrongdoing is the final installment in Feinberg's four-volume series, *The Moral Limits of the Criminal Law.*[2] Like the three volumes that preceded it, it is a model of clear, rigorous, and fair-minded philosophical argument. Feinberg carefully frames the propositions that he believes must be established if the liberal critique of "morals legislation" is to prevail; he defends those propositions by stating with particularity the reasons for believing them to be true; and he fairly considers any reasons he can think of against them or in favor of incompatible alternative propositions.

Feinberg's overarching goal is to vindicate "the liberal position," which he defines as the view that "[t]he harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions" (p. xix). The "harm principle" states that "[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is no other means that is equally effective at no greater cost to other values" (p. xix). The "offense principle" says that "[i]t is always a good reason in support of a proposed criminal prohibition that it is

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1. Professor of Philosophy and Law, University of Arizona. B.A. 1949, M.A. 1951, Ph.D. (Philosophy) 1957, University of Michigan. — Ed.

2. The previous volumes in the series are HARM TO OTHERS (1984), OFFENSE TO OTHERS (1985), and HARM TO SELF (1986).

necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted" (p. xix).

In *Offense to Others,* an earlier volume in the series,[3] Feinberg rejected "the extreme liberal position" that only the harm principle can justify criminal prohibitions. That rejection enables him to draw on the "offense principle" to support laws that would forbid pornographers, for example, from displaying their wares in public places. But his "moderate liberalism" nevertheless enables him to oppose laws that seriously impede, and *a fortiori* those that forbid, distribution of even the most sordid pornographic materials.

In *Harmless Wrongdoing,* Feinberg warns his readers not to confuse the distinction between "moderate" and "extreme" liberalism with the distinction between "cautious" and "bold" liberalism. Cautious liberals hold that "only the harm and offense principles state reasons that are always good and frequently decisive for criminalization, while conceding that legal moralism states reasons that are sometimes (but rarely) good" (p. 324). Bold liberals believe that "the harm and offense principle reasons are not only always good and frequently decisive, but also that they are the only kinds of reasons that are *ever* good or decisive . . . ." (p. 324). While Feinberg has no interest in defending "extreme" liberalism, he did set out to defend a "bold," albeit "moderate," liberalism; and he strenuously attempts to hold on to the bold position in the face of criticisms marshaled by opponents of liberalism. He admits, however, that "some of the legal moralist's counterexamples [may] prove too difficult to handle satisfactorily." In that case, he is willing to retreat to "cautious" liberalism as "the fallback position" (p. 324).

Cautious or bold, Feinberg's liberalism is, by his own reckoning, universalistic and, indeed, "dogmatic." Unlike the more circumspect liberalism of, say, Joseph Raz,[4] Feinberg's liberalism is not meant to apply only in modern pluralistic or secular societies. Rather, it is proposed and defended as the one true (political) faith. Although it is in many ways a doctrine of tolerance, it is self-consciously intolerant of nonliberal cultures. In *Harmless Wrongdoing,* Feinberg concludes the *Moral Limits of the Criminal Law* series with a stirring declaration on precisely this point: "[I]f there is personal sovereignty anywhere, then it exists everywhere, in traditional societies as well as in modern pluralistic ones. Liberalism has long been associated with tolerance and caution, but about this point it must be brave enough to be dogmatic" (p. 338).

While he defends a "dogmatic" liberalism, Feinberg does not offer a dogmatic defense of that liberalism. He does not assume the truth of liberalism in advance. He recognizes that "the liberal position" on the

3. *See supra* note 2.

4. *See* Raz, *Liberalism, Skepticism, and Democracy,* 74 IOWA L. REV. 761, 785 n.31 (1989).

moral limits of the criminal law is not self-evidently true, and that its truth must therefore be established by argument. Despite this recognition, however, he offers little direct or affirmative argument to establish its truth. His method is one of dialectical, rather than direct, argumentation. He seeks to demonstrate (1) that the liberal position can withstand arguments meant to establish its falsity, and (2) that alternatives to liberalism suffer debilitating defects.

In *Harm to Self,*[5] the third volume in the series, Feinberg indicated that his commitment to liberalism followed in part from his view that "personal sovereignty" almost always outweighs considerations that support criminalizing behavior that, if it harms anyone, harms only parties consenting to it. And, as he reminds his readers in *Harmless Wrongdoing,* in the very first book of the series, *Harm to Others,*[6] he concluded that the concept of "moral harm" (or corruption of oneself) is not a legitimate concern of the law because "[h]arm to character . . . need not be a setback to one's interests . . . and when it is not, it cannot be a harm in the primary sense unless the person has a prior interest (and again he need not) in the excellence of his character" (p. 17).

Feinberg's rejection of the concept of moral harm is important because the widely shared Aristotelian belief that a morally upright character is *intrinsically* valuable is central to the traditional (and, in my view, best) defense of the moral validity of morals laws. The view that personal sovereignty almost always outweighs considerations supporting laws that protect the moral environment in which people form their characters will seem far less plausible to someone who believes, as I do, that a good character is an objective, rather than a mere subjective, interest or value, than it does to Feinberg. Nonetheless, since Feinberg's arguments in *Harmless Wrongdoing* rarely presuppose that his readers share his views about personal sovereignty and moral harm, I shall not take issue with these views here.

Feinberg's defense of the liberal position is moralistic: his reasons for rejecting morals laws are moral reasons. None of the participants in the modern philosophical debate over morals legislation deny that the proper scope of the criminal law is limited. No one believes that the law can or should enforce every moral obligation. Even Feinberg's fiercest opponents acknowledge practical or prudential reasons for restricting the reach of the criminal law. What Feinberg wishes to show is that there are compelling *moral* reasons as well. He insists that laws forbidding activities that neither harm nor seriously offend others are *immoral* laws, notwithstanding the immorality of the activities they forbid.

Of course, some liberals argue against morals legislation on the

5. *See supra* note 2.

6. *See supra* note 2.

ground that the activities typically forbidden by morals laws are not really immoral. The radical version of this argument appeals to general moral subjectivism or relativism. Anyone who has ever attended a cocktail party or taught an introductory course in ethics or political theory is familiar with the following chain of reasoning:

(i) All moral views are relative.

(ii) Thus, no one has the right to impose his view of morality on anyone else.

(iii) Therefore, laws forbidding allegedly immoral activities on the ground of their immorality are wrong.

The glaring defect in the logic of this argument has been pointed out by virtually every serious writer on the subject, including Joel Feinberg. Propositions (ii) and (iii) express moral judgments. These judgments are either relative or nonrelative. If they are relative, as (i) says that all moral judgments are, then there is no reason for someone who happens not to share them to revise his view in favor of the liberal position. If they are nonrelative, then proposition (i) is false and cannot provide a valid premise for propositions (ii) and (iii).

Feinberg makes the point in the form of a warning to his fellow liberals:

> The liberal . . . had better beware of ethical relativism — or at least of a *sweeping* ethical relativism, for his own theory is committed to a kind of absolutism about *his* favorite values. If his arguments conveniently presuppose ethical relativism in some places yet presuppose its denial elsewhere, he is in danger of being hoist with his own petard. [p. 305; emphasis in original]

A less radical version of the relativistic argument for liberalism avoids this self-contradiction by affirming the existence of a certain class of objective moral judgments while denying that judgments about the sorts of activities forbidden by morals laws are within this class. Liberals who rely on this argument typically claim, not that *all* moral judgments are relative, but only that moral judgments condemning activities that do not harm or unreasonably offend others are relative. The relativism of this form of liberalism is what Feinberg might call a less "sweeping" form of relativism.

This form of liberalism identifies as a central nonrelative truth the proposition that it is morally wrong — because it violates people's rights to autonomy or personal sovereignty — for the law to forbid people from doing as they please in matters that concern only themselves and their consenting partners. Moral judgments about such matters — the very stuff of autonomy or sovereignty — are subjective or relative. This form of liberalism identifies the whole of objective morality with the morality of interpersonal conduct. It acknowledges the existence of objective reasons for action (or forbearance) only where the rights or interests of others are at stake. It makes political

theory the central concern of moral philosophy, and the requirements of justice the sole concern of political theory.

Feinberg, however, does not wish to argue on the basis of even so limited a form of relativism. He boldly suggests that liberal principles of political morality ought to be persuasive even to people who believe that objective moral norms govern self-regarding, as well as other-regarding, conduct. Thus, he is willing to grant, at least for the sake of argument, that the activities typically forbidden by morals laws really are immoral. The burden of his argument is to show that morals laws are seriously wrong even when the moral norms they enforce are objectively true.

Thus, Feinberg's liberalism accords the legislator the same role as does the liberalism of the moderate relativist who denies that there are self-regarding immoralities. The task of the conscientious legislator, in either form of liberalism, is easier than the traditional moralist imagines; for the legislator can exclude some morally controversial activities from the domain of criminal prohibition without undertaking the daunting task of inquiring into their moral status. The legislator need only inquire whether an act or practice proposed as a candidate for criminalization is likely to prove harmful or unavoidably offensive to nonconsenting parties. Of course, that is often a difficult question requiring skill and knowledge in various areas of social (and sometimes natural) science. Consider the question of whether the widespread availability of pornography leads to violence against women. Some competent researchers say "yes," others say "no." A liberal legislator trying to decide on a bill that would restrict the availability of pornography would have no easy job in sorting through the evidence and deciding which way to vote. But Feinberg's and the moderate relativist's liberalism would free him from the additional task of moral reflection that would otherwise be imposed on him by the traditional moralist who believes that the morality of pornography ought to be relevant to the legislator's judgment.

While declining to identify the whole of objective morality with the morality of interpersonal conduct, Feinberg does share with moderate relativist liberals a conception of liberalism as a purely political doctrine. Unlike competing political doctrines, it is not, nor is it even continuous with, a doctrine of personal morality. It says what *society,* or the *state,* or the *criminal law,* must do, may do, and may not do. Although Feinberg does not deny that there can be objectively true judgments of personal morality, his liberalism claims to presuppose no particular judgments of personal morality, and is, indeed, meant to be consistent with widely divergent views on the moral permissibility of the activities typically prohibited by morals laws.

Although this conception of liberalism as a purely political doctrine — in no way dependent upon or continuous with a doctrine of

personal morality — is the prevailing view among liberal political philosophers, some contemporary liberals dissent from it. Recently some liberal political philosophers have challenged the belief that liberalism consists of a "relatively independent body of moral principles, addressed primarily to the government and constituting a (semi-)autonomous political morality."[7] These "perfectionist"[8] liberals take the view that the values and moral principles that govern practical rationality in the area of personal moral judgments are the same as those that govern in the area of political judgments. Accordingly, they reject the "anti-perfectionism" of John Rawls and his followers, and ground the liberal concern for individual freedom, not in an autonomous principle of political morality that directs the state to refrain from imposing any controversial conception of human well-being or flourishing on individuals who may not share that conception, but rather in a distinctively liberal conception of human well-being or flourishing.[9] Although perfectionist liberals share Feinberg's aversion to morals legislation, they typically allow the law greater scope to combat vice through noncoercive means than do anti-perfectionist liberals.

Sometimes Feinberg's liberal premises generate conclusions that are unacceptable even to those generally favoring a permissive regime of criminal law. In most of these cases, he is admirably willing to face up to the implications of his fundamental principles and embrace unpopular conclusions openly. For example, instead of fabricating ad hoc reasons to justify widely accepted laws forbidding bigamy and usury, Feinberg straightforwardly declares these practices (when engaged in by consenting parties) to be beyond the morally legitimate reach of the criminal law (p. 166).

In most of the cases in which he would permit the legal prohibition of acts that in themselves harm no one apart from parties consenting to them — consensual dueling and slavery are two examples — he

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7. J. RAZ, THE MORALITY OF FREEDOM 4 (1986).

8. "Anti-perfectionists" hold that governments are either (i) required to remain neutral on controversial questions of what makes for, or detracts from, a morally good life, or (ii) forbidden to act on the basis of controversial ideals of moral goodness. They typically defend strict versions of the harm principle as an implication of the requirements of governmental neutrality and the exclusion of ideals. "Perfectionists" believe that governments may legitimately act on the basis of judgments about what is humanly good and morally right, even when these judgments are controversial. Traditional moralists are perfectionists. They typically reject the harm principle and permit the legal prohibition of some victimless immoralities. But some contemporary liberals are also perfectionists. They reject government neutrality and the exclusion of ideals; but, at the same time, they maintain that a due regard for the human good of individual autonomy limits the *means* by which governments may pursue controversial moral ideals. They typically accept a version of the harm principle that forbids, or sharply limits, the use of coercive measures to combat victimless immoralities.

9. *See generally* V. HAKSAR, EQUALITY, LIBERTY, AND PERFECTIONISM (1979); J. RAZ, *supra* note 7; Galston, *Liberalism and Public Morality*, in LIBERALS ON LIBERALISM 129 (A. Damico ed. 1986); Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621 (1982).

makes it clear that the ground for criminalization is purely pragmatic and has nothing to do with the wickedness of fighting duels or selling oneself into slavery. His sole reason for supporting laws against these sorts of immoralities is that there are "insolvable problems of verifying voluntariness" (p. 166). His justification, then, for criminalization in these areas is to protect nonconsenting parties from being forced into fighting duels or slavery.

Feinberg does, however, identify one or two cases — which he assures us are strictly hypothetical — in which he finds himself unable, in good conscience, to oppose the criminalization of verifiably voluntary immoralities whose prohibition cannot be justified under an honest application of his liberal principles. An example is a hypothetical case originally proposed by Derek Parfit: a couple deliberately act to conceive a child at a time when they know the child will be born with serious permanent impairments, and when they could have waited a month and conceived a child likely to enjoy perfect health. Now, the couple's action violates neither the harm nor offense principles; so, under a strict application of Feinberg's liberalism, it is, as he admits, beyond the morally permissible scope of the criminal law. Nevertheless, Feinberg is willing to "carve out a clear categorical exception to [his] liberalism" (p. 327) and permit the law to punish the parents for their cruelty. While not attempting to hide the fact that he is making an exception, he defends his willingness to permit the criminalization of such gratuitous cruelty by appealing to the "humane spirit" of liberalism. He describes his position as "reluctantly departing from the letter of liberalism but not from its spirit" (p. 327).

In treating arguments against the liberal position or in favor of the legal enforcement of morality, Feinberg refrains from distorting his opponents' claims or presenting their arguments in an unfairly unfavorable light. He rarely criticizes a view before taking pains to present the strongest argument he can muster on its behalf. He does not pretend that the sole alternative to the libertarian permissiveness he espouses is an authoritarian oppression that no honorable critic of liberalism would endorse or even tolerate. Nor does he resort to questioning the motives or character of those who do not share his liberal faith. In the most ancient and best tradition of philosophy, he treats his interlocutors as partners with him in the quest for truth.

Occasionally, however, he fails, despite a bona fide effort, to understand or adequately represent a nonliberal author, position, or argument. For instance, at one point, he mistakenly interprets St. Thomas Aquinas as an opponent of victimless crimes and thus as someone who subscribed to the liberal position on the moral limits of the criminal law. What Aquinas actually held in his famous discussion about whether human law should repress all vices, is that the law should be concerned *mainly* with those vices that cause harm to others. He did

not hold the view that the law must, as a matter of principle, refrain from prohibiting victimless immoralities. Thus, he did not subscribe to the liberal position.[10] In fact, Aquinas' position, which is the one I believe to be correct, is the position of most defenders of morals legislation, namely, that, while the main concern of the criminal law ought to be the prevention of murder, rape, theft, fraud, and the like, the law may also legitimately protect the community's moral environment by forbidding what James Fitzjames Stephen, the nineteenth-century defender of morals laws, referred to as "the grosser forms of vice."[11]

Elsewhere, in attempting to rebut Ernest Nagel's claim that some laws that liberals would justify by reference to the offense principle are really morals laws inasmuch as people find the activities they prohibit offensive precisely because they consider them to be immoral,[12] Feinberg argues:

> [I]f public nudity . . . or public married intercourse are judged immoral by most people, it is obviously not because they are thought to be inherently wicked wherever and whenever they occur, but rather precisely because they offend those who witness them. In these cases the actions are immoral (better "indecent") because they offend; they do not offend because they are judged to be, in their essential nature, immoral. Thus one can urge their prohibition entirely on the liberal ground of the offense principle, without recourse to legal moralism at all. [pp. 15-16]

But Feinberg is mistaken in supposing that most people consider public nudity or public married intercourse immoral "precisely because they offend those who witness them." Moral conservatives, and other nonliberals, do, in fact, consider public nudity and public married intercourse to be "inherently wicked" regardless of whether they offend anyone. Of course, they do not consider *nudity* or *marital intercourse* to be inherently wicked. But they do consider *public* nudity and *public* intercourse to be wicked — even in circumstances where all the members of the relevant public hold "sexually liberated" attitudes and are therefore unoffended by public nudity and intercourse. Thus, moral conservatives consider public nudity immoral even on designated nude beaches where, presumably, no one present is in danger of being offended. The reason they consider public nudity immoral — regardless of whether it gives offense — is that it is, "in its essential nature," immodest. And immodesty is, in their view, immoral.

At another point, Feinberg ventures to meet a theological argument that seeks to justify the legal enforcement of morals on the ground that all immoralities, including victimless immoralities, are di-

10. T. AQUINAS, SUMMA THEOLOGIAE I-II, Question 96, Answer 2, Reply.

11. J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R.J. White ed. 1967) (2d ed. 1874).

12. P. 15 (citing Nagel, *The Enforcement of Morals*, THE HUMANIST, May/June 1968, at 19, 26).

rect wrongs against God and should therefore be punished. According to Feinberg:

> [T]here . . . seems [to be] little point, and no justification, for using the resources of the all-too-human political state for such purposes. Just as God's authority over human beings must be thought of in highly personal terms, so must His "retribution." No merely political leader has ever made a persuasive claim to speak, *qua* political leader, for God, and the claim to be an instrument of God's highly personal purposes is a piece of swaggering presumption, not to say insolent usurpation. If God decrees "retribution" for all private acts that are incidentally non-compliant with His own Will, He has his own resources. The human criminal law is hardly necessary. [p. 163]

Here Feinberg fails to appreciate, much less credit, the theology of those who make the argument he attempts to refute. His theological counterargument presupposes an understanding of the relationship between human and divine causality, and between religious and secular authority, that many — perhaps most — religious people simply do not share. They believe that there is nothing in principle presumptuous or insolent about trying to be an "instrument of God's highly personal purposes." According to most theological views, God's mercy is as "highly personal" as his judgment; but people who hold these views do not believe that that fact absolves human beings from the responsibility to serve as instruments of divine mercy. By her own account, Mother Teresa, for example, seeks precisely to serve as such an instrument. Thus, it begs the question to say against the Ayatollah, for instance, that his aspiration to be an instrument of another of God's highly personal purposes — namely, his retribution — is "a piece of swaggering presumption, not to say insolent usurpation." It is very well to observe that "God has his own resources" and therefore has no need to employ fallible human institutions like the criminal law. But the fact that an omnipotent God could effect his will in other ways hardly refutes the claim that he has chosen to effect it through any particular agency — even a fallible human agency. After all, God could comfort dying beggars without the help of Mother Teresa. But many religious people suppose that, in his inscrutable wisdom, he has chosen to deliver that comfort precisely through her agency.

It is, to say the least, unusual to encounter explicitly theological argumentation in a work of liberal political theory. Perhaps Feinberg's venture into theology is merely a stray bullet. I doubt it, though. One of the points that Feinberg wishes to establish is that the liberal position on the limits of the criminal law does not depend on any particular view of the source or content of judgments of personal morality. As I have observed, Feinberg thinks that people holding widely varied moral (and, we can now add, religious) views nonetheless have reason to subscribe to liberal political views. I doubt, however, that his position can be sustained. At critical points, one will

find Feinberg's rejection of particular morals laws more or less persuasive, depending on one's judgments of personal morality.

Let me give an example of a case in which Feinberg's rejection of a morals law clearly depends on a judgment of personal morality widely shared by people who happen to be liberals and widely rejected by people who hold more traditional ideas. Along with "Parfit's misconceived baby," Feinberg cites as an especially difficult case for liberal opponents of morals legislation Irving Kristol's hypothetical example of a "gladiatorial contest[] in Yankee Stadium before [a] consenting adult audience . . . between well-paid gladiators who are willing to risk life or limb for huge stakes" (p. 128). A strict liberal will not want the law to prohibit such contests, for there is no victim. Yet, as Feinberg says, "[i]t is morally wrong for thousands of observers to experience pleasure at the sight of maiming and killing" (p. 139). As in the "misconceived baby case," the "humane spirit" of liberalism seems to be in conflict with its "letter."

Feinberg outlines three possible liberal responses to the gladiatorial contests. The one that he considers least satisfactory is the very strategy that worked in the case of dueling and voluntary slavery, namely, to support a ban on gladiatorial contests on the ground that it is too difficult to ascertain whether the gladiators' participation is voluntary. Alternatively, a liberal could support a ban on the ground that the gladiatorial spectacle will brutalize the audience and lead to an increase in violent crimes. Thus, a legitimate concern to prevent harm to others would provide the rationale for legal prohibition. Of course, it might be very difficult to establish that the gladiatorial contests would lead to more violence. The difficulty of proving that pornography leads to crimes against women may be replicated in the case of the gladiatorial contests.

A third possibility, which Feinberg describes as "a rather uncomfortable fallback position for the liberal who wishes to preserve without hypocrisy what he can of his liberal principles in the face of Kristol's vivid counterexample" (p. 131), would be to "concede that the case is close," but distinguish it from

> the actual examples that people quarrel over: pornographic films, bawdy houses, obscene books, homosexuality, prostitution, private gambling, soft drugs, and the like, [which] are at most very minor free-floating[13] evils, and at the least, not intuitively evils at all. The liberal can continue to oppose legal prohibitions of them, while acknowledging that the wildly improbable evils in [Kristol's] hypothetical example[] . . . are [an]other kettle[] of fish. [p. 131]

The liberal can, to be sure, support the legal proscription of gladia-

13. A "free-floating" evil, in Feinberg's taxonomy, is an evil that exists independently of its effect on anyone's interests. "Free-floating evils" are a subclass of "non-grievance evils," that is, evils that do not give grounds for personal grievances. For Feinberg's very useful taxonomy of evils, see pp. 17-20.

torial contests without hypocrisy or inconsistency by modifying his position to permit the prohibition of evils that are truly grave. But any judgment of the gravity of evils like those involved in gladiatorial spectacles, and any judgment that compares the gravity of these evils to the gravity of other evils (like those involved in pornographic films, bawdy houses, obscene books, etc.), will be a judgment of *personal* morality, not a judgment one can make on the basis of liberal principles of *political* morality.

While liberals will likely judge the evils of gladiatorial contests to be particularly grave, nonliberals are just as likely to judge other evils, including some of those on Feinberg's list, to be equally or even more serious. Many nonliberals consider the sorts of activities that Feinberg assures us are "at most very minor evils" to be at least very serious evils. Thus, the very considerations of personal morality that may lead Feinberg to favor the banning of gladiatorial contests may lead his philosophical opponents to support the criminalization of, say, pornography, prostitution, and the recreational use of drugs.

Liberals may find such judgments baffling; but traditional moralists do not. Traditional morality takes sexual immorality, for example, to be a deadly serious business. Traditional moralists believe that there are intrinsically evil acts — including intrinsically evil sexual acts — and that these acts disintegrate the individual personality and often threaten the integrity of critical human relationships. (In the traditional language, they "tend to corrupt and deprave.") Of course, traditional moralists might be wrong on these points. Liberals might be correct in supposing that sexual immoralities are "at most very minor evils." But, regardless of which side has the superior understanding of sexual morality and immorality, the point remains that if the validity of the liberal position on the moral limits of the criminal law depends on a denial that there are intrinsically evil sexual acts, or that such acts can be seriously evil, then liberalism is not quite as independent of a doctrine of personal morality as Feinberg imagines.

I shall conclude by considering an argument by which Feinberg seeks to show that traditional moralists, who typically subscribe to retributivist justifications of criminal punishment, cannot square their retributivism with their willingness to criminalize "victimless" immoralities.[14] If successful, the argument tells against what I consider to be the most plausible alternative to the liberal position. But even if the argument ultimately fails, as I think it does, it is nevertheless illuminating. For, to answer Feinberg's argument, the traditional moralist must defend a third controversial position in addition to his legal moralism and his retributivism, namely, his belief in a prima facie (defeasible) moral obligation to obey the law as such.

14. Feinberg sets out this argument on pages 159-65 of *Harmless Wrongdoing* under the section title " 'Retribution' for wrongs without victims."

Retributivism holds that punishment is justified for the sake of restoring an order of fairness, particularly in respect of the distribution of the benefits (including liberty) and burdens (including sacrifices of liberty) of common life, when this order of fairness has been disturbed by criminal wrongdoing. For example, a criminal may justly be deprived of liberty commensurate with the liberty he wrongfully seized in breaking the law. The retributivist wishes the law to maintain a state of affairs in which a law-abiding individual, looking back over a period of time, will have no reason to consider himself to have been a sucker for obeying the law when others were disregarding it with abandon. Retributivism thus considers (just) punishment to instantiate — immediately and in itself — the good of justice because it restores the order of fairness.

Traditional moralists also hold that morals laws may legitimately be enacted and enforced for the sake of establishing and maintaining a cultural milieu conducive to virtue and inhospitable to vice. And they believe that morals offenders may legitimately be punished. To some extent, they understand the moral obligations not to engage in the activities prohibited by morals laws to be obligations in justice. They hold that it is wrong to manufacture or distribute or even purchase pornography, for example, not only because such activities are intrinsically immoral, but also because one has an obligation to one's fellow citizens not to do things that make pornography more widely available, or acceptable, or that may tempt or induce others to produce or distribute or use the stuff. Such an obligation to others is an obligation in justice. To the extent that antipornography laws restrict liberty and provide for punishment for the sake of preserving and restoring a just social order, they present no problem for retributivists.

Of course, Feinberg, who rejects the very concept of moral harm, denies that people have obligations not to corrupt the characters of others. So he perceives no injustice in efforts to induce people to use pornography, even if pornography does tend to corrupt and deprave. But his point against legal moralists here does not depend on joining the issue with them over the concept of moral harm. He has noticed that the traditional case for enforcing morality does not rest exclusively on an appeal to justice, understood as the restoration and preservation of an order of fairness (or a just social order). The traditional case has a morally paternalistic dimension as well. But just to the extent that the point of a law is paternalistic — and is thus motivated by something other than a concern to prevent injustice — punishment for breaking that law seems to be unjustifiable. If the point of punishment, according to the retributivist view, is to restore an order of justice disturbed by criminal wrongdoing, how can punishment be justified for an act which in no way disturbed that order? In Feinberg's terms: how can there be retribution for crimes without victims?

Another way of stating the dispute between liberal and traditional moralists is that they disagree about whether there are ever valid reasons other than the prevention of injustice for restricting people's liberty to do as they please. The liberal position is that there are no such reasons; traditional moralists, on the other hand, hold that preventing people from hurting themselves (physical paternalism) or corrupting themselves (moral paternalism) can be valid reasons for restricting liberty. It is important to notice that Feinberg's argument does not assume the liberal position to be true in advance. Rather, it seeks to exploit what he takes to be a contradiction between retributivism and legal moralism to show that if the traditional moralist wishes to retain his view that what justifies punishment is the good of restoring the disrupted order of justice, then he must abandon his view that the law may justly criminalize acts that do not disrupt that order.

To meet Feinberg's argument, the traditional moralist must indeed claim that "victimless" crimes involve some injustice. But he need not claim that the injustice inheres in the underlying immoralities of the victimless class that are prohibited under the criminal law. He can claim instead that the morals-law offender's injustice is the breach of a duty not to break laws that are not unjust — regardless of whether the law is motivated by a concern to prevent injustice and irrespective of whether the activity forbidden by the law is unjust. It is the breach of the duty not to break laws that are not unjust that is itself unjust and, thus, warrants punishment.

Feinberg's argument overlooks the claim of traditional moralists that people have a prima facie moral obligation to obey the laws of a basically just society. Traditional moralists understand this obligation to be an obligation that every member of the community owes to all other members; it is an obligation in justice. They hold that the prima facie obligation may be defeated in the case of seriously unjust laws; and that it is always defeated when the law requires a citizen to perform an unjust or otherwise immoral act. They maintain, however, that where the law is not unjust — whether or not its purpose is to prevent injustice — it creates a moral obligation, even where no such obligation existed prior to the law's enactment. The sheer fact of legislation creates an obligation. People who violate the law breach this obligation and disrupt the order of justice. A concern to restore that order provides a valid retributive reason for punishment.

Thus, traditional morality considers punishment justifiable even in cases where an act forbidden under the law is neither inherently unjust nor intrinsically immoral. Consider, for example, laws based on physical, rather than moral, paternalism. Riding a motorcycle while not wearing a helmet may be dangerous and foolish, but it is neither unjust nor otherwise immoral. It may cost the cyclist his life in an accident, but it will not harm others or corrupt his own character. (In any

event, let us stipulate these things for the sake of argument.) Prior to the enactment of a law requiring helmets, cyclists have safety reasons to wear helmets; but it would be unjust to punish them for not wearing helmets, not only because the principles of the rule of law would forbid punishment for a perfectly lawful, even if dangerous and foolish, act, but also because the failure to wear a helmet does not disrupt the order of justice. But, according to traditional moralists, the situation changes the moment a law on the subject goes into force. Where legitimate public authority has acted without injustice to remove from private judgment the choice of whether to wear a helmet while riding a motorcycle, it is unjust for an individual to seize back that choice. Someone who does so — who breaks the law — may justly be punished precisely for the injustice involved in failing to obey a just law.

Of course, the libertarian critic of paternalism will claim that the law's paternalism renders it unjust. But this claim, even if it were true, will not restore the force of Feinberg's argument against retribution for victimless immoralities. That argument is supposed to show that acts which are not unjust in themselves should never be made illegal because there can be no valid retributive reason for punishing people who commit victimless crimes. The argument cannot, however, assume in advance that people cannot be punished for performing acts not in themselves unjust because it is (for some other reason) in principle wrong to criminalize acts except for the sake of preventing injustices. To make this illicit assumption would be to confuse the issue of the proper basis of criminalization with the issue of the legitimacy of punishment for violations of a criminal law.

Feinberg's argument seems to assume that the reason for making an act illegal must be the same as the reason for punishing someone who commits the illegal act. Traditional moralists do not share this assumption. If, as they believe, there is a *prima facie* moral obligation to obey the law, and if this obligation is an obligation in justice, then a valid retributive reason exists for punishing someone who breaks the law, even where the act forbidden by the law is not inherently unjust. To salvage his argument against retribution for victimless crimes, Feinberg must, therefore, show that traditional morality is mistaken in supposing that there is a prima facie obligation to obey the law, or, at least, mistaken in supposing that the obligation to obey the law is an obligation in justice.

Even if Feinberg ultimately fails to give compelling reasons for traditional moralists to abandon their legal moralism and adopt the liberal position, his project can hardly be described as a failure. The arguments he marshals against legally prohibiting victimless immoralities are far from trivial; and even their failings are illuminating. Moreover, his able defense of liberalism shows that obituaries generated by the recent barrage of criticism of liberal moral and political thought

are, at best, premature. Dead traditions of thought do not produce achievements on the order of Joel Feinberg's *Moral Limits of the Criminal Law* series.