CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Thinkers beginning with the Greeks have always worked under the assumption that there is a system of government most suitable for human flourishing. However, these theorists have also always disagreed on what this system of government should look like. Surprisingly, one of the few things they seem to agree on is that handling human freedom should be the guide in determining which state is better for self-realization. Their disagreements often center on whether the realization of the best system of government would either require the circumscription of or promotion of man's innate desire for liberty. Plato, for instance, prescribes that the ideal state would proscribe the quest for freedom which according to him is not only inherent in human nature but also the bane of every society. For Plato, the ideal state is a restrictive society. Hobbes, Bodin, Machiavelli and a whole host of later theorists pitched their tent with Plato in seeing enforcement of consent as the measure of statehood.[1]

Hegel, Mill and Feinberg, unlike Plato and his followers believe that the ideal state should allow full expression of man's natural desire for liberty.[2] Admittedly, in supporting the absolute rule of Frederick III of Prussia, Hegel could be accused as many[3] have done, of failing to live by the cannons of his own code, but be that as it may, there is no doubt that ideologically, for Hegel, as well as for Mill and Feinberg, the arrival of the ideal state must coincide with the realization of human liberty. In fact, Hegel went as far as arguing that history is linear and comes to an end with the ultimate realization of liberty.

Now, in social and political philosophy, these two orientations to the organization of society and attitudes towards liberty are known as conservatism and liberalism respectively. As such, while conservatism encourages broad government involvement in

curtailing human liberty, liberalism interprets such involvement as the case of a state overstepping its mandate and therefore anti-human.

A careful study of the evolution of human history over the past few decades seems to show that liberalism is winning the ideological battle, for if according to liberalism the best government is one where liberty is manifested in the form of human rights and equality, then, it is perfectly justifiable to say that liberalism has carried the day.

Nevertheless, even the liberals for all their love for human liberty and call for limited state, still accept that a liberal state needs some authority to mediate between individual's competing quests for liberty such that the liberty of a particular citizen does not hinder another citizen from expressing his own liberty. The thinker who suggested how this problem has been navigated over the years is John Stuart Mill. Mill in his now famous harm principles legislates that the only justifiable reason for using criminal law to curtail the liberty of a citizen in a liberal state is to prevent that citizen from causing harm to another citizen.

Recently however, the American social and political philosopher, Joel Feinberg added what he called the offense principle as a supplementary doctrine to Mill's original harm principle. Contrary to Mill who saw the harm principle as containing sufficient moral conditions for liberty prohibition, Feinberg believes that the harm principle is deficient and needs to be supplemented with the offense principle. Investigating the logical and experiential veracity of Feinberg's claim in the face of the dynamic nature of society, the complex and evolving nature of crime and criminal law is a venture worth investing in. Such investment is therefore, the motivation behind this research.

1.2. **Problem of the Study**

The problem of liberalism is not only how to reconcile the tension between liberty and authority but also of how to promote as well as curtail human liberty. This is because liberalism does not only see freedom as the highest social and political value but also believes that this value cannot be enjoyed if it is not properly regulated. It is in the

context of this understanding that both political theorists and jurists usually strive to formulate theories and laws that will create a balance between liberty and authority. It is also within this background that Joel Feinberg made his claim that the harm and offense principles are sufficient moral grounds for curtailing liberty in a liberal state. Consequently, this dissertation will be attempting to address the following questions: is Feinberg's claim that harm and offense principles are sufficient moral grounds for criminal legislations morally defensible? If upon interrogation these two principles are found not to be sufficient, what other principles are required and can these principles be justified within a liberal framework?

1.3 Purpose of Study

Having outlined the two questions this dissertation is saddled with answering, the commensurate objectives of the study are to answer the two questions. Now, the first question is to investigate whether there are counterarguments that can dislodge Feinberg's claim that the harm and offense principles constitute enough moral limits for criminal legislation in a liberal state. The purpose of the dissertation here is to demonstrate that there are counterarguments and that based on that, Feinberg's arguments in his *The Moral Limit of Criminal Law* is undermined. The second question as it was formulated above sought to know whether there are other principles that could be added to complement Feinberg's harm and offense principles and if these principles are both experientially and rationally justifiable within the liberal framework. Regarding this question, the dissertation uses legal paternalism (offense to self) and legal moralism (harmless offense) to argue that such principles exist and that they are defensible within liberalism. Cumulatively, the whole effort in this dissertation is oriented towards substantiating the aforementioned purposes.

1.4. Scope of Study

The moral limit of criminal law is an interdisciplinary theme that has attracted the attentions of scholars from different fields of study. Nevertheless, and in spite of the vast and encompassing nature of the theme itself, our investigation in this dissertation is

limited to Feinberg and his political philosophy. Consequently, Feinberg's four volumes work on the moral limit of criminal law forms the primary source of the study. The works of other scholars in the field will be used as secondary sources.

1.5. Significance of the Study

The findings of this research will be very useful to a number of places and persons. Particularly, it will be invaluable to Nigerians who on account of recent developments surrounding the agitation for the restoration of the sovereign State Biafra by the Indigenous People of Biafra (IPOB) are thrown into the legal and linguistic difficulties of navigating between the hard distinction between mere political criticism and hate speech. Additionally, since President Buhari came to power in 2015, there have been accusations and counter accusations, including arrests of politicians who the presidency accused of hate speech. These political opponents while denying these accusations had on their own accused the presidency of witch hunting members of the opposition. The very interesting distinction that will be made in this work between statements that are harmfully offensive and statements that are merely offensive will go a long way in helping to address this issue.

The other persons who will benefit from the fruit of this work are liberals like Mill and Feinberg who believe that paternalism and moralism are antithetical to freedom and therefore incompatible with liberalism. By demonstrating that there are some bother line cases where the demand for freedom requires that these principles be upheld, those in this category will be assisted to understand the complex and evolving nature of criminal law. Most importantly, they will come to know that criminal law does not always require the dichotomist logic of either or but should be approached comprehensively with an open mind.

The work will also be useful to lawmakers as it will delineate the important relationship between law and morality. Particularly, it will make the case that criminal code of a given society should be the outcome of prevailing moral principle of that society. Thus,

contrary to the orientation of legal positivists, lawmakers will be exposed through this work to understand the importance of ensuring that legislations represent the moral permutation of a given society. In other words, law is not an exercise in logic but one that arises from the live and experience of a given people.

Furthermore, judges and lawyers will find the findings of this work very beneficial. Contrary to what is usually the contention of pure law theorists, that law should be interpreted without moral bias, the claim of this work shares a kindred spirit with natural law theorists and believes that law and morality share a common domicile. Consequently, judges will from the pages of this research discover the need why it is necessary to decide cases while having their eyes on the moral values and the meanings of justice, right and wrong in a given society.

Lastly, this work will contribute to scholarship by adding to existing literature on the moral limit on criminal law. Particular, it will call the attention of scholars, especially those in Nigerian to the interesting achievement of Joel Fienberg in this field. Since, it is in the nature of academics that no scholar has a final say on a particular topic, it is believed this investigation will inspire other scholars to investigate and contribute to the erudite achievement already recorded in the field.

1.6. Methodology

The procedure employed for assembling data for this research is the method generally known by researchers as library research. What this translates into is that this researcher will engage in step by step use of both digital and analogue libraries to gather information for this investigation. In addition, the method of analysis will be used to evaluate the data assembled from the library.

Applying this method to achieve the purpose of this study demands the following course of action. Chapter One, introduces the problems and lays the groundwork on the approach towards resolving them. It also describes the purpose and scope of the study

and the research methodology that the dissertation adopts. By logical sequence, a discussion of Feinberg's liberalism or harm and offence principles should fellow immediately after the background. However, this sequence would set aside by the need to understand the positions of other scholars in the ongoing discussion on Feinberg's contribution to the moral limit of criminal law. Thus, chapter two embarks on a rigorous and intensive review of the works of some renowned scholars on Feinberg. Adopting the thematic review method, the literature reviewed are classified according to the interpretation each author has on Feinberg's moral limit of criminal law.

Chapter Three presents Feinberg's harm and offense principles. The textual analysis is based on his *The Moral Limit of Criminal Law, particularly the Vols. 1. & 2. Harm to Others and Offense to Others,* and elements of his ideas on this scattered elsewhere in her writings. The intention of this chapter is to show the supportive arguments Feinberg uses to justify Mill's harm principle and his own offense principle and the arguments he deployed to show that Mill harm principle instead of being considered as necessary and sufficient alone should be seen jointly with the offense principle as moral grounds for criminalization

Chapter Four relies on Vols. 3 & 4 of the *Moral Limit of Criminal Law* (*Offense to Self and Harmless Offense*) to present and analyze Feinberg's case against legal paternalism and legal moralism. Chapter Five which is the evaluation and conclusion takes up the task of comparing and evaluating Feinberg's moral limit of criminal law in the face of counterexamples from paternalism and moralism. The chapter particularly investigates whether the harm and offense principles avoid the tensions coming from these counterexamples. The findings shows that Feinberg's arguments do not stand up to these counterexamples and therefore that his claim that harm and offense exhausts grounds for limiting liberty is undermined. Finally, the chapter summarizes the findings of the study and makes some recommendations.

1.7. Definition of Terms

Anyone who attempts to write about political liberty, which is the subject of this dissertation, finds his task compounded by a terminological difficulty. Not only are the issues themselves a matter of controversy, but so too is the very language in which the issues are debated. For one reason or another, various crucial words in this area have come to be used by some people to mean things quite different from - or even the exact opposite of - what they mean when used by other people. This is particularly true of the words Liberty, liberalism, harm and offense. We shall take up these terms and operationalize their usage for this dissertation.

Liberty

Liberty is the most basic principle of democracy. Consequently, because of the triumph of liberal democracy in modern times, liberty has become the most commonly used concept. Unfortunately, like other frequently used terms the standard definition of Liberty has continued to be elusive and different parties have not ceased to use it to defend their partisan purposes.

One way of circumventing this definitional problem is by approaching the definition of liberty etymologically. The word liberty is an old French and means “unconstrained.” Hereto, “unconstrained” is the bedrock from which every other definition of liberty is derived such that you cannot deviate from this core idea and still be talking about “liberty.” For instance, Paul Rosenberg made use of this core idea when he defined liberty as “A condition in which a man’s will regard his own person and property is unopposed by any other will.” Thomas Jefferson also used this core idea, but added a political aspect:

> Rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add ‘within the limits of the law’ because law is often but the tyrant’s will, and

> always so when it violates the rights of the individual.[4]

The great John Locke also held to this core, but took it in a more philosophical direction:

> All men are naturally in a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man.[5]

P. Rosenberg summarizes it in a very plain but catchy sentence, liberty means that "We should be allowed to do whatever we want, so long as we don't hurt others."[6] This idea of liberty as unconstrained will guide the use of the term throughout this work.

Liberalism

The dissertation will use "liberalism" in the traditional, classical sense - meaning a set of beliefs tending towards the promotion of political arrangements which recognize individual liberty as the supreme political value, not to be subordinated to the pursuit of social objectives like welfare or equality. Liberalism in this sense holds that the range of functions of the state ought accordingly to be limited. It insists, moreover, that individual liberty must extend to the economic sphere, so that free enterprise, the operation of markets, and capitalism, are preferred to state ownership. This working definition is in line with President Reagan's understanding of liberalism, summed up in that "government is not the solution to our problem; government is the problem."[7]

Harm versus Offense

The debate on liberty prohibitory legislation, especially as it concerns Mill's harm principle and Feinberg's offense principle principally depends on how one understands the concepts of harm and offense. However, these two terms like the previous concepts we tried clarifying are not only vague and ambiguous in themselves but are also used to mean different things by different scholars.

Mill identifies that there is a difference between harm and offense. He defines harm as something that injures the rights of others or that set back their important interests. Understood in this way, an example of harm would be refusing to pay taxes because cities rely on the money to take care of their citizens. On the other hand, an offense, for Mill, is something that "hurts our feelings." Offense for him, are less serious and should not be the object of prohibitory legislation.[8]

Agreeing with Mill, Feinberg also distinguishes between harm and offense. He gives account of harm as a setback to one's interest and offense as an act that causes mental dislike. He exemplifies this distinction with the following illustration:

> If A pours an acid into B's eye and B becomes blind as a result then A has harmed B because she has caused him to have a setback in his interest or desire to see, however if A has intercourse with B in public and a number of people see them then they did not cause harm but they caused a mental dislike.[9]

Feinberg's contention here is that cases such as those of disgust and embarrassment might not be harmful however they are offensive and should be given equal attention as acts that are considered harmful. He states that considering offense as an object of legal prohibition seeks to prevent people from wrongfully offending others. In this way Feinberg undermines the entire concept that the harm principle is the only way to restrict liberty, by advocating the idea that if interference to one's liberty can be limited to an element of harm then surely it is possible for the interference to be extended to cases such as those of offence as well. Thus, for Feinberg, it is unfair to place only harm as a barometer of interference to one's liberty.

What is clear in the foregoing is that Mill and Feinberg agree that harm and offense are semantically different but disagree on what should be their role in determining the moral limit of criminal law. For Mill, the only justifiable way to limit the liberty of a person is to prevent harm to others. While Feinberg does not denounce the actuality of the harm principle he believes that it is not the only principle that could be used to justify the interference on one's own liberty. Therefore, the offense principle is a declaration by

Feinberg that harm and offense serve different purposes and are jointly legitimate moral grounds for limiting liberty. In the next chapter we shall see what scholars are saying concerning this claim by Feinberg.

Endnotes

1. C. N. Ogugua, “Democracy and the Quest for an Open Society”, in *Reach Out* (June 2015-July 2016), p. 15.
2. See K. Popper’s *The Open Society and its Enemies*, Vol. II, (New York: Happer and Row Publishers, 1962), p. 82.
3. Paul Rosenberg, What Exactly is Liberty? http://www.freemanperspective .com (25/04/2017).
4. Loc. cit.
5. Loc. cit.
6. Loc. cit.
7. *Time* magazine, Atlantic edition (Amsterdam/New York, 30th January 1989), p. 11.
8. J. S. MILL, *On Liberty*, edited by Alburey Castell, (New York: Appleton-Century Crofts, Inc., 1947), p. 151..
9. J. Feinberg, *The Offence Principle* (New York: Oxford University Press Inc., 1985), p. 3.

CHAPTER TWO

LITERATURE REVIEW

In Chapter One, it was explained that the arguments on the moral limit of criminal law have devolved, among others, into four major theories, namely: harm principle, offense principle, legal paternalism and legal moralism. While J. S. Mill was the originator of the harm principle, the offense principle in its most popular form, was formulated by Joel Feinberg. The other two principles are at different time advanced and defended by different philosophers and jurists. Now, Feinberg's claim that the harm and offense principles are the only legitimate and rational moral limits to liberty in a liberal society has been the focal point of scholarly debate.

The aim of this chapter is to find out what this debate is all about. Doing this will help the researcher to discover the extent scholars have gone in resolving the problems of Feinberg's liberty-limiting principles in other to survey how a new entrant can contribute to the ongoing debate. Thus, at the end of this review, we will identify a literary gap and go ahead in subsequent chapters to try filling it up. The review is thematic and is schematized to swim from authors who simply present Feinberg's opinion to those who endorsed his vision. The last theme is on those who think that Feinberg's moral limit of criminal law is fatally flawed and therefore fundamentally inapplicable.

Erich Gilson, in "Limiting Speech: Harm and Offense" is one of the few scholars who while going through the tempting job of X-raying Feinberg's liberty-limiting principles, still managed to refrain from giving either his own legal or moral verdict on the principles. Gilson's presentation of Feinberg's idea is located within the context of the former's analysis of the ongoing controversy on free speech in the Western world.

To begin with, Gilson acknowledges that advocates of speech regulation agrees that if an individual's right to free expression interferes with the rights and freedoms of others, it is an abuse of this right and ought not to be protected. However, the question, according to

him is "to what degree and by what measure restrictions are enforced."[1]It is from this point that Gilson navigates into his analysis of Feinberg's work. First of all, he explains that "Philosophical and legal approaches are by and large focused around two principles.

> The first, known as the harm principle, was put forth by John Stuart Mill in the 19th Century…. This principle mandates that the only justification for any interference with the liberty or rights of another person is self-protection or the prevention of harm to others. The second and more contentious of the two is Joel Feinberg's "offense principle", which is outlined in the second of his four volume reflection on *The Moral Limits of Criminal Law* and suggests that actions or speech which cause extreme offense, disgust or shame to another person or group are equally deserving of government interference.[2]

Gilson explains that the harm principle is widely accepted among academics as a guide for speech regulation and in essence underlies the legal and moral system of all democratic liberal societies. Unfortunately, according to him, restricting speech in accordance with this principle is inherently limited. The reason for this limitation as Gilson sees it is that laws which prohibit incitement to racial hatred or incitement to imminent danger have been framed in a deliberate effort to avoid harm; outside such circumstances as these, however, speech in and of itself cannot cause harm in the traditional, physical sense of the word.

> It is for this reason that many proponents of speech regulation argue for an expanded definition of harm, contending that racial vilification and hate speech cause tangible harm to their targets either through the process of marginalizing, silencing and disempowering them or by causing serious psychological and mental distress.[3]

Feinberg's principle on Gilson's reading, seeks to solve this problem by introducing a new measure which overcomes the limitations of the harm principle.

In other words, for Gilson, the offense principle is an effort to protect individuals from speech which falls within certain parameters: "…key considerations include the magnitude of the offense experienced, the reasonable avoidability of the offensive act or expression, and the broader social impact of the action."[4]

By and large, Gilson believes that Feinberg's offense principle offers advocates of speech regulation a more concrete ground than the harm principle on which to justify their call for the limitation of speech that are more likely to cause harm.

Like Gilson, Erich Tennen's *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law* also delimits itself to a general exposition of Feinberg's liberty prohibitory principles. Tennen explains that Feinberg's aim in *The Moral Limit*, is to make the best case for Liberalism, which, the latter defines as the believe that, "the harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions."[5] The implication of acknowledging only the harm and offense principles as the only legitimate criteria for limiting liberty as Tennen sees it is that the other two common liberty-limiting principles often advanced as justifications for criminal prohibitions, legal paternalism and legal moralism, are not then proper foundations for criminal sanctions. Tennen underlines that this distinction between harm and offense principles is the first limitation that Feinberg makes in study.

The second limitation is that Feinberg limits his inquiry to the criminal law, as opposed to, for example, Mill, who was concerned with any exercise of power over an individual. Feinberg did so because he believed, "the technique of direct prohibition through penal legislation, *on the whole*, is a more drastic and serious thing than its main alternatives, if only because criminal punishment (usually imprisonment) is a more frightening evil" than civil penalties.[6]

From this locus according to Tennen, Feinberg transits into the framework of a proper analysis of the principles themselves. In *Harm to Others*, he defines what it means to cause harm to a person. He establishes three possible interpretations of harm.

> Harm in the first sense refers to damage, such as breaking a window. Harm in the second sense refers to a setback to interest, an interest being 'all those things in which one has a stake' and a set-back being 'what thwarts [a person's interests] to his detriment.' Harm in the third sense refers to wrongdoing, which is when one person's 'indefensible (unjustifiable and inexcusable) conduct violates the other's right.'[7]

The harm principle, according to Feinberg therefore is invoked only when both of the last two senses of harm are present:

> The sense of "harm" as that term is used in the harm principle must represent the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interests, are to count as harms in the appropriate sense.[8]

Feinberg believed that the harm principle as a guiding theory in criminal law could not "support the prohibition of actions that cause harms without violating rights."

Progressing to offense, Tennen observes that:

> In *Offense to Others*, Feinberg argues that the only other legitimate liberty limiting principle which can support criminal sanctions is the offense principle, which holds that criminal penalties are justified when the prohibition 'is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted.'[9]

Continuing, Tennen avers that from the first two volumes, Feinberg moved to *Harm to Self* where he set out to refute the idea that legal paternalism is a valid basis for criminal sanctions. Legal paternalism, according to Feinberg on Tennen's reading, is the idea that criminal penalties are justified when the prohibition "is necessary to prevent harm (physical, psychological, or economic) to the actor himself."[10]

Finally, Tennen's introduces legal moralism or harmless wrongdoing which for him is the last principle treated by Feinberg in *The Moral Limit of Criminal Law*. He observes that in *Harmless Wrongdoing*, Feinberg argues that legal moralism is an improper justification for criminal sanctions. Legal moralism holds that:

> [i]t can be morally legitimate for the state, by means of criminal law, to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other ('free-floating') kinds.[11]

The point Tennen strives to underline in this final section is that Feinberg directed his criticism at pure legal moralists who view evil "quite apart from its causal relations to harm and offense" and who base criminal sanctions solely on "the inherent character of the evil itself." Feinberg contrasted this with other forms of legal moralism that wish to criminalize acts that are free-floating evils, not because of their inherent evilness but because they would eventually cause some social harm.

What can be taken away from the review of Tennen in the foregoing is that uppermost in his mind is not to draw any moral or legal conclusion from Feinberg's work but to analyze the work in other to show the structure of the latter's argument in support of liberalism.

As indicated earlier, the second group of scholars that would be reviewed in this chapter is those authors that approvingly endorsed Feinberg's liberty-limiting principles. This review shall at this juncture turn its attention to authors in this category.

In their book, *Crimes, Harms, and Wrongs*, A. P. Simester and Andreas von Hirsch offered some incremental approbations to Feinberg's analysis of the moral limit of criminal law. The authors' concern in the book is, "with the moral question, when should the criminal law be deployed to regulate the behaviour of citizens?"[12]Simester and von Hirsch identified four moral principles which have been deployed over the years to access the question: harm to others, offense to others, and harm to self and harmless

offense. However, in line with Feinberg, they claim that the only justifiable moral grounds for limiting the liberty of citizen in a liberal state are harm and offense to others, dismissing the other two principles as illiberal.

In adopting this position, Simester and von Hirsch demonstrate that they are in agreement with Feinberg on substantive difference between harm and offense. Thus, in a serious attempt to clarify what Feinberg means by harm, they argue that the harm principle, despite being a necessary condition for criminalization, requires only "wrongful actions that lead to harm," as opposed to actions that are "harmful in themselves."[13]This for Finberg, according to them, means that actions that potentially have only a tenuous relationship to the harm we wish to prevent are candidates for criminalization. However, for such tenuous linkages to be permissible the eventual harm must be of the sort that were it to follow directly from the conduct, criminalization would be appropriate.[14]

Still, much harm is remote from the actor's initial conduct. Some harm is mediated by further acts of the defendant or a third party. Simester and von Hirsch note that the harm principle "assigns no special status to the fact of an intervening choice."[15] This is the sort of concern that animates something like gun possession, which is only problematic if I use the gun wrongfully or if a third party does. Consequently, for Feinberg on the reading of Simester and von Hirsch the way to constrain the criminalization of remote harms is wrongfulness. The more remote the actor's conduct from the eventual harm, the harder it is to say that he has acted wrongly vis-à-vis the potential remote event.[16]Thus, in their interpretation, only when the remote harm may be imputed to the actor has he acted wrongfully.

Simester and von Hirsch then turned their attention to Feinberg's understanding of offense and that can be defended as a legitimate moral principle for criminalization. Their contention is that offense on Feinberg's account is not simply about an affront to an individual's sensibilities. Rather, to ask someone to desist with "offensive" conduct requires giving reasons beyond the affront.[17]These reasons, Simester and von Hirsch

argue, are grounded in wrongdoing. They argue that for Feinberg, what offenses to others that justify criminalization have in common is that the conduct at issue displays disrespect for others, ranging from insult, to invasion of privacy, to failure to respect boundaries in not being subject to others' intimacies.[18]However, only those offenses that are linked to harm are the proper subjects of criminalization.[19]

This final statement forces Simester and von Hirsch to acknowledge that it is often difficult to distinguish what acts are harmful and what acts are offensive within Feinberg's framework, nevertheless, they maintain that there are two reasons not to collapse the offense principle into the harm principle. First, the wrong inherent in offense is a communicative wrong, whereas there is no particular wrong that is associated with the harms that directly fall within the harm principle.[20]In simple terms, Simester and von Hirsch explanation here is that while the harms that merit criminalization for the harm principle arises directly from the action without need for any mediating argument, the offenses that merit criminalization are not directly related to the offense principle in this manner and therefore requires additional mediation in the form of justification.

Their second argument is similar to the first but differs only in a subtle way. They argue that the way that harms matters to criminalization is structurally different for offense than for harm. With harm, one points directly to the harm as a reason for criminalization. With offense, one points to offense as a reason to criminalize, then counterarguments to criminalization may be offered (restrictions on liberty, autonomy, expression), and then the harm is offered in rebuttal as a reason to defeat these counterarguments.[21]

In the last section of the book, Simester and von Hirsch present a theoretically nuanced look at paternalism. Unlike Feinberg who distinguished between soft and hard paternalism, they distinguish between direct paternalism (coercing the person whom you are trying to benefit) and indirect paternalism (coercing one person for the benefit of another).[22]The authors riding on the authority of Feinberg, are ultimately exceedingly skeptical of directly paternalistic laws. The problem according to them is this: even

when acting for the person's own good, by, for example, preventing her suicide attempt, the criminal law is the wrong mechanism.[23]In line with Feinberg's notion of soft paternalism, Simester and von Hirsch explained that a forward-looking mechanism, under this situation is to give the person time to reconsider and reflect not the condemnatory, backward-looking censure of the criminal law.[24] Moreover, even to the extent that this conduct can be deemed "wrong," the justification for intervention cannot be reconciled with punishment, which ignores what is in the actor's best interests, and punishes her instead.[25]

The authors then consider two types of indirect paternalism. First, they look at the removal of unwanted options, such as the requirement that all cars have airbags, a regulation that makes it impossible for consumers to buy cars without airbags.[26] Interestingly, but not quite unlike Feinberg, the authors do not condemn such indirectly paternalistic measures outright. Rather, they argue that the concern is cumulative—most importantly; cost.[27]driving safe cars is expensive. When the state regulates, it increases the cost and thereby deprives the poor of an option–it is no car or expensive car. They cannot choose a less safe but cheap car. For this reason, the paternalistic legislation may fail on its own terms, as it does not provide the individuals with what is best for them.[28]

In the final analysis, Simester and von Hirsch agree with Feinberg that it is always better to err in favour of liberty such that even if an act implicates harm or offense and is wrong, there may still be reasons not to criminalize it or there may be restrictions on how it is criminalized. It is their contention that privacy matters, and that the state ought to explore other alternatives to criminalization.[29]

H. M. Malm, in his "Liberalism, Bad Samaritan Law and Legal Paternalism"[30] also agrees with Feinberg's criteria for limiting liberty. However, unlike Simester and von Hirsch who brought Feinberg's four principles within the radar of their investigation, the object of Malm's study is legal paternalism. Ab initio, he had informed his audience that his interest in paternalism relates to how it pertains to liberalism as defined by Feinberg.

In Malm's documentation, liberalism as defined by Feinberg states "State interference with individual liberty is morally justified when it is reasonably necessary to prevent harm to persons other than the one whose liberty is being restricted."[31]

Malm claims that Feinberg's position on this is informed by two commitments which are very relevant for liberals. These are firstly; that each person should be free to choose their own notion of 'the good life', and secondly; that they reject State interferences. Since the latter varies, Malm uses Feinberg's account of "sovereign-right liberalism" as this is the most extreme of such stances.[32] "Sovereign-right liberalism" entails that each person has a domain over which they are sovereign. In that vein, interferences by the State in this domain are illegitimate. There is thus a strong rejection of paternalism in Feinberg and Malm believes such rejection is in accordance with liberal principle of autonomy and therefore is justified.

Athini Majali, "Feinberg's Offense Principle and the Harm Principle" also offers corroborative arguments to Feinberg's criteria for criminalization. Nevertheless, contrary to Simester and von Hirsch who talked about the four moral limits to criminal law on the one hand, and Malm, who singled out paternalism on the other hand, the focus of Majali is the offense and the harm principles. The foundation of Majali's claim in this article is an original agreement with Feinberg against Mill, that the harm principle is not the only legitimate criterion for limiting liberty. He expressed this stance in a typical formulation right at the beginning of the essay: "This essay will argue against the notion that the harm principle is the only concept that is appropriate to use when contemplating to limit the liberty of citizens in a democratic state."[33]

From this point, Majali believes that the onus is on him to establish the difference between the harm and offense principles and to demonstrate how each complements the other within Feinberg's vision. He claims that harm for Feinberg involves a setback in one's interest while the act of offense causes a mental dislike. If A pours an acid into B's eye and B becomes blind as a result then A has harmed B because she has caused him to have a setback in his interest or desire to see, however if A has intercourse with B in

public and number of people see them then they did not cause harm but they caused a mental dislike. Majali presents the arguments more crisply:

> Feinberg's offense principle declares that cases such as those of disgust and embarrassment might not be harmful however they are offensive and should be given equal attention as acts that are considered harmful. In this way Feinberg undermines the entire concept that the harm principle is the only way to restrict liberty, by advocating the idea that if interference to one's liberty can be limited to an element of harm then surely it is possible for the interference to be extended to cases such as those of offence as well, thus it is unfair to only place harm as a barometer of interference to one's liberty.[34]

However, Majali is quick to clarify that it is not any seemingly offensive act that should be criminalized. He claims that Feinberg suggests that before a speech can be considered offensive certain factors need to be evaluated. The criteria for assessing if an offense is viable or not is through looking at the extent, the duration, the social value of the speech, the motive of the defendant or speaker, the extent to which the offense can be avoided and the intensity of the offense.

With that statement Feinberg eliminates the idea that offense means petty actions. In the case of A writing a story that implicates B and using harsh and defamatory language to describe B as an act of freedom of expression then unlike the harm principle, before deliberating whether the act deserves punishment or not several things must be taken into account. Is the freedom of expression in this case more significant than the dignity of B, did A write about B out of spite and could A avoid writing such a story. Based on this consideration, Majali is convinced that "…the offence principle is much more detailed in contrast to the harm principle."[35]

It is therefore his claim that his essay agrees with Feinberg's offense principle because the problem with providing limitations in a state is providing a theory or idea that would be sufficient and reasonable enough to limit the liberty of citizen's in that specific state.

Posing the harm principle as the foundation to limit such acts is questionable. Then if the harm principle does not count as a good enough reason to limit democracy's most prized concept what should count as a reasonable purpose to interfere with one's liberty? The answer for Majali as it is for Feinberg is the offense principle.

In his paper "Liberty, Coercion and the Limits of the State", Allan Wertheimer, follows Majali in endorsing Feinberg's moral limit of criminal law. However, in contrast to Majali whose circumference of investigation covers the both harm and offense principles the target of Wertheimer's investigation is the offense principle.In the first place, he contends that Feinberg's aim in The Moral Limit of Criminal Law, is in line with the aim of classical liberals, especially Mill and that aim is to build a society where the coercive apparatus of the state is mitigated by the freedom of the individual. He makes the claim that for Feinberg and other liberal limiting the authority of the state is necessary because man as a meaning-oriented being can only grow, develop his potentials and flourish in an environment of where he is free to make his choices. [36]

This notwithstanding, Wertheimer maintains that the social nature of human society and the limited availability of the resources necessary for human flourishing, man's freedom cannot be an absolute freedom. This according to him is what necessitates and at the same time justifies the existence of the state and every coercive institution for that matter. It follows therefore that for Feinberg as interpreted by Wertheimer, the state and her criminal law "play only mediatory role in the negative understanding of mediation."[37]That is the state is like a watchman or a security guard in a supermarket, who gets involved in the ongoing transaction only when there is a problem or disagreement.

Now, Wertheimer submits that the document that outlines the limits of state authority on the individual and which has been the beacon of modern liberalism is Mill's *On Liberty*. On Wertheimer's reading, for Mill, the only legitimate ground upon which the society can stand to curtail or legislate the liberty of any citizen is to prevent that citizen from

intentionally inflicting harm on another citizen. Wertheimer articulates that Mill's formulation is eventually popularized as the harm principle and has been the rationale for criminalization in the West.

However, Wertheimer agrees with Feinberg that the harm principle is too narrow and as such leaves most of our judicial practices unexplained. It was to correct such inconsistencies that Feinberg proposes his offense principle not as a replacement for the harm principle but as a supplement that can help us not only to understand how our judicial system operates but to help jurist and legislators in understanding the limits the should go in the making and interpretation of laws.

Wertheimer, consequently sees the offense principle as a landmark achievement. Eulogizing Feinberg, he wraps up his article with the claim that:

> Feinberg's compelling argument challenged a liberal theory that has been considered veritable for centuries. It seems not enough to say that 'I have an obligation to engage in an offensive behaviour as long as I am not harming you' but it should be mentioned that offensive acts qualify as a reason to limit one's liberty.[38]

Another scholar who accepts Feinberg's claim that the only reason for which prohibition can be exercised rightfully over a member of a civilized community is Hun Wing Young. He made this case in his article, "Should the State Use the Criminal Law to Prohibit Private Consenting Homosexual Behaviour?" As can be gleaned from the title of his work, Young comes into the debate in an attempt to establish whether consensual homosexual behaviour can be criminalized within the framework of Feinberg liberalism? His answer on to this question is:

> In this paper, I am going to make the claim that it is not justified for the state to use the criminal law to regulate private homosexual behaviour between consenting adults. I would argue for this position by suggesting that: (1) Individual liberty should not be

> limited by law unless there are good counterbalancing reasons to do so; (2) There is no good reason to limit individual liberty concerning private homosexual behaviour between consenting adults. [3] Therefore, private homosexual behaviour between consenting adults should not be criminalized.[39]

The rest of Yung paper is an attempt to justify this initial claim laid out in the quotation above

Yung claims that the foundation of his acceptance of private homosexual behaviour is the liberty-preserving principle which he defines as the principle that "liberty should be preserved and should not be limited by the use of coercive force unless there are good reasons to do so." After tracing the harm principle to Mill and expounding the high influence the principle has enjoyed over the years, he acknowledges that there are:

> Other principles which support limitations on individual liberty on the grounds of appealing reasons," including legal moralism, paternalism, perfectionism, and distributive justice.[40]

However, Yung argues that critics of allowing private homosexual behaviour usually challenge its recommendations based on legal moralism. Consequently, his whole argument is centered on undermining legal moralists' case against private homosexual behaviour

Legal moralist argument as is used by Yung is essentially in its "pure" form, as identified by Joel Feinberg, because according Yung this form of legal moralist declares that the criminal law may prohibit certain actions purely because they are immoral, even though they are harmless. The other argument Yung offers as the reason legal moralists call for the criminalization of private homosexual behaviour is what he calls "impure" legal moralism. He explains that "It is "impure" because it requires an additional reason, apart from purely immorality, for the prohibition of moral evils. To apply the premises against private homosexuality, the justification follows that because the common agreement of

the society is the general abhorrence to homosexuality, and it is the right of the society to preserve this common agreement to guard itself against disintegration, so it is the right of the society to use the law to ban private homosexuality.

At this point Yung observes that the real question here is whether immorality is always a sufficient reason to justify restriction on personal liberty. To answer this question, he makes distinction between what he calls real morality and established morality. Real morality, is a "collection of governing principles thought to be part of the nature of things, critical, rational and correct". It is applicable to all communities and societies. Established morality, on the other hand is the morality generally accepted and shared by a given social group.

Yung acknowledges that "whether immorality has sufficient weight to counterbalance liberty depends on which concept of morality one is discussing." He maintains that since it is almost impossible to ascertain what true morality genuinely is, it is difficult to draw a conclusion to this problem. Based on that he decided to shift his attention to established morality. Concerning established moralities, Yung argues that a crucial shortcoming is that, as Feinberg pointed out, they "can be, and often have been, absurd, cruel, or unjust." According to him:

> It is solely based on human emotions without proper reasoning, and is susceptible to bias and distortion. History has also proved that shared values of the society can be utterly wicked and absurd, for example, the female circumcision tradition in some African countries, the inferior status of female and the foot-binding tradition in ancient China.[41]

Yung therefore, argues that established morality in this sense is, therefore, not a sufficient reason to counterbalance liberty. Apart from its vulnerability to absurdity, it is also difficult to see why it is legitimate to interfere with personal liberty to "vindicate feelings supported by no cogent reasons, or even by no reasons at all."[42]

He concludes that social attitudes and shared values keep evolving over time. In fact, homosexuality has become more accepted nowadays than it was in the past. Despite this trend however, there remains an array of negative feelings of revulsion against homosexuality by many. The legalization of homosexuality is, therefore, of paramount importance to the recognition of homosexual rights.[43]

Agreeing with Yung, Judith Eden in her article, "A Critique of Mill's Harm Principle", accepts that Feinberg's Offense to Others is an improvement on Mill's harm principle. Thus, Eden's contention is that most of the limitations of the harm principle are overcomed by the offense principle. To lend credence to this claim, he goes back to experiment of a ride in a bus employed by Feinberg not only to differentiate between offense and harm but also to show that why offense as a wrong doing merits criminalization.

> Feinberg relates a set of examples, each more offensive than its predecessor, which take place in full view of the passengers. He starts innocently enough with comparatively mild examples like horrible smells, migraine inducing lights, and intolerable noises and so on. In the next section which is headed, Disgust and Revulsion, he outlines even more revolting examples; people eating live insects, each other's vomit and so on. Further on Feinberg talks of sex acts on the bus, both heterosexual and homosexual. He goes on to suggest increasingly more offensive examples, cataloguing in all 31 distinct illustrations. It emerges that some actions, although offensive, can be tolerated in public whilst others may be so intolerable as to be better conducted in private.[44]

In the light of these enunciations, Eden agrees with Feinberg that it is possible to achieve a real distinction between acts that are offensive and those that are harmful. According to him, someone could find the idea of a homosexual relationship, even if behind closed doors, more offensive than an intimate heterosexual liaison which takes place in public. Eden therefore, concludes by noting that some things are judged offensive if conducted in

public but may well be condoned in private noting that this is a clear case that offense and harm should be treated differently by the criminal law.

So far, this review has devoted time to authors who claim that Feinberg's moral limit of criminal law is plausible. The attention of the review shall now dovetail to scholars who think that his attempt at developing liberty prohibitive principles is fatally flawed.

One of the scholars who make this claim is Stanley C. Brubakerz. In his article, "Offense to Others", Brubakerz, identifies Feinberg's attack on legal moralism as the reason why he thinks the latter's theory is fatally contradictory, and fundamentally incapable of delivering on its promises. Brubakerz case against Feinberg consists in the following:

> Some of these judgments that... [I] find more startling than smooth are subsumed under Feinberg's proposition that maintaining a way of life-the tone of the community and character of its citizens, preserving as sacred what is held as sacred, encouraging the minimal moral requisites that may be necessary for its continuation can never justify the coercive use of the law as long as the activity involves only consenting adults and is not directly thrust upon an unwilling public. Or his judgments that the polity must be utterly indifferent to the character of citizens promoted by its criminal law; that the only wrongdoing of which the criminal law can take cognizance is a violation of the rights of others; that the 'reasonableness' of taking offense cannot be a factor in assessing the offending action's lawfulness.[45]

As can be seen in this quotation, Brubakerz's contention is that the scope of criminal law should not be limited to harmful and offensive wrong doings. While not disputing Feinberg's claim that harmful and offensive actions should come under the radar of the criminal law, he particularly believes that there are societal values and norms which the criminal law should also take cognizance of and protect.

On Brubakerz's interpretation therefore, Feinberg's mistake derive from the very heavy weight that he gives to the claim of liberty and the virtual weightlessness he gives to the claims of politics (as preserving a way of life) and virtue (as the cultivation of human excellence). This according to Brubakerz is a balance that entails the absolute exclusion from the law by Feinberg of what he calls "legal moralism" and "legal paternalism."[46]Brubakerz is consequently of the opinion that if liberalism entails the rejection of the values of the society only very few people and society if any will adopt liberalism as a way of life. It is on this ground that he faults Feinberg maintaining that his position is fatally flawed.

Beside legal moralism, another concept of Feinberg that Brubakerz took issue with was the latter's concept of profound offense. Walking through what Feinberg means by profound offense, Brubakerz notes that the experience of "profound offense" differs from ordinary offense in several respects. It differs by its felt tone (it is more than even a gross annoyance; it is profound); by the fact that mere knowledge of the offensive action is sufficient to produce the offense (it is unnecessary to see, hear or smell the offensive action); and by what it offends in us (not merely one's sensibilities, but the very self that possesses these sensibilities, one's very *being).* Yet for Feinberg according to Brubakerz, the depth with which the offense strikes the "self" does not mean in any way that it is personal, for profound offense is expressed impersonally. It is not one's own personal good that one is protecting, but a standard of morality. One is offended because the action is wrong, not as with ordinary offenses, where one claims the action is wrong because one is offended. Brubakerz summarizes as follows:

> As Feinberg explains, the real complaint in a case of profound offense is the wrongfulness of the act, not one's personal discomfort at the knowledge that it is taking place. But then, he notes, we must recognize that the nature of the complaint is not really a claim to be free from this discomfiture, or offense, but a claim of legal moralism-that it is necessary to prevent inherently immoral conduct whether or not that conduct causes harm or [direct] offense to anyone.[47]

For Feinberg as recounted by Brubakerz such a claim is foreclosed to the liberal. This is because it is the alleged wrongfulness of the action that leads to the offended state of mind and once that action is recognized as not truly "wrongful" (because no one's "rights" are violated), offense at the "bare knowledge" of the action becomes barren indeed. This realization, on Brubakerz interpretation of Feinberg should prick the bloated righteousness of the profoundly offended and the "moral fervor will seep out like air through a punctured inner tube."[48]

An exception to this that signals when profound offense can become criminal is when the offense is directed towards somebody. Brubakerz indicates the highlight Feinberg offered to clarify this exception:

> Except where the profound offense becomes a personal offense as well (where a widow learns that it is her late beloved husband whose face is "smashed to bits in a scientific experiment") or where the offensive conducts is obtrusively advertised (a neon sign proclaiming "Cannibalism, Bestiality, Incest. Tickets $5.00 Meals $25. Close relatives half price"), the balance scales would not authorize suppression of the conduct.[49]

The climax of Brubakerz's argument which is also the summation of his case against Feinberg's liberty-limiting principle is that apart from one who is already dogmatically committed to the liberal's ideal, Feinberg's claim is quite unconvincing.

> For one who is already thoroughly committed to the framework of philosophical liberalism, this argument works. But it is unlikely to convert those with doubts about the liberal framework itself. For if one does take profound offense when another mutilates a corpse, desecrates a religious icon, or engages in incest, unless he is already dogmatically committed to liberalism, he is likely to find Feinberg's observation- that liberals 'by definition' cannot act on this

> sentiment-a better reason for rejecting liberalism than his sentiments.[50]

In his *Critique of Joel Feinberg's Offense to Others* A.E.M Baumann accused Feinberg of presenting disguised conservatism in the name of liberalism. Baumann's accusation stems from the fact that Feinberg in making his case for liberalism expanded the range of criminalization beyond what was acceptable to Mill who Baumann describes as "often the father of political liberalism."[51]At this point, Baumann believes his quarrel with Feinberg will be better understood if his reader recalls that the starting point of Feinberg's liberal vision is inspired by Mill's *On Liberty*.[52]This particular point is obvious to every thinking reader because the central question Feinberg attempts to address in the second volume of his *Moral Limit of Criminal Law* is a narrow version of the question Mill raised in *On Liberty*. "The question Feinberg is addressing in the greater work (of the four volumes of the *Moral Limit of Criminal Law*), is what sorts of conduct may the state might rightly make criminal."

Now, Baumann explains that the first volume of Feinberg's work concerns harm which every philosopher beginning from Mill (legal or otherwise) would accept as justifiably criminal conduct. However, as Feinberg sees it according to Baumann's interpretation, controversy arises when we consider whether it is the only valid liberty limiting principle, as John Stuart Mill declared. Baumann maintains that Feinberg embraces this controversy and proposes such an extension of criminalization beyond Mill's limits, offering an offense principle to stand next to harm principle. What seems to be Baumann's worries here is not that Feinberg is bringing in a new principle, rather it is that "Feinberg doubly embraces the controversy in claiming that his proposed criminalization is a liberal legal philosophy, even though it goes against Mill who is often declared the father of political liberalism."

It is from this background that Baumann contends that Feinberg's program reeks of conservatism. The summary of his claim are as follows:

> Indeed, in the beginning of my reading of Offense to Others, I was prompted to ask a fundamental but yet an unanswered question: what initially propelled Feinberg into finding justification for the criminalization of offense? The project itself, in its very nature and intend reeks of a conservative correction of liberal principles. In fact, if proposed to Mill, could not the first response be, simply the counter-question: why must we have such criminalization? I have not noticed a need for it. [53]

Following this strong worded observation; Baumann is convinced that Feinberg's motivation when correctly interpreted can only have two origins:

> And ultimately, is there a need for such thing that does not lie in one of two places: governmentally backed restriction of rights (cut in any way and it always reads oppressions), or the individual's desire for a means to end behaviour the he personally found offensive.[54]

It therefore becomes Baumann's argument that it is terribly difficult not to convince oneself that such latter motivations underlie Feinberg's argument even if the text has been academically cleansed of evidence of such.[55]

Kyle J. Lucas, in "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" also argues against Feinberg's moral limit of criminal law. Nevertheless, Lucas clash with Feinberg is not on the same issue as Baumann who accuses Feinberg of being a conservative parading as a liberal. Rather Lucas attack consists in a particular concession that Fienberg grants to legal moralists. Simply stated, Feinberg is of the opinion that some individual harmless wrong doing but that collectively and cumulatively set back the interest of the community should be legislated against. This claim is what Lucas lucidly contests in his intricately and excitingly written article.

To understand Lucas position on this it is ad rem, to underline that he enters the debate within the context of an attempt to determine the legitimacy of the criminalization of

illicit drugs. In building up his case against Feinberg, Lucas observes that: "Arguments put forth to justify criminal statutes against drug use are numerous and generally fall into three main categories: Moral perfectionism, harm to self, and harm to others."[56]Nevertheless, he "believes that harm to others is the strongest rationale of the trio capable of justifying the criminal statutes. He therefore, promises to focus solely on the arguments put forth that drug use should be illegal because it harms others.

After these initial elucidations, Lucas goes ahead to state that Feinberg believes that societal harm provides a convincing rationale to criminalize the risks of harm created by drug use. He set out the case as follows:

> Societal harm, as argued by Feinberg, is a harm of public interest. Feinberg defines public interest as "a 'common,' or widely shared, specific interest." It is a common interest which nearly all members of society have, for example, avoiding epidemic sicknesses, providing a sustainable environment in which one can live, and having economic prosperity. Acts can be considered harmful to society even if an individual act is relatively harmless itself. For instance, a single act of littering causes little harm. Nonetheless, the sum total of harm caused by all the individual acts in a given time might end up being quite substantial. The aggregate of the harms pushes us past a certain unacceptable level, then we have a strong reason to prohibit such acts. Feinberg refers to these types of harm as "aggregate-harm." Thus, in the case of drugs, one might argue that although each individual use of a certain drugs causes a small amount of harm, the aggregate is substantial enough to warrant the criminalstatute.[57]

Lucas believes that overall, societal harm seems to carry some weight at first glance; however, he promises to show that such weight is confronted by some significant challenges. The main challenge as Lucas articulates it is that there is no objective threshold which determines when there is enough societal harm to justify criminal sanctions. Hence he argues that we must rely on comparative cases. Such cases,

according to him, do exist, nonetheless, “they leave us open to doubt the aggregate level is high enough to warrant proscription.” In addition, Lucas believes there is also reason to doubt an epidemic scenario on a scale which would push us past the aggregate threshold would occur.

The first exemplification Lucas employs to problematize the claim that illicit drugs causes harm and therefore should be criminalized is the case of alcohol. Here he claims that:

> Most notably, this is the case with alcohol, which is interesting given its affinity with drug use and crime. It seems fairly uncontroversial that the amount of aggregate harm caused by alcohol is higher than that of most illicit drugs. Even if we assume that alcohol causes considerably less harm on average per user than most illicit drugs, the aggregate must still be far greater given that more people use and abuse alcohol than any illegal drug. But what is more, there is evidence that alcohol is one of the most socially harmful drugs in widespread use.[58]

Lucas in other words concludes that it will be wrong to criminalize illicit drugs while alcohol remains decriminalized. Therefore, harm alone is not legitimate ground for justifying the criminalization of illicit drugs.

The second, example employed by Lucas consist in the claim that lifting the prohibitions on drug use would push us past the acceptable level of aggregate harm. In other words, by legalizing drug use, there will be a surge in the number of users which will significantly increase the aggregate harm. Lucas maintains that the significant challenge facing this second attempt is that there is simply no empirical data supporting the idea that should proscriptions be removed; a large amount of people would turn to drug use. He references a work by Robert MacCoun and Peter. Reuter, which found that few people said they abstained from drugs, or quit after using drugs, for legal reasons. Lucas inference from this therefore, is that:

> If this is true, it implies that we should not expect a significant change in drug use should the prohibitions be lifted; in turn, we should not expect a substantial increase in the current level of aggregate harm.[59]

Consequently, it is Lucas argued opinion that Feinberg erred in thinking that some form of societal harm can be used as exception to the liberal position that "free floating harms" or harmless offenses should be criminalized.

Another scholar who antagonizes Feinberg's view on liberty-limiting laws is ErikBleich. In "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies," Bleich situates his participation in the debate within the circumference of the upsurge in the controversy surrounding the regulation of free speech in the Western world in recent years. He locates his own argument against Feinberg on what he calls "the slippery slope argument." His argument consists in the following claim:

> Placing any form of restriction on freedom of expression is a small step to applying further restrictions and sliding down a 'slippery slope' toward censorship and totalitarian suppression of free speech in society.[60]

Thus, Bleich claims that the harm principle as originally formulated by Mill is enough to regulate the relations between individuals and states and the amount or nature of force the state can bring to bear on the individual. He believes that any attempt to expand this initial principle carries with it the possibilities of opening the door for different kinds of state actions that are against the spirit of liberalism.

Bleich argument against the offense principle therefore is that offense by nature is personal, subjective, and difficult to measure. In other words, offense is extremely difficult to regulate even with the measures put forward by Feinberg. Because of this

subjectivity and the abstract nature of offense or insult, Bleich insist that offensive speech should not be punishable by law. He sums up his argument claiming that:

> Whereas even absolutists will often acknowledge the value of the harm principle, arguments which rely on the notion of protecting against offense or insult are likely to provoke claims of tyranny, thought-policing and a dangerous 'slippery slope' toward totalitarianism.[61]

An additional charge is brought against Feinberg's moral limit of criminal law by James Cullen Sacha, in the latter's master's thesis: *Father Knows Best: A Critique of Joel Feinberg's Soft Paternalism.* Sacha's offensive is aimed at Feinberg's paternalism expressed in the third volume of *The Moral Limit of Criminal Law*. Before initiating the attack, Sacha, detained himself a little conceptualizing paternalism within the framework of Feinberg philosophy.

To this end, Sacha, notes that Feinberg makes a distinction between hard and soft paternalisms. Feinberg defines hard paternalism in the following terms:

> Hard paternalism will accept as a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings.[62]

Commenting on this quotation, Sacha maintains that Feinberg asserts that hard paternalism is "paternalism" in the truest sense, that is, "the government can coercively interfere in the lives of an individual for her own sake, even if she poses no threat to others."

In contrast to hard paternalism, Feinberg on Sacha's reading defines and ultimately defends soft paternalism. The soft paternalist, Sacha explains further, is not clearly defending "paternalism" at all. Feinberg often comments that the name "soft paternalism"

is a bit of a misnomer, and the position more clearly resembles anti-paternalism. Sacha presents Feinberg's definition of soft paternalism:

> Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct…*when but only when* that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.[63]

Sacha acknowledges here that "Feinberg's position is similar to the one held by Mill. The government can only interfere with self-regarding actions but only when the person's conduct is not voluntary." Sacha then devotes the rest of the thesis to demonstrating that Feinberg is wrong in assuming that it is illegitimate for the states to intervene to prevent adults from harming themselves without the adult's consent.

He observes that the arguments defending hard and soft paternalism hinge on how one defines the terms "autonomy" and "voluntary," as well as the weight that is attached to these concepts in determining when it is permissible for the state to coercively intervene in an individual's conduct. On his account, Feinberg places a lot of weight on autonomy that autonomy trumps any argument that the state can bring to justify it its attempt to interfere to prevent an adult self-harm. However, Sacha claims that this particular claim by Feinberg does not cohere with real life moral intuition and experiences. Using some examples, Sacha demonstrates it is more reasonable to prefer hard paternalism because hard paternalist prioritizes the individual's safety and health.[64]

On the whole, the conclusion Sacha comes to is that no responsible individual and government for that matter will allow individuals to their citizens to harm themselves in the name of respecting liberty or personal autonomy. True, he agrees that liberty is important but he refused to be persuaded by Feinberg and other liberals who think that allowing individuals to harm themselves, even when the willingly and consciously choose to do so is the way to achieve a liberal society.

Following Sacha, David Dyzenhaus, in "Harm Principle and Offense Principle", claims that Feinberg's *Moral Limit of Criminal Law* is not particularly as successful as Feinberg and his disciples would have us believe. Unlike Sacha who attacks Feinberg from the point of view of paternalism, Dyzenhaus' quarrel with Feinberg is that the latter's position is anti-liberal. In other words, Dyzenhaus' contention recalls Baumann (already discussed in this chapter) who describes Feinberg as a "conservative who adores himself with the gab of liberalism," that is, that the offense principle is a conservative principle coached in the language of liberalism.

In an attempt to demonstrate how this is so, Dyzenhaus momentarily focuses his attention on the structure of the offense principle itself. He claims that Feinberg proposes that if one is forced to suffer an offense, regardless of whether or not actual harm results, one is not less harmed and therefore the government is legitimate in regulating those offensive actions.[56]However, Dyzenhaus notes that Feinberg recognizes the danger in giving government the freedom to permit legislation that limits liberty just because someone somewhere finds something offensive, because there is almost always someone somewhere who will find anything offensive. It is this acknowledgement that prompted Feinberg to offer certain criteria for determining when an offense merits government intervention.

> The magnitude, the reasonableness of avoidability, the volenti maxim, and the discounting of abnormal susceptibilities. Though I will not go into the definition of these constraints, suffice it to say that petty offenses would not be regulated.[65]

After offering an extensive description of the 'hypothetical bus ride experiment' used by Feinberg to underline the cogency of his argument that offense should be treated as a different moral category from harm, Dyzenhaus makes the following submissions:

> I can see how many of these offensive instances could incite someone to side with Feinberg, but I remain

> unconvinced that the harm principle is not sufficient to deal with each story.[66]

He claims that Feinberg argues that it is a matter of human psychology that the observation of lascivious acts results in the minds absorption. Nevertheless, for him, to accept such kind of thinking would be to reduce the willpower to a level of impotence, and suggests that autonomy is not something we are always capable of. "That is not something I am prepared to do", Dyzenhaus interjected, "If humans have the freewill," he continues "then they can certainly choose to avoid the things they find offensive." And if they find themselves unable to avoid them, such as in the bus story provided by Feinberg, then the solution seems obvious: "Find another way to get to where you are going." In the final analysis, Dyzenhaus' conclusion is that:

> The harm principle seems the more logical choice for a society that values liberty. Between the harm principle and the offense principle, it is the harm principle which gives more respect to the autonomy of the individual, and their ability to make choices and judgments. If we allow for legislation according to the offense principle we diminish the value and capacity of what it means to be human.[67]

Another author who is unconvinced by the arguments provided in *The Moral Limit of Criminal Law* is A. Ripstein. Ripstein makes this claim in his well-structured and articulated article, "Beyond the harm principle". His position consists in the claims that despite Feinberg's best efforts, he still fails to give the exact meaning of harm and offense. To punctuate this point, he employs several examples highlighting how the harm and offense principles cannot provide a cogent account of either the harm or offense committed or the ground for their criminalization.[68]

Ripstein consequently concludes that:

> The harm and offense principles as formulated by Feinberg do indeed sound sensible, but in reality, they of no practical use. Their failure to fully assign a meanings to 'harm', and offense and therefore contain the scope of criminalization, along with their

> potentials to be overextended with creative use of causal-links and be damaging to liberty makes them impractical, and of no use to a realistic legal framework. While in its original sense, they could be seen as useful, as defenses of basic liberties in a debate, their use stretches no further I believe. A practical development for the harm and offense principles would be to moralize the concept of harm and offense, removing many of the ambiguities surrounding the terms.[69]

This review shows that authors understand and interpret Feinberg's *Moral Limit of Criminal Law* from a number of dimensions. On the whole, three dimensions are identified in the review: first, there are authors who simply explored and exposed Feinberg's vision. No attempt was made by these scholars to make any value judgment or draw any legal inference from Feinberg. Second, there are others who approvingly endorsed Feinberg's stance on liberty prohibitive legislation. The authors here believe that Feinberg has solved an age-long problem of what should be the relation between liberty and authority. Third, and finally, there are those who claimed that Feinberg's programme is not only fatally flawed but is also fundamentally incapable of realizing the purposes for which Feinberg conceived and formulated it.

What is starkly missing in this literature is that while there are scholars who find the inadequacy in Feinberg's doctrine and accordingly criticize it in that regard, none tries to use his template to fashion a new moral limit of criminal law which will not only incorporate those principles rejected by Feinberg as illiberal but that will also be defensible within the framework of political liberalism. The development of such framework is the literary gap that the present study hopes to make up for.

Endnotes

1. Erich, Gilson, “Limiting Speech: Harm and Offense” Australian Legal Journal, Vol. 12, No. 7, (2015), p. 37.
2. Loc. Cit.
3. Loc. Cit.
4. Ibid. p. 40.
5. Erich Tennen, Is the Constitution in Harm’s Way? Substantive Due Process and Criminal Law (Michigan: University of Michigan, 2004), p. 6.
6. Ibid. p. 7.
7. Ibid. p.8.
8. Loc. Cit.
9. Ibid. p. 9.
10. Ibid. p. 12.
11. Loc. Cit.
12. A. P. Simester and Andreas Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011), p. 3.
13. Ibid. p. 52.
14. Ibid. p. 55.
15. Ibid. p. 58.
16. Ibid. pp. 59-70.
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CHAPTER THREE

3. FEINBERG'S MORAL LIMIT OF CRIMINAL LAW

In the last chapter, this dissertation reviewed the opinions of authors on Feinberg's limits of criminal law. The basic result of that exercise is that none of the scholars reviewed tries to use Feinberg's template to fashion out a new moral limit of criminal law which will not only incorporate the principles rejected by Feinberg as illiberal but that is also rationally defensible. The present chapter intends to begin the long process of making good the purpose of this dissertation, that is, to show that Feinberg erred in his claim that harm and offence are the sufficient moral conditions for limiting liberty. Specifically, this chapter applies the method of analysis to read Feinberg's harm and offense principles. The objectives are to present these principles as a background for their critical evaluation in the next chapter. The chapter commences with an exploration of the background to Feinberg's liberalism and progressively delves into an analysis of the logical structure and coherency of his harm and offense principles.

3.1. Background to Feinberg's Liberalism

Many factors inspired Feinberg's *Moral Limit of Criminal Law*. However, of all these factors, the influence of J. S. Mill's work, *On Liberty*, Mill-Stevens conflict and the Hart-Delving debate are very fundamental. Therefore, this section shall analyze these factors as the two most important influences that inspired Feinberg before delving into Feinberg's work proper.

3.1.2. J. S. Mill's On Liberty

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[1]

This simple sentence from John Stuart Mill's Introduction to *On Liberty* written in 1859 eventually became a foundational reference of Anglo-American criminal law and helped shape the course of penal legislation, enforcement, and theory during the twentieth century. Known as the 'harm to others' principle - or 'Harm Principle' for short - Mill's simple sentence emerged, in the hands of H. L. A. Hart, Joel Feinberg, Herbert Wechsler, and other liberal legal thinkers as the critical principle used to shield individuals from the legal enforcement of morals legislation - including, most notably, penal laws against homosexual conduct, commercial sex, illicit drugs, and other behaviour that came to be known as 'moral vices' for some and 'victimless crimes' for others. 'Harm to Others' became, in the 1970s and 1980s, the defining criteria of liberal thinkers in the debate over the proper scope of the criminal law and the legitimate reach of the State - as evidenced, perhaps most notably, by the lead volume of Feinberg's magisterial and influential treatise on *The Moral Limits of Criminal Law*, titled 'Harm to Others,' published in 1984.

Mill's position in the *On Liberty* was a child of its time. The book was written at the time of crises in Europe. It was at the time when Europe was living under the influence of the French Revolution, the Napoleonic wars and the growth of the revolutionaries who were spreading the Napoleonic principles of Equality, Liberty and Fraternity. It was the time when the spirit of representative democracy was beginning to spread all over Europe. The idea of *On Liberty* probably came at the time of Mill's visit to France after his mental distress and the reform Act of 1832. It was at this time that he discovered that the extension of the suffrage, though very significant and necessary, could not alone prevent the recurrence of display of egocentric nature of the ruling class. This was the origin of his feelings against the tyranny of the majority, which is well expressed in *On Liberty*.

To be specific, in the *On Liberty,* Mill is concerned about the effect of democratization as a better government compared to the autocratic governments of the time of antiquity. He makes a brief survey of the changing roles of liberty as a political ideal and how it has been subjected to varied degrees of denial and persecution. But the coming of democracy has made the power of the rulers distinguishable from those of the people, and so, there

arose the need to find a limit to the power of the ruler in order to prevent unnecessary infringement of the rulers on the liberty of the people. It has now been realized that the so-called majority rule is the rule of the people amongst themselves, and as such, it poses another problem – "the tyranny of the majority". This is how Mill captures problem:

> The advent of liberal democracy in the nineteenth century had raised a new set of concerns, not only about representation, but also about 'social tyranny.' In the emerging liberal democracies, the problem was no longer, or not only to protect against 'the acts of the public authorities,' but also to guard against the tidal wave of public opinion that could so easily encroach on individuality and self-development. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.[2]

Mill was rather explicit in his criticism of public opinion, which, he observed, "now rules the world" and reflects "the tendencies and instincts of the masses," which he expressly equated with "collective mediocrity.

However, Mill was by no means opposed to liberal democracy, to majority rule, nor to the extension of suffrage. He was an outspoken advocate of women's suffrage and defended universal suffrage. It is indeed a fact that in his days as it is now, democracy seems to be the fairest of all systems of governments in terms of the status of individual liberty and the extent of the power of the ruler. But sad enough, its practice does not completely remove the vestiges of tyranny in governance. Thus, the existence of democracy in a society does not remove injustice from the land. The fact that 'the people' make the laws does not rule out the possibility that the majority will pass laws, which will oppress the minority. Mill therefore regards the tyranny of the majority as a monster

which we need to guard against. This tyranny of the majority may express itself either in formal structure of legal enactment or in form of government policy.

Thus, in *On Liberty* Mill identifies two major concepts to which attention should be paid in order to enhance progress in a civilized society, namely: (i) complete liberty of thought and discussion within a particular political order, and (ii) the free development of individuality. Mill centers his focus on these two main independent aspects of human life. Consequently, the main spirit behind the writing of *On Liberty*, according to Mill, was:

> …to assert one very simple principle, (which is) entitled to govern absolutely the dealings of society with the individual…That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.[3]

Hence, Mill's essay *on Liberty* is concerned with the question of the nature and limits of power, which can be legitimately exercised by society over the individual. Mill proposes a thesis that considerable amount of power be reserved for the citizens while the limits of the state intervention in individual liberty as well as the limits of public opinion as a way of ensuring good conduct of the citizens, be determined.

In other words, Mill's proposal regarding the solution to the problem is not directed towards a total removal of tyranny from the seat of power because he recognizes the inevitability of some degrees of tyranny in any form of government administered by men. Rather than a complete extinction of tyranny, he proposes "protection against all forms of tyranny". But being mindful also of the in-exhaustiveness of the application of tyranny in human affairs, he highlights the areas where protection against tyranny is needed in order to protect liberty and pave the way for the enthronement of societal peace in the following words:

> Protection therefore, against the tyranny of the magistrate is not enough: there need be protection also against the tyranny of` the prevailing opinion and feeling; against the tendency of society to impose, by other means, than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves up the model of its own.[4]

The business of providing a formidable protection against the tyranny of the majority involves setting a limit to which "collective opinion" or the majority can legitimately interfere with the independence of the individual citizens in a community.

But how and where in human affairs will the limit be placed? Mill realizes that man, as a moral agent needs to be restrained in his actions because, "all that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of the people",[5]living together in a community. Such restraints are possible by placing some restrictions on man's liberty as a means of regulating his conduct for a harmonious existence with others in society. As Johnston puts it:

> [Mill] does not argue that we have a basic right to these freedoms or that the government is under some sort of moral obligation to maximize our freedom or that such freedoms are divine commandments. His argument is a thoroughly utilitarian one: he argues that adopting his principle will bring direct social benefits for everyone, they will permit faster progress in all sectors of society…Without such principles, Mill believes, society is in danger of stagnating. For people will not threaten the stability of society if we give them much more freedom than they presently possess.[6]

Mill acknowledges these restrictions as a function of "law" and "opinion". "Therefore", he says that "some rules of conduct must be imposed, by law in the first place, and by

opinion on many things which are not fit subjects for the operation of law."[7] This Millian proposition is the background to his famous questions:

> When is the state qualified to interfere in the liberty of the individuals? Or on what grounds can the state prohibit or permit individuals from acting as they wish or 'force' the individuals to act against their desires?[8]

Mill's response to these posers is as observed above what has come to be known Mill's Harm Principle.

Mill believes that the only ground for which the state is justified to interfere in the liberties of the individual is to prevent harm to others. Thus, he claimed that his aim in his *On Liberty* was to assert one very simple principle, which is qualified to govern absolutely the dealings of society with the individual. This principle is that the only reason that warrants any individual or a group of individuals to interfere with the liberty of action of any other individual or a group of individuals, is self-protection because the purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others.[9] More importantly, according to Mill, a great evil is committed if the individual is denied his or her liberty.

Mill would however, emphasize that the individual "must not make himself a nuisance to other people."[10] He must refrain from molesting others in what concerns them, and merely act according to his own inclination and judgment in things which concern himself. Mill developed and elaborated a first distinction between self-regarding and other-regarding acts - between "the part of a person's life which concerns only himself and that which concerns others."[11]

On the whole, this Millian principle of liberty can be summarized as follows: (i) that everybody should be bound to observe a certain line of conduct towards the rest. (ii) That

this conduct should consist in not injuring the interests of one another. This principle serves as one of the initiating acts that inspire Feinberg's limits of criminal laws.

3.1.3. The Mill-FitzJames Debate

From the beginning of philosophy, philosophers have frequently clashed over determining the appropriate relationship between the state and the individual. Nevertheless, the official commencement of the legal version of this debate occurred between J.S. Mill and another famous British jurist, Lord James Fitzjames Stephen. Feinberg entered the debate a hundred years later through his Moral Limit of Criminal Law. However, much earlier before Feinberg joined the debate, HLA Hart and Lord Devlin had quarreled over the issue in what is famous today in Jurisprudence as the Hart-Devlin Debate. In other words, the Hart-Devlin debate replicated, in many ways, the earlier debate between Mill and Lord Stephen.

In a book entitled *Liberty, Equality, Fraternity,* Lord Stephen published a scathing attack on Mill's *On Liberty*, and strenuously advocated legal moralism. Stephen described his argument as "absolutely inconsistent with and contradictory to Mr. Mill's." Stephen's argument, like Mill's, was best captured in a now-famous passage:

> There are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.[12]

This passage is the most frequently excerpted in discussions of Stephen. It was liberally cited by Hart[13], and Feinberg[14], underscoring the ineffaceable impact both Stephen and Mill have had on the evolving debate.

3.1.4. The Hart-Devlin Debate

After the rich contributions of both Mill and Stephen, contemporary discourse on the harm principle was rekindled by a more recent exchange of ideas. In the United States, it

was triggered by obscenity cases in the Supreme Court and the drafting of the Model Penal Code.[15] In England, the debate over the criminal enforcement of morality was reignited when the Committee on Homosexual Offences and Prostitution created the "Wolfenden Report," which recommended the decriminalization of homosexual acts conducted privately among consenting adults.[16]In both countries, the debate was fuelled by the perception among liberal theorists that legal moralist principles were experiencing a rejuvenation and were threatening to encroach on liberalism. More than anyone else, Lord Patrick Devlin catalyzed and as well, was seen as the embodiment of this perceived threat.

The Wolfenden Report prompted Lord Patrick Devlin to respond and denounce the committee's recommendations.[17]In his Maccabean Lecture, delivered to the British Academy in 1959, Lord Devlin argued that purportedly immoral activities, like homosexuality and prostitution, should remain criminal offenses. He published his lecture and other essays under the title *The Enforcement of Morals,* and Devlin soon became associated with the principle of legal moralism-the principle that moral offenses should be regulated because they are immoral.

Devlin's lecture in turn instigated a response from H.L.A. Hart in his lecture and book, *Law, Liberty, and Morality*.[18] Thus, came about the Hart-Devlin debate and the renaissance of 20th century harm principle. As we shall see, in the 1980's, Joel Feinberg entered the conflict with his highly influential four-volume treatise, *The Moral Limits of Criminal Law*. These three jurists defined the contours of the harm principle as we now know it. Before moving on to Feinberg, let us sketch the positions of Devlin and Hart on the matter.

In response to growing dissatisfaction with the treatment of prostitution and homosexuality in England, the Wolfenden committee was appointed to reevaluate the state of the laws. As to homosexuality, it recommended, "practices between consenting adults in private should no longer be a crime."[19] As to prostitution, it

recommended that "though it should not itself be made illegal, legislation should be passed 'to drive it off the streets' on the ground that public soliciting was an offensive nuisance to ordinary citizens." The reasoning supporting both findings was the committee's belief that the function of criminal law was:

> To preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable.[20]

The report specified that there is a sphere of private morality that the law should not invade. It noted that the purpose of the law is not "to intervene in the private lives of citizens." The report concluded that the law should not "seek to enforce any particular pattern of behavior further than is necessary to carry out the purposes we have outlined."[21]

Devlin heartily disagreed. In his lecture, he argued that criminal law should enforce morality. He began by acknowledging that one could conceive of a criminal system whose laws are not based on morality, and where the State justifies its sanctions by other means. However, the possibility that such a system could exist did not negate the idea that a society could still base its laws on morality. Devlin argued that there is a public morality, which he called a "moral structure." He believed that a society must have its own collective ideas, including a collective morality, which bonded individuals into a community together. Given that society is inherently governed by a moral code, "society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence."[22] Devlin also offered a methodology for ascertaining how society defines morality: the reasonable man standard. "Immorality," according to Devlin, is what every reasonable person would consider to be immoral.[23]

Finally, Devlin discussed what should limit or guide a society in exercising this power to govern morality. He argued that only when the society is harmed should it act in collective judgment. Although this argument sounds like a variant of the harm principle, Devlin believed that "any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does."[24] That is to say, he considered immorality harmful.

Hart on his own accepted that the harm principle is not the only justification for the criminalization of certain acts, which, on their face, seemed to cause no individual harm (e.g. euthanasia, where one party consents to his own killing). He believed that those rules could be explained and justified by some kind's paternalism. He also subscribed to the notion that public nuisance was a worthy justification for crimes such as bigamy.[25] However, Hart was disturbed by Devlin's assumption that certain acts, such as sexually immoral ones, have the ability to hurt society generally for Devlin had argued that:

> Immorality might lead to the disintegration of society and society is entitled to use its laws to protect itself from this danger. Therefore, it is not possible to set theoretical limits to the power of the State to legislate against immorality.[26]

Hart criticized Devlin on this by asserting that, "There is no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society."[27] On the whole, like the Wolfenden Committee, Hart conceded that coercion might be justified by grounds other than the prevention of harm to others, such as offence to others, but denied any justification to the legal enforcement of morality as such.[28]In the finally analysis Feinberg would ultimately, argue that the only substantial difference between Hart and Devlin is that "Hart focused on harm to the individual, whereas Devlin focused on harm to society as a whole."[29]

As underscored already, the exchange between Hart and Devlin is the major event that set the main terms of the problem of harm and prompted one of the most important jurisprudential debates of the second half of the Twentieth century which found its climax in Joel Feinberg.

3.2. Feinberg's Liberalism

The preceding subsection profiles the background, especially the scholarly exchanges which precipitated Feinberg's liberalism. This section will focus on the two moral principles (the Harm and Offense Principles) projected by Feinberg as the only justified conditions for imposing legal restrictions on citizens in a liberal society.

Universal consensus among readers of Mill's *On Liberty* holds that, its merits aside, Mill's statement of the liberal credo are neither simple nor unitary. In contrast with Mill, Joel Feinberg takes up the challenge to articulate a liberal conception of limits of the criminal law which is sensitive to the great conceptual and normative complexities of the subject. In this he succeeds admirably. The Moral *Limits of* the *Criminal Law* promises to be the most comprehensive systematic discussion of the subject to date and, if Gerald Postema is correct, the most successful articulation and defense of the liberal credo since Mill.[30]

The subject of Feinberg's investigation is narrower than Mill's. While Mill addressed the limits of legitimate use of social power generally, Feinberg considers only formally institutionalized legal interference, and within this category he concentrates on the state's exercise of power through the apparatus of the criminal law. His reasons for this restriction are both substantive and methodological. The criminal law deserves special treatment, says Feinberg, because of the especially high costs of criminalization of behavior to human interests and dignity.[31]

In this regard, the central question of Feinberg's inquiry is, under, what conditions is Interference with individual liberty by the criminal law morally legitimate? His

interpretation of this question is distinctively Millian. The question is not, what kinds of actions may the criminal law legitimately prohibit or prescribe? But rather, on the basis of what type of considerations or arguments may a legislator legitimately propose to interfere with individual liberty? Thus, the "liberty-limiting principles" that Feinberg considers are defined in terms of legitimate reasons for coercive interference.

Mill's 'extreme' liberalism restricts legitimate liberty-limiting principles to only one, the Harm Principle. As Feinberg defines this principle:

> It is always a good reason in support of penal legislation that it would probably be effective in preventing… harm to persons other than the actor…and there is probably no other means that is equally effective at no greater cost to other values.[32]

However, Feinberg believes this principle must be supplemented with the Offense Principle, which according to him holds "it is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted."[33] Liberalism, in this context, is defined as the view that these two principles *and* they only, constitute proper grounds for criminal legislation. Hence, in *The Moral Limits of the Criminal Law*, Feinberg defends what he takes to be the liberal view of justified limitations on liberty by the state, namely, that "the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions."[34]

Therefore, Feinberg's liberalism is distinctive from Mill's in virtue of what it includes not what it excludes. In virtue of what it includes because Feinberg contrary to many liberals, including Mill, universally acclaimed as the father of liberalism, believes that the Harm Principle needs to be supplemented with the offense principle. Not in virtue of what it excludes because like many liberals, including Mill, Feinberg holds that any other considerations, especially concerns for the actor's own good (whether prevention of harm

or promotion of good), or for the actor's character, or for the improvement of the lot of others, or the immorality of the actions apart from their tendency to cause harm or offense - are inappropriate bases for legal interference with liberty. This liberal outlook is offered and defended by Feinberg in his magnum opus, a unified four volume inquiry into the Moral Limits of the Criminal Law.

Armed with this presumption that Feinberg fixes his philosopher's gaze upon four commonly proposed justifications for invoking penal law, with a separate volume devoted to each. The first volume, *Harm to Others,* defines and qualifies the "harm principle," the relatively noncontroversial but potentially all-encompassing notion that "the need to prevent harm to parties other than the actor is always an appropriate reason for state interference with a citizen's behaviour."[35] In the second volume, *Offense to Others,* Feinberg considers whether, and to what extent, the government legitimately may prohibit an individual from engaging in conduct that is offensive, but not necessarily harmful, to others. The third volume addresses the argument that conduct may be prohibited because it causes harm to the actor herself. The final volume, Harmless Wrongdoing, considers whether conduct may be prohibited simply because it is inherently immoral. Throughout, Feinberg's aim is not to determine what ought to be included in a penal code, but simply what "an account of the moral constraints on legislative action," and is, therefore, "a quest not for useful policies but for valid principles."[36]

The remaining part of this section will be used to analyze the harm and offense principles as the two criteria espoused by Feinberg as the only justifiable moral conditions for criminalization. The other two principles, Moral legalism and Paternalism rejected by him, will be discussed in chapter four.

3.2.1. The Harm Principle

Feinberg's aim in the *Moral Limit* was to "make the best case for Liberalism,"[37]which, as already observed above, believes that, "the harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions."[38]The first volume of the Moral Limit, *Harm to Others* is an avowedly liberal endeavours, which self-consciously attempts to vindicate at least the "motivating spirit" of John Stuart Mill's *On Liberty*, while qualifying its argument "in light of the many accumulated difficulties and criticisms."[39]This implies that Feinberg has two basic objectives in writing the *Moral Limits*. First, to vindicate Mill's liberalism, especially the Harm Principle by means of detailed clarification and second, to respond and possibly modify Mill's doctrine in the context of the accumulated criticisms it has attracted over the years.

In an early essay in 1973 entitled *Moral Enforcement and the Harm Principle* - an essay which had sketched the contours of *The Moral Limits* – Feinberg had rehearsed Mill's harm principle and pared the principle down to its original, simple formulation. Mill as we saw only distinguished between direct and indirect harm. Feinberg went no further, at the time of this essay in developing the harm argument. He endorsed Mill's argument and wrote that the distinction, "as Mill intended it to be understood, does see mat least roughly serviceable, and unlikely to invite massive social interference in private affairs."[40]

However, contrary to *Moral Enforcement and the Harm Principle,* in *Harm to Others*, Feinberg departs from Mill in two significant respects. First, he abandons Mill's utilitarianism for the method of "coherence." That is, he establishes the strength of a proposition by showing that its denial would entail a proposition that the reader finds unacceptable; or alternatively, he argues that what the reader believes true or right has certain implications of which the reader may be unaware. "If the argument is successful," he writes, "it shows to the person addressed that the judgment it supports coheres more

smoothly than its rivals with the network of convictions he already possesses, so that if he rejects it, then he will have to abandon other judgments that he would be loath to relinquish."[41] Second, in contrast with Mill, Feinberg provides a detailed explanation of the meaning of harm.

To begin with, he argues that harm is a useful concept for formulating a moral foundation for criminal law only when understood beyond its core sense of inflicting physical hurt. He went on to explore the infliction of psychological hurt. However, this also yields an inaccurate concept, for according to him, some uniquely sensitive people may be psychologically hurt by otherwise permissible actions. Also, harms may exist independently of physical or psychological suffering, as in damage to a person's reputation without this knowledge. To overcome these difficulties, Feinberg wisely abandons the subjective criterion of seeing harms as suffering in favor of viewing harms as objectivelydeterminablesetbackstointerests.[42]

In this context, he describes three different senses of the term "harm." The first sense is used to describe harm to objects, and is similar to the terms "damaged" or "broken."[43] Feinberg uses the example of a vandal who breaks a window to illustrate this. Although this sense of harm is commonly used, it is really only harm in a "derivative" or "extended" sense. If people say that the window is harmed, they really mean that the interests of the owner of the window have been harmed. The "harm" caused to objects that have been damaged, broken, spoiled, et cetera, is only a metaphorical harm, and therefore as Feinberg presents it is not a worthy candidate in understanding the harm principle.

The second sense of harm is harm as a setback to interests. Feinberg defines it as "the thwarting, setting back, or defeating of an interest."[44]An "interest" in this regards means "all those things in which one has a stake" and a set-back being "what thwarts a person's interests to his detriment."[45]If someone for instance has a stake or interest in a company, then his well-being is linked to the company's success. Thus, if the condition of the

company improves, so does the condition of the individual. Additionally, one may have an interest in attending a very important job interview at two o'clock. If another person prevented him from attending the interview, that person would be thwarting his attempt to further his own well-being. Since attending this interview is in his interest, the individual who prevented him from attending would cause "harm" to him.

Nevertheless, Feinberg is aware that interests be frustrated or setback by a variety of occurrences, including natural disaster, negligence, misadventure, accident, and deliberate interference on the part of others. Forced, therefore, to still narrow his focus, he contends that the proper moral aim of criminal law is to prohibit only those harms that are wrongs as well as setbacks to interests.[46]In other words for Feinberg, one is wronged in this relevant sense only when one's rights have been violated in a morally indefensible manner. This last point is Feinberg's third sense of harm. Harm occurs in this third sense when one person's "unjustifiable conduct violates the other's right."[47]That is, to say that X harms Y, in this third sense is to mean that X has illegitimately or inexcusably "wronged" Y.

As used by Feinberg harm represents the overlap of the second and the third notions of harm: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense. Therefore, the Harm Principle is invoked only when both of the last two senses of harm are present:

> The sense of harm as that term is used in the harm principle must represent the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interests, are to count as harms in the appropriate sense.[48]

Overall, Feinberg believes that the harm principle as a guiding theory in criminal law could not "support the prohibition of actions that cause harms without violating rights."[49]

3.2.1.1. Kinds of Interests

Feinberg appreciates that understanding his Harm Principle relies heavily in understanding his notion of interests. This is why he takes his time in *Harm to Others* to itemize and discuss the various senses of interests and how this applies to the Harm Principle. However, before delving into his analysis of the various kinds of interests, Feinberg initially distinguishes mere wants from cognizable interests. According to him, it would be implausible to classify strong wants as interests. For example, Mr Obiefuna, a devoted fan of *Enyimba* of Aba may have a fervent desire to see *Enyimba* win a crucial match against Rangers International of Enugu, but that alone would hardly ground a case for Mr Obiefuna to claim an interest in an *Enyimba's* victory. Feinberg argues in this regards that:

> Some of our most intense desires then are not of the appropriate kind to ground ulterior interests since (like a sudden craving for an ice cream cone) they are unlinked to our longer-range purposes, or they are insufficiently stable and durable to represent any investment of a stake.[50]

In other words, for Feinberg, short term desires or wants are different from what he considers under the Harm Principle as 'interests' and therefore are not worthy moral indicators for criminalizable behaviour.

Interests on the other hand, fall into two broad categories: welfare interests and ulterior interests. Feinberg defines the degrees to which individuals can be harmed, according to these interests.

3.3.1.1.1 Welfare Interest

Welfare interests are at the core of Feinberg's scheme. They are interests of a kind shared by almost everyone as "necessary means to ... more ultimate goals, whatever the latter may come to be.[51] The section where Feinberg adumbrated the items that come under welfare interest in worth quoting in details here:

> Welfare interests include our interest in prolonging the continuance of our life for a foreseeable period of time, preserving our physical health and security, maintaining minimum intellectual acuity and emotional stability, being able to engage in social intercourse and benefiting from friendships, sustaining minimum financial security, sustaining reasonable living conditions, avoiding pain and grotesque disfigurement, preventing unjustified anxieties and resentments, and being free from unwarranted coercion.[52]

This list shows that welfare interests are those interests in goods and conditions that everybody needs, independently of their individual life-plans. Everyone has a necessary stake in these kinds of interests as they are the requisite for human existence and wellbeing.

The list is a robust definition of welfare and the interests that define such a concept. Indeed, Feinberg's definition of welfare interests goes beyond the minimal interpretation of basic provisions for sustenance as it shows that psychological well-being and social abilities are equally constituents of an individual's welfare. However, the final interest in the list, 'freedom from interference and coercion,' requires further explanation. Interference and coercion between private citizens is accepted as generally illegitimate under the Harm Principle. However, a significant component of state action must include coercion; the prevention of harm necessitates a trade-off between individual liberties and the state's ability to act. Since Feinberg applies the Harm Principle to acts of the state, this final criterion seems to come with an addendum: individuals should enjoy a degree of

freedom from interference and coercion, insofar as such freedom does not hinder the ability of the state to regulate harm and dispense justice thereto. For Feinberg, infringement upon welfare interests constitutes harm of the greatest magnitude.

3.3.1.1.2 Ulterior Interest

Feinberg distinguishes important welfare interests from those interests that merely concern a person's more ulterior aims, that is, ulterior interests. Though more ambiguous, ulterior interests are likewise important to the individual, and harm may occur if such interests are mitigated by a third party. In simplistic terms, an individual's ulterior interests are long-term desires, such as future security and enjoyment. Feinberg explains:

> …building a dream house is a means to the entertainment of house guests, to the private pursuit of studies and pleasures, to hours of aesthetic contemplation, and so on; the achievement of political power is a means to the advancement of favorite causes and policies; and the solution of a scientific problem is a means to the further advance of knowledge and technology, to say nothing of personal glory.[53]

Hence, ulterior interests are defined by Feinberg as "ultimate goals... such aims as producing good novels or works of art, the goal to own a dream house, or to have a prominent career as a movie star or as a politician, and so forth." Hindrance to ulterior interests may constitute harm; however, this harm can be outweighed by more fundamental welfare interests.

Here Feinberg is equating welfare interests with interests as they are used properly in the Harm Principle and ulterior interests with long term goals. His position on this is clearer in the following affirmation:

> But in respect at least to welfare interests, we are inclined to say that what promotes them is good for a person in any case, whatever his beliefs or wants may be. There may be a correspondence between interest

> and want, but the existence of the former is not dependent upon, nor derivative from, the existence of the latter.[54]

It is consequently Feinberg's contention that a person's more ultimate goals and wants (e.g., building a dream house, gaining a political or professional position, solving some vital scientific question, raising a family, or achieving spiritual grace) are not directly protected by the law:

> If I have an interest in making an important scientific discovery, creating valuable works of art, or other personal achievements, the law will protect that interest by guarding my welfare interests that are essential to it. But given that I have my life, health, economic adequacy, liberty, and security, there is nothing more that the law (or anyone else, for that matter) can do for me; the rest is entirely up to me.[55]

Feinberg goes on to add:

> If my highest interest is in pecuniary accumulation as such, or in such uses of wealth as the purchase of a yacht or a dream house, the law can protect that interest indirectly by protecting me from burglary and fraud, but it cannot protect me from bad investment advice, personal imprudence, the unpredictable dependencies of others, the lack of personal diligence or ingenuity, and so forth. Ulterior interests that extend elements of welfare beyond minimal level are however not protected. Ulterior interests are only indirectly invadable. [56]

The point then is that ulterior interests are not harmed directly and thus are not as a rule protected by criminal law. However, the usual way of harming one of another person's ulterior interests is by invading one of the welfare interests whose maintenance at a minimal level is a necessary condition for the advancement of any other interests at all.

However, one class of ulterior interests is directly vulnerable: those that consist of the extension of welfare interests to trans-minimal levels. The rich man is wronged by indefensible acts of theft just as much as the poor man is, though he will not be harmed as much.[57]

Feinberg here is trying to underline the web of inter-connection between welfare and ulterior interests. He clarifies that these interests may vary from individual to individual depending on their economic situation in society. Nevertheless, criminal law should always aim at protecting welfare interests since in doing so it also protects ulterior interests. Accordingly, he avers that:

> The law against burglary not only protects the welfare of the indigent person who might face starvation if burgled, but it also protects the billionaire whose welfare might not be directly affected by the theft of a Caravaggio painting that they forgot they owned.[58]

In other words, though certain types of harm only have a trivial impact on the interests of certain individuals, they can have an accumulative impact. The theft of a billionaire's yacht or Caravaggio would not necessarily deprive a billionaire of their livelihood or margin of security above the minimum they require, but it would invade their accumulative resources. If left unchecked, theft would also destabilize the entire property system in which we all have an interest.

> Hence, it is not only the ulterior interests of billionaires that are protected but also their interests in liberty (the interest in being the person who decide show the accumulated funds are to be spent) and security (even his welfare interests might be threatened by the act that invades his financial interest, especially if the invasive act employs force or coercion, or seems likely to be frequently repeated.[59]

The point Feinberg strives to make here is that while they may not directly constitute welfare interests and therefore candidates for direct protection of the criminal law,

nevertheless, minor setbacks to the financial interests of others still threaten the general security of property, and the orderliness and predictability of financial affairs in which everyone has an interest however small. Based on this, those security interests that cushion our welfare interests can be protected. For instance, common assaults are criminalized to protect our elementary sense of security. Beyond the bare minimum of health and economic well-being required to pursue his aims, a person requires a certain additional safety margin. Without that margin, the person may be able to function, (welfare interests) but only barely so.

What is clear in this sub-section is that the relationship between welfare and ulterior interests and the possible mediating role of criminal law in this relationship is complex. Particularly, as with any individual's conception of the good life, ulterior interests as Feinberg presents them seem impossibly difficult to estimate and assign ordering. Feinberg himself concedes this, though he argues that, by definition, welfare interests (as well as some interests conducive to ulterior interests) are necessary to satisfying any condition of ulterior interests.[60]This notwithstanding, it is logical to end this section by surmising that according to Feinberg, welfare interests conducive to ulterior interests, require preventative measures against harm.

3.3.1.4. The Harm Principle and the Normative Force of Consent

Feinberg endorses the idea that consent nullifies wrong arguing in this regard that a person cannot harm himself. He writes: "One class of harms (in the sense of set-back to interests) must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented."[61]

If a person consents to the harm, Feinberg concludes that it is not a wrongful harm. According to Feinberg:

> The third sense of harm is therefore not applicable to a discussion about self-regarding harm….Only the

> prevention of wrongful harm can justify coercion, he [Mill] held, and what a person consents to is not 'harm' in the requisite sense. It follows from these premises that no one can rightly intervene to prevent a responsible adult from voluntarily doing something that will harm only himself (for such a harm is not a 'wrong'), and also that one person cannot properly be prevented from doing something that will harm another when the latter has voluntarily assumed the risk of harm himself through his free and informed consent.[62]

For Feinberg, the sense in which one's consent transforms the moral quality of another's conduct is captured by the volenti maxim: volenti non fit injuria (to one who consents, no wrong is done).[63]

However, Feinberg recognizes that the volenti maxim itself is imprecise and requires further elaboration. Unfortunately, however, he often seems conflicted in his own interpretation of the volenti maxim - offering at least three different accounts of what the maxim means. In one attempt to explain the meaning of the volenti maxim, Feinberg claims that consent transforms the consenter into the agent who is responsible for the action itself.[64]This transfer of responsibility, Feinberg claims, is the result of the fact that one's consent authorizes the other's conduct. On this interpretation then, the volenti maxim is better understood to mean: if one consents to being harmed, then one harms oneself. To his credit, Feinberg is careful not to claim that the transfer of responsibility is total. Rather, he claims that the consenting subject becomes jointly responsible with the other party as the co-agent of the harmful conduct. Still, even Feinberg admits that this transfer-of-responsibility interpretation of the volenti maxim is "somewhat strained" when it comes to cases involving physical violence.[65] Surely he is right to acknowledge as much, for if B consents to A punching him in the face, it makes little sense to think that B has, in effect, punched himself.

Another way Feinberg explains the import of the volenti maxim is by claiming that one's consent "causes the forfeiture of his right after the fact to complain that [the other

person's] act wronged him."[66] This interpretation offers a plausible account of how one's consent affects his own moral situation - specifically, it tells us that one who consents has no standing to complain about the harm done to him. Thus, if B consents to A punching him in the face, B has no standing to complain about A's conduct. However, this interpretation does little to explain how one's consent affects the moral situation of the person to whom he consented. The fact that B has no standing to complain against A does not tell us whether A has done anything wrong to B - it simply tells us that, even if A has done something wrong to B, then B is not entitled to complain about it.

This loss-of-standing interpretation of the volenti maxim has the advantage of been considerably less strained than Feinberg's transfer-of-responsibility interpretation. Still, the loss-of-standing interpretation does not seem able to explain the normative force of consent in a way that is relevant to a proper understanding of the moral limits of the criminal law. Rather, the loss of-standing interpretation seems far better suited to delineating the moral limits of tort law, where the question of the harmed-person's standing to complain is central. In criminal law, as distinct from tort, the party with standing to complain against wrongful conduct is the State - not the injured party. Thus, if B consents to A's punching him, the fact that B's consent strips B of standing to complain against A is of no consequence to criminal law - for, in criminal law, B has no standing to complain against A in any event. Rather, in criminal law, only the State has standing to complain against A's conduct.[67] If our ultimate inquiry is whether the State may justifiably criminalize A's conduct, then we should focus our attention on the normative force of B's consent insofar as it affects the moral quality of A's conduct. We gain little insight into this matter by simply observing that B loses his standing to complain about A's conduct, for such an observation tells us only about the moral situation of harmed person (B) and not the moral situation of the person who inflicted the harm (A).

In his more illuminating moments, Feinberg interprets the Volenti maxim to mean that one's consent transforms the moral quality of the other person's conduct - changing it from conduct that wrongs the consenter into conduct that does not wrong him.[67] This moral-transformation interpretation of the Volenti maxim is preferable to the "somewhat strained" interpretation discussed above, because it provides a more satisfying explanation of cases involving physical violence. As noted above, if B consents to A punching him in the face, it makes little sense to think that B has, in effect, punched himself. Rather, it makes better sense to think that A has indeed punched B - but that A's conduct is not wrong in the same sense that it would have been wrong absent B's consent. Moreover, the moral-transformation interpretation of the volenti maxim is preferable to the loss-of-standing interpretation discussed above, because it maintains our focus on the moral quality of A's conduct. Specifically, according to this interpretation, if B consents to A punching him, then A's conduct does not constitute a wrong by A against B.

The moral transformation that may be occasioned by B's consent to A is best explained in terms of the two kinds of Feinbergian harms discussed and adopted above. The first kind of harm, identified by the subscript 1 (harm1), refers to all set-backs to interests; whereas the second kind of harm, identified by the subscript 2 (harm2), refers only to those set-backs to interests that are also wrongs to the harmed person. As Feinberg explains it, to say that "A harms1 B" means "A adversely affects B's interest"; whereas to say "A harms2 B" means "A adversely affects B's interest and in so doing wrongs B."[68]

Building on this distinction, Feinberg explains his view that cases of consensual harming always involve harm1, rather than harm2. Moreover, he explains, the only sense in which B is the victim of A's harmful conduct toward him involves cases in which A harms2 B. Thus, according to Feinberg, when B consents to A's harmful conduct toward him, A's conduct does not wrong B - in the sense that it does not take B as its victim.[69]

3.3.1.5. The Harm Principle and Bad Samaritanism

Contrary to what one might expect from Feinberg's introductory disparagement of legal paternalism, he advocates criminal sanctions against "bad samaritanism."[70]Bad samaritanism is case where rescue will not unreasonably endanger or inconvenience a potential rescuer. Feinberg argues that failure to rescue in such a situation ought to be criminalized. By thus prescribing a legal duty to rescue that transcends the bounds of special obligations - such as those of a parent or paid lifeguard - Feinberg rejects the tenet of Anglo-American law that declines to acknowledge such a duty. A traditional line of reasoning in favor of such a view, however, is not available to him; he does not assume, as others have, that the state has an interest in promoting good character among its citizens. While Feinberg may concede this interest as legitimate in guiding tax policy, he must deny that it could ever be an interest relevant to criminal law, for it is unnecessarily meddlesome, and allows governmental interference into the private sector far beyond the extent necessary to prevent wrongful harms. Following the harm principle, Feinberg must therefore establish that failure to rescue under the prescribed circumstances is (1) a harm, and (2) a violation of the moral rights of the person in need of rescue.

To establish that bad samaritanism results in harm, Feinberg argues persuasively against those who consider unobligated rescue a gratuitousbenefit.[71]The gratuitous benefit concept, Feinberg demonstrates only applies to instances where person *A* enhances *B's* interests and *B's* interests are already at or near some normative baseline. One thus gratuitously benefits another by bestowing on that individual an unanticipated gift of one hundred dollars. In contrast, if *A* rescues *B* from imminent death, A is restoring *B* to his baseline, not gratuitously benefiting him. Failure to rescue, then, is an act of harming, even though the failed rescuer is neither causally nor morally responsible for the victim's original plight.

3.2.2. Feinberg's Defence of the Offence Principle

As we have seen, the question Feinberg is addressing in *The Moral Limits of Criminal Law* is, "What sorts of conduct may the state rightly make criminal?" The first volume discussed above concerned harm, which nearly every philosopher would accept as justifiably criminal conduct. However, "Controversy arises," Feinberg says, "when we consider whether it is the only valid liberty-limiting principle, as John Stuart Mill declared."[72]Feinberg begins his investigation into this issue with a promise "to try to go as far as possible with the harm principle alone, acknowledging additional valid principles only if driven to do so byargument."[73] He explains that John Stuart Mill's *On Liberty* is meant to be an argument for the claim that only harm is justifiably prohibited by the state, a view Feinberg calls "extreme liberalism". Yet, according to him even Mill admits that some acts:

> If done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited. Of this kind are offenses against decency; on which it is unnecessary to dwell on as they are only connected indirectly with our subject.[74]

As is already apparent, much turns on Feinberg's ability to convince us, at least provisionally, (1) that harm and offense are different in kind, and (2) "that the prevention of offensive conduct *is* properly the state's business."[75]

3.2.2.1. Meaning of Offence

Feinberg uses the term "offense" as shorthand for a whole:

> Miscellany of disliked mental states"-disgust, shame, hurt, anxiety, disappointment, embarrassment, resentment, humiliation, anger and the like - which,

> he tells us, “are not in themselves necessarily harmful.[76]

It follows, then, that if we are to use the law to punish those who inflict such states on others (i.e. those who are offensive), we cannot according to Feinberg justify so doing by resort to the harm principle, but must instead call upon a separate and distinct “offense principle.”

However, Feinberg recognizes that the term offense is broad and must be narrowed down so as to eliminate much of the broadness. This, for him, can be readily done through distinguishing the response of “being offended” from the response of “taking offense.” The latter response, which is the narrower meaning of offense with which Feinberg is concerned, involves a sort of universal subjectivity. Taking offense is not merely some wholly objective response to actual or imagined stimulus (say, a feeling of disgust at viewing something gory). Taking offense is rather a subjective response to wrongful stimulus. This clarification saves offense from pure subjectivity: it is not enough for offense to have occurred that the victim feels offended. In fact, it is not even necessary to offense that the victim feels offended; what is necessary is solely that there was a wrongful act. There is also a second element that can be identified which serves to differentiate offense in the strict sense from that in the broad sense: that is, the consequential feeling of resentment. Offense in the “strict” sense of the term necessitates resentment. Though, for Feinberg, that distinction – the actual feeling of resentment – is not necessary to legal action based upon Offense Principle. There need, again, only be a wrongful act.[77]

Feinberg’s contention here is that like the word ‘harm’, the word ‘offence’ has both a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, and so on), while the latter refers to those states only when caused by the wrongful (right violating) conduct of others. He postulates that offence takes place when three criteria are present: one is offended when (a) one suffers a disliked state, and (b) one attributes that state to the

wrongful conduct of another, and (c) one resents the other for his role in causing one to be in that state. Following Feinberg's understanding of the Offense Principle, the notion of wrongful offense specifies an objective condition in the sense that the unpleasant mental state must be caused by conduct that really is wrongful. In other words, whether an individual takes offense at something or feels wronged is of no importance in establishing whether an act is offensive in the sense invoked by the Offense Principle.

3.2.2.2. A Ride on the Bus Experience

After defining 'offence' Feinberg takes the reader on an imaginary 'ride on the bus'[78] where he attempts to use some very emotionally challenging stories to convince that some offensiveness must be curbed. Accordingly, Feinberg, asks you to imagine yourself seated on a crowded bus trying to get to an important meeting - say, a job interview - for which you are late. So, you cannot get off the bus without great cost to yourself. You may feel disgust if the passenger next to you is malodorous, coughs loudly, sneezes openly, chews on rotten food, and vomits or farts. You might feel shame or embarrassment if the passenger next to you masturbates or if she or he is totally nude or tries to give sexual satisfaction to a dog. You might become annoyed if you have to listen to a loud and intimate conversation between the passenger next to you and someone at the other end of her or his mobile phone connection. You might feel anger or insult if the person in front of you wears an anti- Muslim T-shirt with an offensive caricature of the prophet Mohammed and the message, written in large red letters, ''All Muslims are Terrorists,'' or if a person next to you begins to shout racist slogans like ''all blacks are criminals'' or ''all whites are Nazis.''

For a philosophically acceptable answer, Feinberg claims that we must "engage our imaginations in the inquiry, consider hypothetically the most offensive experiences we can imagine, and then sort them into groups in an effort to isolate the kernel of the offense in each category."[79] To this end, he takes us on an imaginary "ride on the bus,"during which we are confronted with slate-scratching, radio-playing, vomit-and-

feces-eating, corpse-smashing, self-satisfying, pet-pleasuring, swastika-wearing, and racist-banner-carrying passengers. Feinberg once joked that he feared that he might become known for his offensive stories, thirty-one in all, noting that - at the time - he was receiving weekly requests to reprint the passage.

The stories of "a ride on the bus" are organized into six conceptual categories, distinguished primarily by the nature of our physiological or psychological responses to the offense:

A. Affronts to the senses (fingernails scratching a tablet)

B. Disgust and revulsion (coprophagic diners)

C. Shock to moral, religious, or patriotic sensibilities (smashing of a corpse's face by mockful mourners)

D. Shame, embarrassment (including vicarious embarrassment), and anxiety (ten stories in all, with passengers engaging in an astonishing variety of sexual acts).

E. Annoyance, boredom, frustration (boring radio show, a boring conversation, and being accosted into continual, boring conversation)

F. Fear, resentment, humiliation, anger (from empty threats, insults, mockery, flaunting, or taunting).

Category C because of it religious and moral under tone appears to us to be more relevant to the Nigerian situation and will be used for our analysis here. This category includes, for example, a roughly analogous kind of offense in Story 11:

A strapping youth enters the bus and takes a seat directly in your line of vision. He is wearing a T-shirt with a cartoon across his chest of Christ on the cross. Underneath the picture appear the words "Hang in there, baby!"[80]The behavior of this young man mocks

not only the central figure of the Christian religious tradition but also what is believed by some to be Jesus' defining act, namely, his crucifixion and subsequent resurrection. But notice that distinctly religious offense falls into at least two of Feinberg's other categories as well. Religious offense crosses categories because, as we have seen, behavior in "a ride on the bus" is sorted not by the subject matter of the offense but by the nature of our physical or psychological response to it. In category D, "shame, embarrassment, and anxiety," Feinberg's Story 19has us imagine a confrontation with a passenger wearing a T-shirt that depicts Jesus and Mary in a sex act. Religious offense also causes "fear, resentment, humiliation, anger," as evidenced by category F's Story 28 and Story 29, in which our fellow bus passenger wears "a black arm band with a large white swastika on it" or "carries a banner with a large and abusive caricature of the Pope and an anti-Catholic slogan".

Overall, Feinberg was confident that he has convinced the reader that "to suffer such experiences, at least in their extreme forms, is an evil," and trulymost readers, it can be assumed, will emerge from the bus with their "network of convictions" firmly supporting limits on liberty based on offensiveness. Feinberg also uses the bus ride to make the point that "to the normal person (like the reader) such experiences, unpleasant as they are, do not cause or constitute harm."[81]

3.2.2.3. The Balancing Test

Even with the above narrowing, Feinberg is still aware that criminalizing any and every annoyance will of course be socially debilitating. In other words, how do we decide that a particular offense may give rise to criminal sanctions? Feinberg reminds us that some evils are more evil than others that some are offset by the good they produce, that some are consented to, and that some may be avoided by the victim. He assumes specifically, that evil and illegal are not necessarily synonymous. Therefore, a central aspect of his inquiry is his effort to develop and refine practical guidelines-he calls them "mediating

principles"-that can be used to discern that specific kind of offense that merits criminal legal response .[82]

The answer, for Feinberg, lies in nuisance. Both nuisance and offense involve "annoying distractions" which are "unwelcome demands on one's attention."[83] In fact, Feinberg ultimately equates the two: offenses are, "in short, themselves nuisances in the perfectly ordinary sense." So qualified, Feinberg calls for the application to offense of a balancing test much on the lines of that balancing test already in existence with nuisance law. Like nuisances more generally, "offending conduct produces unpleasant or uncomfortable experiences - affronts to sense or sensibility, disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear, or humiliation - from which one cannot escape without unreasonable inconvenience."[84]

According to Feinberg, this confrontation between the offended and the offender thus calls for "interest-balancing." Drawing attention to the justificatory force of nuisance - experiences that cause not harm but, rather, "irritations to our senses or inconvenient detours from our normal course", puts Feinberg in good liberal company. Mill tells us, "The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people."[85] Similarly, the 1957 "Report on Homosexual Offenses and Prostitution" in Britain suggests that while homosexuals and prostitutes should be immune to criminal sanction for their private behaviour, public acts - for example, solicitation - deserve no such protection. In a BBC interview, Sir John Wolfenden, chair of the committee, articulates the reasoning behind the recommendations on prostitution in the "Wolfenden Report":

> My hope, and our endeavour, I think, is this. At the present time, there are in London, and there are in other places, streets where - oh well - if I am walking with my fourteen- or fifteen-year-old daughter, I have to make a detour around those places. And I honestly don't think I should have to. And what we're really trying to do, again, is to preserve public order and

> decency and to make it possible for the ordinary man and woman, you and me, to go about the streets as he likes.[86]

H. L. A. Hart also claims that the liberal can support legal interventions "in order to protect religious sensibilities from outrage by a public act" and, as a consequence, can punish the offender "neither as irreligious nor as immoral but as a nuisance."[87]Much akin to Hart, Feinberg suggests that the offense principle will have to be mediated by balancing tests similar to those already employed in the law of nuisance.

While Feinberg identifies three factors which he claims will inevitably play in any socio-legal balance - the seriousness of the offense, the reasonableness of the conduct, and the interests of the community, he collapses the three into two, and rests his argument upon the following balance of factors:

The Seriousness of the Offense

1. The magnitude of the offense (in intensity, duration, extent)

2. The standard of reasonable avoidability

3. The Volenti maxim (states voluntarily incurred, or risks voluntarily accepted, are not to count as offenses)

4. The discounting of abnormal susceptibilities (the eggshell-head issues).[88]

The Reasonableness of the Offending Conduct

1. Personal importance

2. Social value

3. Free expression

4. Alternative opportunities

5. Acting in malice and spite

6. Nature of the locality.[89]

More specifically, Feinberg's claim is that in establishing criminalization, the seriousness of the offense must ultimately be weighed against the reasonableness of the offending conduct. With characteristic precision, he strives to give content to these notions. According to him seriousness of the offense is determined by judging its "magnitude," while appropriately discounting for offenses that are reasonably avoidable, voluntarily incurred (*Volenti non fit injuria*), or the result of "abnormal susceptibilities"[90]. The magnitude of the offense increases with the intensity of the response to the offensive behaviour, the length of time the offended state lasts, and the number of people affected by the offense. Acting as a counterweight to seriousness, the reasonableness of the offending conduct increases with the importance of the behaviour to the person engaging in it, the value of the behaviour to society, and classification of the behaviour as an expression of an opinion "about matters of empirical fact, and about historical, scientific, theological, philosophical, political, and moral questions". Offending conduct is less reasonable, however, if it is the result of malice and spite or could have been carried out in a different manner, at a different time, or in a different place, especially if it could have been carried out in "neighbourhoods where it is common, and widely known to be common."[91]

Feinberg also argues that his reasonableness maxims are suitable for protecting morally innocent, from displeasing affronts. 'The more people can expect to be offended, *ceteris paribus*, the stronger the case for legal prohibition.

> Other things, however, are rarely equal. It is important to remember that certain kinds of valuable, or at least innocent actions, can be expected to offend large numbers of people … The interracial couple strolling

> hand in hand down the streets of a deep southern town might still cause shock, even shame and disgust, perhaps to the majority of white pedestrians who happen to observe them.[92]

Feinberg asserts that if the legislature wanted to produce a reason against criminalizing conduct, such as interracial handholding, all it would have to do is cite the reasonableness of the conduct: "The behaviour of the interracial couple has much to be said for it: it is reasonable, personally valuable, expressive and affectionate, spontaneous, natural, and irreplaceable, and the offence it causes is easily avoidable."[93] This is an important normative consideration, for Feinberg means here that interracial couples do not wrong others by appearing in public. Therefore, such conduct is not even *prima facie* criminalizable.

Outside equating offense with nuisance, Feinberg finds justification for the use of a balancing test in the observation that that type of deliberative processes are "at the very heart of judicial deliberations in tort cases."[94] Balancing tests do, actually, seem to be to a great (if not dominating) degree unavoidable in all deliberations not ratcheted to black-letter, fact analysis, which is the exception that proves the rule. In black-letter conclusions, balancing deliberations are suppressed so as to give discerning potency and legal-truth-defining validity to the black-letter rule. Either the rule directs the court to the correct legal conclusion, or it does not. Black letter deliberation is one concerned with applying brute facts to a generally given legal algebra. Balance tests, however, from the start undermine the definitiveness of such algebras by separating fact from conclusion and inserting between the two fuzzy interpretation, which results in a conclusion that is a result of intuitive (rather than purely rational) analysis.

What concerns us here, however, is not so much the justification of a balancing test but the orientation, the nature of the balancing test as presented by the *Restatement of the Law of Torts* as amended by Feinberg:

> The law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm and risk [or inconvenience or offense] to one is greater than he ought to be required to bear under the circumstances, at least without compensation.[95]

The focus is upon the offended person, but the language of requirement plants that person firmly within the greater, controlling field of public interest. What, then, would be the concern of public interest? It is an obvious truth that each individual in a community must put up with a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of give and take, live and let live. The requirement placed upon the individual in society is toleration of those nuisances and offending acts of other people that should *be* tolerated; acts that should be tolerated because organized society demands that certain degree of "give and take." But inherent in "should be" is that ambiguous line that establishes just what is offense that is "greater than ought to be required." That line cannot be drawn and redrawn by courts ona purely individual by individual basis. After all, the inability to know what that next-met person will be offended by would suppress any possibility of social life-in-public, and would make legal oversight of offense/nuisance an impossibility.

For Feinberg the line of what ought to be tolerated and what ought to be required - and the balancing test that will get us to that result - is not established judicially but *socially*. That line of offensiveness - as well as that principle of give and take, live and let live - lies within the cultural nomos, and functions as an extension of the cultural nomos. What needs to be given and taken, what it means to live and thus, when followed, that which others must let live, is part of the social conscious, not some purely philosophical exercise. As such, the factors that go into the making of any balancing test would also find their origin within the social nomos, for, as the nomos acts unconsciously within the collective, it informs all social constructs, including the "balancing tests" that would be used to measure those constructs. "Public interest," then, is not a derivative of the two (or

three) points in balance. Rather, public interest will always contextualize and define both the test and its implementation. As such, factors of an offense to others balancing test will always be less factors for free consideration and more factors which function to manifest, perform, and reaffirm the dominant cultural nomos and to perform the reinforcement of the nomos. It must not be forgotten that language - language as a social (rather than individual) event - both is a construct of the nomos and serves the nomos. As such, in that the nomos can only dominate the discourse of such a balancing test, the nomos will always define the test itself.

3.2.2.4. Bare Knowledge Problem and Profound Offense

Liberal pedigree notwithstanding, Feinberg's openness to the idea of balancing risks an association with Lord Patrick Devlin's conservative critique of the Wolfenden Report. Devlin charges that both Mill and the authors of the report are in search of "a fundamental doctrine" or "theoretical limit" concerning what the state can do and, accordingly, try to mark off a sphere of "private morality" - when, in fact, we can do nothing more than "try to strike the right balance between liberty and authority."[96]Admittedly, Feinberg, unlike Devlin, sees the analogy of scales to be relevant only when there are "determinate victims with genuine grievances and a right to complain against determinate wrongdoers about the way in which they have been treated"[97]But the risk for the liberal, and Feinberg readily acknowledges this risk, is in introducing the scales in the first place. For instance, the scales analogy raises the possibility that offense from the "bare knowledge" that some behaviour is occurring might be serious enough to outweigh the reasonableness of that conduct. This possibility is all the more worrisome in light of the fact that it is not clear how Feinberg can establish the wrongfulness of a piece of offensive conduct, which is necessary for an application of the offense principle independently of the scales and, especially, without considering factors such as magnitude and application of the *Volenti* standard.

Ultimately, then, Feinberg must solve the "bare knowledge problem" if his account is to maintain its liberal credentials. Liberals, as Hart points out, cannot count the fact that an individual is offended by the bare knowledge of another's behaviour as a reason for prohibiting that behaviour. So doing would yield the very illiberal result that the state can prevent people from doing anything that others "do not want them to do."[98]Feinberg claims that Hart "overstates his case" here: "Provided balancing tests are assumed, it is a *non sequitur* to say that the only permitted liberty would be 'the liberty to do those things to which no one seriously objects'; rather the sole liberty would be to do those things to which not everybody(or nearly everybody) seriously objects."[99] But this reply is hardly comforting for the liberal. It is for good reason, then, that Feinberg faces the problem head-on in his discussion of "profound offense."

Feinberg distinguishes profound offenses from "mere offenses," first, in terms of the way that they feel to offended parties. The former, unlike the latter, are "deep… shattering, serious." Second, one need not directly perceive the offending conduct for the conduct to constitute a profound offense; "one can be offended 'at the very idea'" of profoundly offensive behavior occurring. Third, profound offenses have a particular kind of cognitive component. They attack our higher-order sensibilities, offending "usand not merely our senses or lower order sensibilities." Fourth, it follows that the cognitive component of profoundly offensive behavior is normative in nature. The behavior "offends because it is believed to be wrong, not the other way around." Fifth, in cases of profound offense, the offense is impersonal, not personal: "The offended party does not think of himself as the victim in unwitnessed flag defacing, corpse mutilations, religious icon desecrations, or abortions, and he does not therefore feel aggrieved (wronged) on his own behalf.[100]

According to Feinberg, when we balance the seriousness of the offense against the reasonableness of the offending conduct, profound offenses are unlikely to pass the test that mediates application of the Offense Principle. Yet he fears that special cases might

arise in which profound offenses generate an illiberal result if we submit the relevant factors to the balance. What he needs, therefore, is a principled argument against criminalizing profound offenses. Feinberg develops just such an argument by setting a dilemma for the advocate of prohibiting profound offenses. Either the profoundly offended party makes the claim on personal or impersonal grounds. The offended party cannot complain that the offense is personal because, as we have seen, profound offenses are defined by their impersonal quality. In other words, this characteristic is part of what makes them profound offenses rather than mere offenses. Feinberg tells us that:

> As soon as he shifts his attention to his own discomfiture, the whole nature of his complaint will change, and his moral fervor will seep out like air through a punctured inner tube.[101]

Also, the profoundly offended party cannot appeal to the moral wrongness of the behavior that offends him. For that would be to rely upon an altogether different liberty limiting principle, namely, legal moralism. However, Feinberg solves the "bare knowledge" problem associated with profound offenses by showing that alleged wrongfulness of the conduct, not its offensiveness, is really the source of the complaint. In this way, the offense principle avoids the decidedly illiberal appeal to morality that his theory cannot tolerate.

3.2.2.5. Obscenity

Most of *Offense to Others* is devoted to obscenity, considering that concept in three distinct senses: as a type of offense felt towards an object, as a technical legal term for a type of pornography, and finally, as a class of impolite words. Feinberg acknowledges that offence in the first understanding of obscenity is the most problematic, since what is offensive to one may not be regarded as offensive at all by another. If we want to make the Offence Principle an intelligible principle, the offence has to be explicit, and it has to be more than emotional distress, inconvenience, embarrassment, or annoyance. We cannot outlaw everything that causes some sort of offence to others. If the Offence

Principle is broadened to include annoyance, it becomes too weak to serve as a guideline in political theory, for almost every action can be said to cause some nuisance to others. Cultural norms and prejudices, for instance, might irritate some people. Liberal views may cause some discomfort to conservatives; and conservative opinions might distress liberals. Some, for instance, might be offended when hearing a woman shouting commands, or just by the sight of black and white people holding hands. This is not to say that these sorts of behaviour should be curbed because of some people who are 'over sensitive' to gender or interracial relations. Similarly, if someone is easily offended by pornographic material, one can easily avoid the pain by not buying magazines marked by the warning: 'The content may be offensive to some.' Under Feinberg's 'reasonable avoidability' and 'Volenti' standards the offence cannot be considered serious. Injuries, to be restricted under the Offence Principle, must involve serious offence to be infringed. By 'serious offence' it is meant that consideration has to be given to the 'reasonable avoidability', and the 'Volenti' as well as the 'extent of offensive' standards. The repugnance produced has to be severe so as to cause an irremediable offence, which might affect the ability of the listeners to function in their lives.[102]

Coming to the second understanding, Feinberg sharply distinguishes pornography from obscenity. According to him, pornography always has the character of allure, that is, it is "designed entirely and plausibly to induce sexual excitement in the reader and observer." But we should call a particular work of pornography obscene only when we wish "to endorse some offense as the appropriate reaction to it." This offense according to Feinberg can be shock at the blatant violation of a moral standard, or revulsion at the coarseness and obtrusiveness. Feinberg's balancing test doesn't justify censoring pornography as such, for that would constitute a form of legal moralism. But to the extent that the pornography is also obscene and thus offensive, it can be controlled to the extent of protecting unwilling audiences and children.

Based on this, Feinberg finds the American Supreme Court's handling of the legal sense of obscenity highly artificial. Since its debut in this field in 1957, when it declared such material outside of first amendment protection, the American Supreme Court has called "obscenity" what is actually pornography. But worse than this semantic confusion for Feinberg is that the Court actually based its ruling on what Feinberg characterize as a species of legal moralism and moralistic legal paternalism, where the alleged immorality of an action consists in its moral harm to the actor himself, as in" harm to one's character" or "becoming a worse person." calls embrace the censorship rationale appropriate for pornography, the moral wrongness of the appeal to a prurient interest.[102]Although the Court later added offensiveness to the criteria of legal obscenity, the basic rationale remained legal moralism. Thus, official censorship could extend to theatres that unobtrusively advertise their films and admit only consenting adults. Moral soundness, by Feinberg's analysis, lies with limiting the reach of state law to the protection of children and unwilling adults, that is, the "offense" rationale.

Obscenity in the sense of impolite words is the final subject of his work. Characterized by their conspicuous violation of taboos (which may be religious, sexual, or scatological) these words, broadly speaking, do "offend." But only in restricted circumstances would the offense warrant the criminal sanction. To this end, Feinberg notes that obscene words serve numerous purposes - providing a no-nonsense dysphemism to balance euphemism, flavouring description with "spice and vinegar," expressing strong feeling, giving insult and provocation, and effecting a good joke. He also recognizes that under certain circumstances their offense may be more than one should have to bear. For the most part, social mores, he argues, can take care of confining obscenities to their proper context, and he chooses to focus on only two areas of controversy-fighting words and indecencies on the airways.

Although he affirms the doctrine of "fighting words," he restricts it sharply to what Austin called a "performative utterance," words that do something rather than simply

express something. Comparable in that way to declarations of war, "fighting words" should be restricted to words that in certain circumstances, by prevailing symbolism, initiate a state of hostility. By virtue of their invective effectiveness, obscene insults may sometimes also constitute fighting words, but they can be proscribed only because they are fighting words, not because they are obscene.

Feinberg finds even less justification for banning or even limiting obscenity on the airways. In this regard, he criticizes Justice Stevens's reasoning in *FCC v. Pacifica Foundation,* which affirmed federal authority to channel "indecent" language over the radio from the hours in which "there is a reasonable risk that children may be in the audience." For Feinberg, the offense of getting hit with an undesired obscenity, for children as well as adults, is a mere "mosquitos bite," too trivial for the concern of the law, and one that the listener can guard against by simply turning the station off. As for the exposure of children to obscene words, Feinberg grants that were the words used pornographically, there might be grounds for state regulation, but he doubts that momentary exposure to obscenity can ever have a sufficiently marked effect on a child's moral character as to justify their proscription.[104]

Feinberg's refusal to endorse the criminalization of indecency on the airways is primarily based on the principle of avoidability. Let us consider this in some details. Under this standard, the offence has to be committed in such circumstances that those offended by it cannot possibly escape for there to be grounds for restriction. For example, if an Hausa man takes a stool and a megaphone to the Ekwueme Square in Awka advocating the abolition of Anambra State, throwing all Biafran War veterans into prison, expressing his desire to murder all Igbos, and claiming that he is Gowon who killed 3 million Igbos during the civil war or an Nnamdi Kanu pouring vituperations on Hausa and Yoruba elders as the oppressors of Ndi Igbo; the offences for Feinberg cannot be considered anything more than annoying, or anything more than an inconvenience to the listeners, for they can simply leave the place switch-off their radio and free themselves of the

speakers presence, as well as of his speech. For Feinberg, we cannot say that the audience interest in 'having a good environment' is more important than the speaker's interest in conveying his thoughts. Also, the argument that this communication does not carry substantive content cannot serve as sufficient reason for abridging it, for then we might supply grounds for curtailing many other speeches that just repeat familiar stands.

In addition, 'the extent of offence standard', determined by the content and manner of the speech, and 'the Volenti standard', do not provide reasons for restriction. The situation is different, however, when the avoidance of offensive conduct in itself constitutes severe pain. Then we may say that the matter is open to dispute. That is, if those who are offended by a certain speech feel an obligation to stay because they think that they will suffer more by leaving and avoiding it, then there are grounds for placing restrictions on speech, provided that the extent of the offence is considerable. In any event, it is the combination of the content and manner of the speech, the evil intention of the speaker, and unavoidable circumstances that warrants the introduction of sanctions.

In the final analysis, Feinberg like most liberals especially J. S. Mill, believes that liberty or personal autonomy is the most important value in a liberal society that it is always better to err in favour of liberty than coercion. Thus, in spite of the fact that contrary to Mill, Feinberg calls for supplementing the Harm Principle with the Offense Principle, he still believes that this should be done sparingly such that the onus is always on the one who calls for criminalizing offensiveness to provide justification(s) for such calls. However, the question is, why does Feinberg think that legal moralism and paternalism should not be used as legitimate moral justifications for criminalization. The next chapter is an attempt to answer this question.

Endnotes

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22. P. Devlin, *Op. cit*. pp. 12-13.
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36. Ibid. p. 4.
37. Loc. cit.
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48. *Ibid. p. 36*
49. *Ibid*. pp. 42-43.
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52. Ibid. p. 77.
53. Ibid. p. 42.
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60. *Ibid.* p. 35.
61. *Ibid. p. 116.*
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72. J. Feinberg, *Offense to Others, p. ix.*
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78. *Ibid. pp. 1-2*

79. The following examples are all from *Offence to Other*, pp. 10–13.

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88. *J. Feinberg, Offense to Others, pp. 7-9.*

89. *Ibid. p. 33.*

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93. Ibid. p. 93.

94. *Ibid. p. 44.*

95. *Ibid. p. 6.*

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98. HLA Hart, *Op. cit. p.* 14.

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CHAPTER FOUR

4. FEINBERG ON PRINCIPLES THAT SHOULD NOT LIMIT LIBERTY

Feinberg's liberalism is by its very nature both inclusive and exclusive. On one hand, it is inclusive because it admits that the Harm and Offense Principles are the only justifiable moral rules for criminal prohibition. On the other hand, it is exclusive because it proposes that Harm to-Self (Paternalism) and victimless offense (Legal Moralism) should not be used to justify criminal coercion. The last chapter analyzed the Harm and Offense Principles in the light of the first and second volumes of Feinberg's four volume treatise, the *Moral Limits of Criminal Law*. This chapter will take up the remaining two volumes which separately discussed legal paternalism and moralism. The chapter is a continuation of the effort to assemble the necessary evidence for a critical analysis of Feinberg's liberalism which this dissertation has promised to undertake in the final chapter.

4.2. Legal Paternalism (Offense to-Self)

It has already been shown that Feinberg's Harm and Offense Principles, especially the Harm Principle are motivated by Mill's doctrine of liberty. In the same token, Feinberg's conceptualization of paternalism is to a large extent the brainchild of Mill's Harm Principle. To maintain the same sequence observed in the previous chapter which is necessary for understanding Feinberg's doctrine of paternalism, a brief sketch of Mill's anti-paternalism and anti-moralism is in order here.

4.2.1. Mill's Anti-Paternalism and Moralism

Recognizing the diversity of human interests in a modern society, John Stuart Mill contends that concrete criteria are needed to determine where the line should be drawn between tyranny and legitimate government interference. According to Mill, as we saw in his articulation of the harm principle in the previous chapter, government can only legitimately restrict liberty of a competent adult when the government is preventing the person from directly harming another unwilling individual.[1] Competent adults as used

here by Mill are of sound mind, and Mill as well explains that they are "human beings in the maturity of their faculties."[2]

Mill adds that legitimately restricted harm must be committed "directly and in the first instance; for whatever affects himself may affect others through himself."[3] Direct harm refers to when one person, without an intermediary, harms another. So, although an individual may commit an act that is harmful to himself, the act cannot be prohibited on the grounds that it indirectly harms others. The government may only legitimately restrict one person from harming another when the victim is unwilling, or has not consented to the harm. Mill would not advocate legally prohibiting "X" from harming "Y", if "Y" freely consented to the harm committed by "X". In other words, a case where two people both freely consent to harm Mill argues that the harmful action should be legally allowed.

Continuing, Mill makes distinction between what he calls self-regarding and others-regarding actions. While self-regarding are actions that directly affect the person committing them, others-regarding actions not only affect the individual, but also other agents. The harmful actions that are "other-regarding" may according to Mill be justifiably prohibited by the state. However, the state may not legitimately restrict the conduct of an individual who is only harming himself. Mill's states his justification for this position as follows:

> The same things which are helpful to one person toward the cultivation of his higher nature are hindrances to another. The same mode of life is healthy excitement to one…while to another it is a distracting burden…Such are the differences among human beings in their sources of pleasure [and] their susceptibilities of pain…unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature which their nature is capable.[4]

No single mode of life constitutes the life of happiness and this idea is at the heart of modern liberal pluralism. Mill concludes that the harm principle guarantees a sufficiently broad scope of individual liberty that allows for many different modes of life.

It follows therefore for Mill that the best method a state can promote happiness and help citizens develop their faculties is by allowing them a wide range of personal liberty. If a state were to pass paternalistic laws, it would hinder the individuals from developing their highest faculties. If the government attempts to create virtuous, happy citizens, it will diminish the opportunity for each individual to deliberate and decide on what choices to make in life. Through the process of deliberation, individuals are helped to strengthen their reason and imagination. It is better to allow individuals to foster their intellectual skills than for the government to select what is good or right for every individual.

For Mill then, people must be allowed to make mistakes in order to learn from those mistakes and develop their minds and character. Laws aimed at improving morality do not foster this kind of development, and a government that can legislate morality will often do so in the wrong way.[5] For example, if a government prohibits certain acts that the government views as immoral, the government will be likely to prohibit the development of many great minds.[6] Geniuses often break the traditional mold of acceptable behaviour, and a government may prohibit certain actions without fully understanding the value of the actions.

It is thus Mill's contention that itis foolish to allow "average minds" to dictate right and wrong to a genius who may be thought to be immoral, but is not actually harming anyone. If this potential genius is not allowed to fully explore the truth in the ways he sees fit, then society at large suffers from him not developing his faculties. Finally, whether the person is a genius or someone far more average, the individual has the most knowledge and the strongest interest to pursue what is best for him. For this reason, one should not allow the state to attempt to build virtuous citizens through paternalistic laws.

Mill concludes that the liberty that is lost in building these type of laws will by far outweigh any potential benefits of such legislation.

4.2.1.1. J. S. Mill's Principle of Utility

Although Mill contends that the harm principle is a useful criterion for determining when government intervention is permissible, he ultimately defends anti-paternalism on the basis of the principle of utility. Mill derives the principle of utility, "the greatest happiness principle," from the work of Jeremy Bentham.[7] Bentham argues that individuals and society should always act to bring about the greatest happiness for the greatest number of people. Happiness for Bentham is a function of pleasure and pain, and the happy person obtains pleasure and avoids pain. Society should create laws that maximize the potential for the most pleasure and minimizes the opportunity for pain, without elevating some pleasures to a superior status.

Although Mill utilizes the principle of utility, he rejects Bentham's notion that all pleasures are inherently equal. Mill writes:

> It is unquestionable fact that those who are equally acquainted with and equally capable of appreciating and enjoying both [the "higher" and "lower" [pleasures] do give a most marked preference to the manner of existence which employs their higher faculties.[8]

The happiness for human beings must be distinguished from the happiness of beasts, and therefore happiness is much more than sensual pleasure. Similar to Aristotle and Aquinas, Mill argues that happiness requires the development of the higher human faculties. However, the three thinkers diverge with respect to the means of achieving happiness. Aristotle believes that happiness is linked to living in accordance with virtue and for Aquinas the glorification of God is entailed in his notion of happiness. On the other hand, Mill argues that individual liberty is crucial for achieving the happiness of which humans are capable as "progressive beings."[9]

Contrasting with Bentham's conception, Mill's principle of utility can best be described in the following terms: individuals and society should always act to bring about the greatest development and exercise of the higher human capabilities for the greatest number of people. According to Mill, the harm principle is ultimately justified because it best promotes social utility.

However, it doubtful whether Mill is factually correct in this claim. In many cases it appears that liberty in self-regarding conduct does not promote more happiness. Many people freely choose self-regarding actions that lead to misery, instead of happiness. For example, let us assume that *Chinelo* a banker in Awka chooses freely not to wear a seatbelt while driving to her office at Regina. The harm principle allows *Chinelo* to make this choice, since her decision to not wear a seatbelt poses no direct harm to others. *Chinelo* gets into a terrible accident and can no longer walk, although it is likely that had she been wearing a seatbelt, she would not have been severely harmed. Although the harm principle allowed *Chinelo* to not wear a seatbelt, it certainly did not promote her happiness. Moreover, if many others had experiences similar as Chinelo's, the "happiness" of society would be greatly diminished.

Although it is possible that the seatbelt law would diminish social utility, it would be difficult to prove this empirically. Protecting individual liberty with a strict rule mandating the use of seatbelts might produce, overall, more happiness than unhappiness in society. However, Mill provides no reason to think that implementing the harm principle will produce more overall happiness in society in all cases, and there seems to be nothing that would guarantee the harmony of the harm and utility principles across the many varied circumstances of human life. It is possible to imagine an array of cases where government intervention in the lives of individuals might actually cause more happiness for more people. This dissertation will examine more of these instances in the evaluation.

Although Mill argues that the state is not justified in preventing self-regarding actions that may cause harm only to the individual, he does make an important exception. Mill introduces an example where a person is attempting to cross an unsafe bridge and another individual or government agent sees this action. If the individual who was witnessing the potential accident did not have time to warn the bridge crosser, then he "might seize him and turn him back without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river."[10]Mill argues that no loss of liberty emerges because the bridge crosser would never want to cross the bridge if he had the knowledge that the bridge was actually unsafe. Once the person was informed about the dangerous bridge, he would then be allowed to do as he wished as long as he was not delirious or insane. Through this example, Mill concludes that paternalistic interference is only justified when a person does not have adequate information or has limited mental faculties. Even in these situations, Mill argues that a person without adequate information should make her own choices once the appropriate information becomes available to her.

It can be inferred from the example of the bridge crosser that implicit in Mill's understanding of the harm principle is a notion of voluntariness. For example, paternalistic interference is permissible in cases where an individual is misinformed or mentally deficient. However, Mill does not adequately elaborate on the concept of voluntariness. Using just the arguments of Mill, it would be difficult to determine in many cases whether or not an individual's actions were voluntary, involuntary, or a third option that lies somewhere between the two extremes. The meanings of this term can only be inferred from Mill's writings. Since voluntariness is crucial to the paternalism debate, it is necessary to adequately address the meaning of the term and that is actually what Feinberg does in his articulation of the problem. In the next section, we shall explain how Feinberg carefully clarifies the concepts of voluntariness. In contrast with Mill, Feinberg explicitly discusses the ideas thereby offering a more comprehensive and robustly defensible version of anti-paternalism.

4.2.2. Feinberg's Anti-Paternalism

From the first two volumes analysed in chapter three Feinberg moved to the third volume, to *Harm to-Self* where he set out to refute the idea that legal paternalism is a valid basis for criminal sanctions. Legal paternalism, according to Feinberg, is the idea that criminal penalties are justified when the prohibition "is necessary to prevent harm (physical, psychological, or economic) to the actor himself."[11] Feinberg identified various types of paternalistic laws: there is active (which requires an act, such as wearing a seatbelt) and passive (which forbids an act, such as taking drugs); there is mixed (justified partly by protecting suffering at one's own hand and partly for other reasons) and unmixed (justified only by preventing self-harm); and, finally, direct (which regulates single-party cases, such as suicide) and indirect (which regulates two-party cases, such as euthanasia).[12] He also further delimited paternalism into "hard paternalism" and "soft paternalism." This second categorization is of special interest to this dissertation and to it we now turn to.

4.2.2.1. Hard and Soft Paternalism

Feinberg defines hard paternalism in the following terms:

> Hard paternalism will accept as a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings.[13]

Feinberg explains that hard paternalism is "paternalism" in the truest sense. He rejected hard paternalism; on the ground that there is no moral justification for coercive interference of the government in the lives of an individual for the individuals own sake, as long as the individual poses no threat to others.

In contrast to hard paternalism, Feinberg defines soft paternalism as the view that:

> The state has the right to prevent self-regarding harmful conduct…when but only when that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.[14]

Feinberg ultimately defended this version of paternalism because he felt that soft paternalism was "really no kind of paternalism at all."[15] He adopted this view for two reasons. First, he understood that in two-party cases (e.g. euthanasia) soft paternalism produces the same result as the harm principle because they are, for all intents and purposes, protecting identical interests.[15]Second, in one-party cases, he once again understood both the harm principle and soft paternalism to counsel, at most, for non-punitive state interference when the choice to act was seemingly non-voluntary (e.g. drug induced) because drug-deluded self is not his 'real self,' and his frenzied desire is not his 'real choice,' so we may defend him against these threats to his autonomous self, which is quite another thing than throttling that autonomous self with external coercion."[15]

Feinberg's position is similar to the one held by Mill for Mill argues that government can only interfere with self-regarding actions only when the person's conduct is not voluntary. Also, as in Mill's example of the uninformed man crossing the bridge, the state may be allowed temporary intervention in order to determine whether the person is truly acting voluntarily. Of course, the important distinction between hard and soft paternalism rests on defining what constitutes a "voluntary" choice and to that we now turn to.

4.2.2.1.1. Autonomy and a Voluntariness Standard

The arguments defending hard and soft paternalism as has been explained ultimately hinge on how one defines the terms "autonomy" and "voluntary," as well as the weight that is attached to these concepts in determining when it is permissible for the state to coercively intervene in an individual's conduct.

Feinberg argues that personal autonomy is extremely important, and that fully competent adults have the right to make their own choices, as long as such choices do not harm other people. The autonomous individual can make choices that harm her, and the government should not interfere to prevent her if she wishes to perform the harmful action. For example, the government should not be able to prevent an individual from smoking if the smoker is fully aware of the health risks and is not exposing other people to second-hand smoke.[17]

To this extent, Feinberg's anti-paternalism rests ultimately on a strong right of personal autonomy, understood as a right of absolute personal sovereignty over a relatively well-defined territory. Out of respect for individual autonomy Feinberg's principles prohibit interference with voluntarily incurred risks or potential harms if they are truly consented to. Within this area, the agent's will is sovereign. Thus, even when an individual risks very great loss, injury, or even death, these evils are not laid on the scales opposite the good of exercising his autonomy when we deliberate about whether the law should intervene. Rather, says Feinberg, "the voluntarily risked injury is treated by the liberal *as if* it were no evil at all."[18]

Feinberg does not minimize in any way the evil of injury or death. His point is, rather, that because "sovereignty is not the kind of value that *can* be weighed against particular evils on a common scale . . . no set of dangers to the actor himself could outweigh his right to determine his own lot within the proper boundaries of his sovereign domain."[19]The idea is not that autonomy is so important that every other value pales in significance but, rather, that the only proper way to respect autonomy is to respect a sphere of personal decisions within which an agent's own will and choices are sovereign:

> "For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there. My authority is a discretionary competence, an authority to choose and make decisions."[20]

Other persons might be in a position to act *for the sake of* or *on behalf of* a person, but respect for her autonomy requires that we acknowledge that her "behalf" always remains within her sovereign control.

Feinberg's argument correctly assumes that the appropriate response to a given value depends on the nature of the value. The appropriate manner of response to the value of autonomy is to recognize and respect a kind of disability, a lack of a certain kind of power or authority, on the part of everyone but the agent herself to act on considerations of her own good. Respect for autonomy, according to Feinberg, entails that where the most important matters of life are concerned, no one other than the person whose life is in question has standing to intervene (without that person's leave). Whether this is so—that is, whether there is such a protected zone of personal sovereignty—depends on the nature of the value of personal autonomy and on the most appropriate way for that value to be respected, protected, and promoted. The denial of standing, in matters of fundamental personal concern, to all but the agent involved (extended to loved ones, perhaps) is the product of a substantive moral argument, albeit one at a theoretically fundamental level.

It follows therefore that Feinberg believes that one's autonomy, or the voluntariness of one's actions, is connected to her consent. If a person has the capacity to consent as a fully competent adult, and actually consents to harmful self-regarding actions, then the individual's autonomy should trump the potential harm. Therefore, the government should not coercively interfere by prohibiting such actions. This view is clearly expressed when Feinberg states that:

> An individual's good and her right to self-determination (personal autonomy) "usually correspond, but in those rare cases when they do not, a person's right of self-determination, being sovereign, takes precedence even over his own good."[21]

So, an individual's right to self-determination must be respected even if the individual will certainly cause harm to himself. The only government interference that is justified in order to prevent self-regarding acts is the interference necessary to determine whether or not a person's conduct is voluntary.

The soft paternalist also must carefully distinguish what makes an individual's actions voluntary, or "voluntary enough." So a person may engage in activities which are risky, and which most people find to be completely ridiculous. However, Feinberg argues that an individual with strange and unreasonable beliefs can still be sufficiently autonomous to perform voluntary actions. Actions fall on a spectrum, and an individual act can be either perfectly voluntary, non-voluntary, or, as most actions lie, somewhere between these two extreme ends of the spectrum. A person who makes perfectly voluntary choices must be completely informed, have no distractions, and be free from coercion, and emotional problems or internal distractions. Feinberg admits that most, "and perhaps even all choices," are not perfectly voluntary.[22]

Entirely non-voluntary choices are also rare; non-voluntary actions are the result of being coerced, completely ignorant, or lacking certain mental or physical capabilities due to some disability. For example, imagine a scenario where X grabs Y, and throws Y into Z causing harm to Z. Y is not making a voluntary choice to harm Z because X is coercing Y. Alternatively, a person could act in a non-voluntary manner due to ignorance: Feinberg gives the example of an individual mistakenly putting arsenic on his eggs, supposing that the arsenic is table salt.[23] In the first example, the person is not voluntarily choosing to harm another agent, and in the second example the person is not voluntarily choosing to harm himself. Feinberg labels choices that come close to being perfectly voluntary as "fully voluntary," and those choices that are close to being entirely non-voluntary as "relatively non-voluntary." The majority of actions that fall somewhere between fully voluntary and relatively non-voluntary are often the actions that give rise to the dispute between hard and soft paternalists.

People often perform acts that put themselves at great risk, but Feinberg explains that only some of these risky actions are truly "irrational."[24] If a person is deranged, insane, or mentally challenged he may frequently behave irrationally. The irrational person is not truly himself and is therefore not autonomous. Since the irrational person is incompetent, he is also not responsible (or at least not fully responsible) for his actions. In addition to people who often act irrationally due to a mental defect, some people lack rationality for a short time due to some form of cognitive impairment. For example, a person might experience temporary delusions or depart wildly from his own goals and ideals. These types of severe, temporary departures from a person's usually rational actions can be explained using the legal language of "temporary insanity."[25]The temporary and permanent irrational actions of individuals are close to perfect cases of non-voluntary actions.

At the bare minimum, irrational actions are not sufficiently voluntary, nor do these actions give rise to much controversy for the hard or soft paternalist. If a person is acting irrationally, the government is warranted in preventing her from harming herself. The person is not choosing to cause self-harm, because such a person is not making a voluntary choice. Yet, the government should only interfere with irrational choices if the choices are harmful or potentially harmful. For example, even if a person is acting entirely irrationally, the government should not interfere in the person's decision to choose orange over mango. Both the hard and soft paternalist agree that the government should not interfere with actions that cause no risk to others or the individual.

In order to help make this difficult distinction between voluntary (or voluntary enough) and non-voluntary, Feinberg describes some "rules of thumb."[26]Feinberg asserts that one should establish variable criteria for voluntariness, and each criterion should have a different cut off point. Still, two rules will be important:

1. As the risk increases, so should the standard required for voluntariness for the action to be permitted.

2. The more irrevocable the harm that could be potentially caused by the action, the higher the standard of voluntariness that is required for the action to be permitted.[24] Feinberg argues that a person who exhibits extremely risky and seemingly unreasonable behaviour must exhibit a high degree of voluntariness in his behaviour.

So, for example, if a person wished to take a canoe over a waterfall, the government would be justified in questioning whether or not this individual is sane. Furthermore, one might investigate if the risk taker is being coerced or is perhaps under the influence of drugs. However, if an individual could prove that she was just a thrill seeking person who otherwise exhibited full mental competence, then, and only then, Feinberg would say that the government should not interfere in her canoeing adventure. However, it is important to note that Feinberg argues that this canoeing risk taker must meet a higher standard of voluntariness than the person making choices that are far less risky and must prove that he meets it to the government.

4.3. Legal Moralism (Harmless Wrongdoing)

Harmless Wrongdoing, the last leg of Feinberg's odyssey, constitutes his assessment of the case for legal moralism, in which he attempts to delineate a position in the spirit of Mill. But Feinberg begins his discussion in this volume with a concession Mill was unwilling to make, arguing that, along with Mill's *prima facie* case for the value of individual liberty, there is also a presumptive case for legal moralism.[27] In the final analysis and after what might be considered one of the most sophisticated endeavor by a philosopher in modern history, Feinberg out rightly argues – though with some qualification – that moral legalism should not be used as a ground for criminal prohibition. This section strives to analyze and make meaning of the logic behind Feinberg's call for the de-legitimization of legal moralism.

4.3.1. What is Legal Moralism

Feinberg begins his discussion of the Hart-Devlin debate by contrasting two theories of criminalization: "liberalism" and "legal moralism." Liberalism according to him is the view that "the prevention of harm or offense to [non-consenting] parties other than the actor is the only morally legitimate reason for a criminal prohibition." Legal moralism, on the other hand, is the view that it is sometimes legitimate to use the criminal law to prevent actions simply because those actions are "inherently immoral even if those actions cause no harm or offense to non-consenting third parties"[28]

After this initial clarification, Feinberg then focuses his attention on two ideas – broad and narrow conceptions - of legal moralism which he claims are notable among proponents of legal moralism. The "broad conception of legal moralism," on his account is defined as follows: "It can be morally legitimate by the state, by means of criminal law, to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that certain actions constitute or cause evil of other kinds." Feinberg lists the reasons commonly given to support criminalization of this broad sense of legal moralism: (1) to preserve a traditional way of life, (2) to enforce morality, (3) to prevent wrongful gain, and (4) to elevate or perfect human character.[29]

Feinberg's contention here is that advocates of broad sense of legal moralism call for criminalization of certain acts neither because the nature of the said act is in itself immoral nor because of the direct harmful or offensive consequences that could result from the act but because of the possible indirect harmful spill overs the acts could have on the society. This is why Feinberg calls such acts victimless crime thinks it is worthwhile to investigate whether such acts could be legitimately criminalized within the framework of liberal considerations.

Turning his attention to "narrow conception of legal moralism," Feinberg explains that moralists in this category believes that the forms of conduct that should lead to

criminalization are instead immorality or those sins that can be committed not only in a publicly harmful or molesting manner but also privately by consenting individuals, who are thus not harmed, in private or before a consenting public. What the narrow sense of legal moralism boils down to is that it can be legitimate to prohibit conduct because it is immoral in and of itself, even if it neither causes harm nor molests the author of the action, or others. On Feinberg's account, those who advocate this narrow sense of legal moralism believe that there are acts which irrespective of their good or bad consequences can be adjudged good or bad in themselves. Thus, these advocates believe and contend that criminalization should be determined by the nature of the acts not their consequences as those with broad understanding will have us believe.[30]

4.3.1.1. Non-grievance Evil

Feinberg's strategy is to enumerate a more or less comprehensive catalogue of moral evils which might be together with an equally systematic classification of varieties of legal moralism, and then argue, by means of numerous examples, that upon reflection, the prevention of each of the relevant classes of evils doesn't count for very much weight at all. He constructs his taxonomy of relevant evils by first defining an evil as "any occurrence or state of affairs that is rather seriously to be regretted"[31] and then paring away various sorts of evils which have no bearing on the question of legal moralism: acts of God or nature (theological evils);and any evils caused by human beings which harm the interests of others in ways which also violate their rights (grievance evils).

The remaining class consists of non-grievance evils, those which are imputable to people but do not involve violations of rights. Within this family, there are three major genera, all of which are relevant to the question of legal moralism: i) Acts that wrong another individual despite the fact that they do not harm him (set back his interests, reduce his well-being) - "harmless grievances"; ii) "impersonal" or non-grievance wrongs that are connected to welfare; and iii) impersonal wrongs not connected to welfare, or "free floating evils."[32]

4.3.1.1.1. Harmless Grievances

An example of a harmless grievance is a benevolent lie. Kant held that the liar wrongly disrespects the person lied to despite the latter's benefit and the former's altruistic intention. On the question whether harmless grievances are possible, Feinberg agrees with Kant. He holds that hard-paternalistic interference with another competent adult's fully voluntary choices wrongs him even if it benefits him in the long run, because it violates his right to personal sovereignty or autonomy. Assuming that the *volenti* principle is true, this kind of harmless immorality is possible only where the person wronged does not consent to the action.

4.3.1.1.2. Welfare Connected Non-Grievance Evils

The second kind of harmless immorality - "welfare connected non-grievance evils" - is of two types. The first is any act that increases the total amount of harm in the world but there is no individual who would have been better off had the act not been performed. Feinberg offers Derek Parfit's example of conceiving a child that one knows will be severely disabled but just barely better off existing than not, instead of waiting and conceiving a different but "normal" child. Feinberg agrees that conceiving in these circumstances is an impersonal wrong, and he even concedes that wrongs like it are properly criminalized - making them an exception (the sole one, he thinks) to his theory. On this Feinberg says: Liberalism must bend to permit an exception in this special kind of case. I think that it can bend without breaking."[33]

The second evil of this type involves harms to others with their consent. Victim consent precludes personal grievance, but the harm suffered is still an evil to be regretted. Thus, these are those which adversely affect human interests even though nobody's moral rights are violated. A possible example is the sale of meth by a drug dealer to a user desperate for a fix. Feinberg employs the example of non-profit tobacco manufacturer to illustrate this category of non-grievance evil. According to him, if there were such a thing as a non-

profit tobacco manufacturer, the practice of manufacturing cigarettes for the purpose of supplying the existing market among nicotine addicts (for only the costs of production) would count as a welfare-connected non-grievance evil. The evil would be welfare-connected because of the adverse effect on the health of nicotine addicts, brought about by furthering their cigarette habits. But the evil is also a non-grievance one: since the nicotine addicts willingly consent to this kind of economic arrangement, their rights are not violated.

4.3.1.1.3. Pure Free-Floating Evils

The third kind of harmless immorality, non-grievance evils not connected to anyone's welfare, is a motley bunch. Some of Feinberg's own examples are: having an evil intention that one doesn't act upon because the opportunity never presents itself; some false belief (e.g. that a famous historical figure was evil when in fact he was highly virtuous); the "wanton, capricious squashing of a bug in the wild"; and the extinction of a species.[35] Feinberg actually has a long list and extensive discussion on this kind of evil.

Consider the following:

> A. "Violations of taboos"B. "Conventional 'immoralities' when discreet and harmless"C. "Religiously tabooed practices"D. "Moral corruption of another (or of oneself)E. "Evil Thoughts"F. "Impure Thoughts"G. "False Beliefs"H. "The wanton, capricious squashing of a beetle (frog, worm, spider, wild flower) in the wild"I. "The extinction of a species."[36]

According to Feinberg, items on these lists are evil independent of how they affect anyone's interest.

Feinberg also counts some exploitation as a free-floating evil. Most exploitation is coercive or deceptive and involves wrongful harm to the person exploited, but in some cases these features are missing and what "offends the moral sense" is simply the exploiter's benefitting in the manner or circumstance he does. The profit by the meth

dealer is a gain of this sort. Some moral conservatives regard homosexuality, the enjoyment of pornography, fornication, and public indecency, as well as all suicide and suicide assistance, as free-floating wrongs.[37]

Therefore, as the name implies, pure free-floating evil are intrinsically evil events or states of affairs brought about by human agency, despite their having no adverse effect on human interests. Feinberg's standard examples to illustrate this mirrors Mill's concern about the wisdom of tolerating the evil of trafficking in vice: e.g., the manufacture and sale of pornographic materials, running a brothel, and pimping. Feinberg argues that the practice of purchasing sexual favours and the kind of voyeurism associated with pornography are not harms to human interests in the strict sense, because the participants embrace aberrant interests which these activities fulfill. But the types of conduct in question are commonly regarded as a form of voluntary degradation "which offends against an ideal of human excellence held by many people."[38]Consequently, the fact that someone is profiting by abetting the degradation of others is especially morally offensive. Nonetheless, as in the previous case (the non-profit tobacco manufacturer), voluntary consent implies that no rights have been violated. Therefore, the economic exploitation should not be criminalized, however distasteful we may find it. The countervailing concern to sustain individual liberty simply outweighs our distaste for the evil thereby permitted. Of course, utilitarian's and defenders of other welfarist moral theories deny that any free-floating evils exist. According to them all putative examples of it either are not evils at all or are evils only because they reduce welfare in some non-conspicuous way.[39] Whatever be the case, Feinberg believes that these kinds of evil exist and is denying that criminalization is ever justified to punish and/or prevent any of the three types of harmless immorality discussed here.

4.3.1.2. Types of Legal Moralists

Understanding Feinberg's theory of legal moralism also requires an appreciation of the distinction he made between impure and pure legal moralism.

4.3.1.2.1. Impure Legal Moralism

In the run to his analysis of impure legal moralism, Feinberg detains himself momentarily to make the very important distinction between what he calls disintegration and conservative theses. On his own account, disintegration thesis is the claim that the state may be morally justified to use its criminal instruments to deter or punish actions that would lead to the disintegration of society. He elucidates the conservative argument as the believe that it is the moral duty of the state to use its coercive apparatus of law to enforce the prohibition of harmless vices or free-floating evils and that such enforcement is required to preserve or conserve the well-being of the society.

Feinberg refers to both the disintegration and conservative theses as versions of "Impure Legal Moralism." Accordingly, he defines impure legal moralism as the view which holds that:

> Legal sanctions should be employed against behaviour deemed to be immoral, not because of the behavior's immorality per se, but because of the disastrous 'secondary effects' that would ensue if the behaviour were not outlawed.[40]

The secondary effects Feinberg talks about here include harms associated with social disintegration and the erosion of society's valued institutions. In other words, for Feinberg, proponents of impure legal moralism like proponents of the harm principle believe that actions that constitute harm are legitimate moral indicators for criminalization. Nevertheless, while for Mill as well as for Feinberg the harm that can be legitimately criminalized are those directed against individuals, that is harm that has direct victims, for the impure legal moralists it is not only harm against individuals that

merits criminal prohibition. Harm can have an entire society as its victim. It is based on this that the legal moralists contend that the state is warranted morally to use instruments of law to protect itself from such harm that can bring about disintegration or erosion of societal values.

It is in the context of these considerations that Feinberg characterizes Lord Devlin as an impure legal moralist. He explains that why it is true that Devlin call for the criminal prohibitions against such activities as oral and anal copulation (sodomy) his reason for this, however, does not seem to be that he regards these activities as inherently immoral if by "inherently immoral" we mean "immoral on the basis of properties of the act itself rather than on the basis of how the act is perceived or judged by others." It apparent therefore according to Feinberg that Devlin might be prepared to concede that it may be difficult to find plausible secular (and thus constitutionally acceptable) grounds for regarding occasional homosexual sodomy between consenting adults as in itself immoral. For instance, occasional homosexual sodomy, unlike say occasional torture, does not seem - at least in any obvious way - to extinguish the possibility of living a virtuous life of human flourishing - unless, of course, one draws one's theory of virtue and flourishing from a religious source.

It follows for Feinberg in this regard that Devlin never seeks to show that consensual sodomy is inherently immoral. The bone of contention as Feinberg sees it is Devlin's conviction that society is bound together, not by moral truth, but simply by shared moral beliefs - however irrational and unenlightened those beliefs may be. Devlin is thus able to construct the following argument:

> the criminal law is legitimately concerned with the preservation of society, violations of a society's shared morality tend (like treason) to undermine society even in cases where these violations have no direct personal victims, and thus the criminal law may legitimately prohibit such violations in those cases

> where the majority judges this to be a prudent course of action.[41]

Viewed in this way, Devlin is not challenging liberalism but is rather exploiting a tension within liberalism itself - the tension between the value of individual liberty, on the one hand, and the value of democratic rule toward utilitarian ends on the other.

Based on these clarifications made by Feinberg, it could be argued and rightly so that Devlin is not just a legal moralist but also a utilitarian, democratic cynic with some controversial empirical views. Utilitarian because he regards social harmfulness, in some very extended sense, as the only factor relevant in justifying a criminal prohibition. Democratic because he believes that the majority has a right to have its preferences enacted into law absent some compelling reason why they should not be. Cynical because he believes the social importance of a moral belief is not a function of its truth or reasonableness but is solely a function of its pervasiveness and the degree to emotional intensity with which it is held.

Hart and Feinberg's case against Devlin in this regard is that his position is empirically controversial for this reason: he holds extremely confident beliefs about the extent and depth of the moral repugnance to sodomy and about the harmful impacts of challenges to those feelings of repugnance and he holds these beliefs, on the basis of little or no empirical evidence. Devlin's belief that private acts of consensual sodomy tend, like treason, to undermine society seems to Hart to be evidentially on a par with the Emperor Justinian's belief that homosexuality causes earthquakes.[42]

If the characterization we have given to Feinberg's interpretation of Devlin's view here is correct, then the differences between Devlin and liberals such as John Stuart Mill seem not as interesting as one might have initially thought. Most of the differences are not on deep issues of ultimate principle, but rather on issues of empirical evidence of social harm. Feinberg's case against Devlin on these issues seems to be that Devlin rely more on hunches than on solid evidence, a tendency exhibited by many utilitarians. Mill's own

case for freedom, after all, is based largely on empirical hunches about the long-range social benefits of freedom, and as we have seen in the previous section there is no overwhelming evidence in support of his extremely strong views on the matter.

In spite of the shortcomings of Devlin's own positive views highlighted by Feinberg, two important issues of principle that are worthy of serious thought and reflection can be generated from his negative discussion - his counter-attack against Hart and other liberals who have attached him. These issues arise as consistency challenges to moral and political liberalism - challenges that a rejection of legal moralism, demanded by liberals especially in the area of sexual freedom, is inconsistent with two other doctrines that many (if not all) liberals hold dear: first, the idea that criminal punishment should be based, at least in part, on the retributive notion of desert or blameworthiness and, second, the idea that democracy constrained by a set of fundamental rights is the preferred form of government. It has often been claimed, by followers of Marx and other philosophical radicals that the ideology of liberalism is filled with internal contradictions and will eventually explode as a result of the tensions generated by such conflict. Some of Devlin's challenges can also be read in this spirit. The next chapter will begin the process of unpacking Feinberg's liberal doctrine in the light of these challenges.

4.3.1.2.1. Pure Legal Moralism

Feinberg reserves the term "Pure Legal Moralism" for those views that argue for using legal sanctions against immoral behavior solely because such behavior is immoral. To explain this concept, Feinberg references James Fitzjames Stephen's challenge to Mill in his essay "Liberty, Equality, Fraternity" published in 1873. For Stephen, according to Feinberg, some immoral acts are so outrageous, that they must be prevented at any cost. On this ground, Feinberg categorizes Stephen as a "pure legal moralist in the strict sense."[43]

Feinberg's categorization of Stephen as a pure legal moralist is better explained within the context of the distinction the former makes between Stephen and Devlin. Feinberg claim that unlike Devlin, Stephen does not reject immoral acts or call for the criminalization of immoral acts on the ground that they cause some kind of indirect harm to society; he does not invoke the harm principle to justify moralism. Stephen's call according to Feinberg is strictly, because the evil Stephen cites is inherently immoral. It is therefore Feinberg's contention that Stephen assertion that the prevention of immorality is a proper end in itself and justifies state action. [44]

One interesting thing about Feinberg's analysis of Stephen's theory is that he doesn't present Stephen as claiming that there are acts whose immorality is self-evident or obvious to every member of a particular society. Rather according to Feinberg's reading, Stephen argues that morality or immorality should be determined by reference to the majority opinion of society. In other words, if there is a unanimous condemnation of a conduct bythe majority, even if it is private and does not harm or offend others, the state can legitimately criminalize it. Feinberg on this ground charges Stephen's pure legal moralism as autocratic and anti-liberal because it considers:

> Morality as the moral code observed by the ruling section of present society, ignoring the possibility of temporal or geographical differences. His theory has some autocratic implications: if the conduct of a minority group is labeled as immoral by the majority, even if it is private and does not harm or offend others, the state can legitimately criminalize it.[45]

Feinberg's rejection of Stephen's pure legal moralism is challenged by some special counter instance, particularly the case of consensual cannibalism. Some of these cases will be explored in the next chapter.

4.4. Feinberg's Liberalism is Grievance Morality

Thus far, this dissertation has shown that Feinberg's liberalism is a defense or justification of the criminalization of grievance Morality. That is, while Feinberg thinks that the state should not interfere on non-grievance immorality, he believes it is the responsibility of the state to use the coercive instrument of criminal law to enforce legitimate harmful and offensive grievances. Feinberg's position on this is informed by the moral weight he places on human autonomy. "The spirit of liberalism," Feinberg writes, lies in its "concern for humanity . . . limited only by its respect for autonomy."[46]The key element in this moral outlook is not its exclusive focus on human good, even less on good human beings, but rather, its focus on that which is good for human beings.[47]

Consequently, for Feinberg, grievance morality takes its cue from the needs, sufferings, interests, and self-fulfillment of individual persons, and in individuals it vests personal sovereignty over a wide domain of thought and action. This outlook is not subjectivist, rather, it takes as morally fundamental the claims persons are entitled to make in their own names and for their own sakes. Whenever demands of morality in this domain are ignored or defied, there are assignable persons who are entitled to complain, "to voice grievances in protest, and press for some sort of remedy or censure."[48]

This last point brings out very clearly why Feinberg sees his liberalism as "grievance morality."[49] In his view, grievance morality provides the only legitimate basis for the criminal law, but this is not because he thinks it defines the outer boundaries of morality. He thinks it is only one department of morality. Unlike some defenders of a liberal position on the enforcement of morals, Feinberg does not dismiss "free-floating evils" (evils that are not anchored to grievance evils) as non-evils, irrelevant from a moral point of view.[50]Nevertheless, his recognition of the existence of free-floating evils is by his own admission "grudging."[51] Some alleged free-floating evils—for example, those associated with sexuality—simply do not exist, he argues,[52]and others—the gradual loss

of language or a way of life—are obscured and distorted by a mist of sentimentality and do not deserve serious moral attention.[53] Other such evils, although they survive a clear-eyed critical survey, still lack significant moral weight when put on the scales opposite grievance evils. While there may be moral evils beyond the pale of grievance morality, rarely, in Feinberg's view, will they rival the moral demands of personal autonomy, or individual projects, or resources necessary for human fulfilment.[54]They may be genuine moral evils, and doing or promoting them may be genuine moral wrongs, in his view, but rarely will they be appropriate grounds for deploying the criminal law to eradicate or control them.

Thus, it is important to recognize that Feinberg's debate with his opponents over the criminal enforcement of morals is a substantive debate over how much or what parts of morality our political societies may legitimately enact and enforce. Any liberty-limiting principle, whether a conservative legal moralist principle or Mill's liberal harm principle, he argues, "is a principle enforcing some segment of some morality" because the criminal law is "an instrument for creating and reinforcing moral consensus." The liberty-limiting principles he proposes are also "moralistic principle[s], aimed at determining the moral values that may properly be enforced by the morality-shaping apparatus of criminal law."[55] The question before us, writes Feinberg, is "which judgments on behaviour may rightly receive the stamp of moral certification from the criminal law, not whether in applying that stamp the criminal law is enforcing some moral judgments or other."[56]

In the final analysis, Feinberg assumes in the third and fourth volumes of the *Moral Limits of Criminal Law* that just as there are reasons to suppose that prevention of interference with individual liberty would be a good thing, so it would be a good thing to prevent evils in general, including self-harm (paternalism) and moral evils (moralism) in particular. Consequently, he is prepared to concede that the mere immorality of an activity carries some weight in assessing policy questions about what should be legally prohibited. Thus, the burden of Feinberg's project is as we have seen to make the case that consideration for legal paternalism and moralism do carry very much weight, when

balanced against the countervailing evil of imposing further restrictions upon people's liberty. Accordingly, Feinberg argues:

> When a person has been harmed in one of his vital interests, or even when he has been seriously inconvenienced to his great annoyance [i.e., offended], a wrong has been done to him; he is entitled to complain; he has a grievance to voice; he is the victim of injustice; he can demand protection against recurrences; he may deserve compensation for his loses. But no one is entitled to complain in the same way when a free-floating evil [or consented evil] is produced by another's action.[47]

It remains to be seen whether Feinberg succeeds or fails on these claims. The next chapter will pass Feinberg's liberalism through the crucible of philosophical criticism in other to show that his doctrine while deserving of commendation is irreparably flawed in some fundamental ways.

Endnotes

1. John Stuart Mill, *On Liberty*, ed. Elizabeth Rappaport (Indianapolis: Hackett, 1978), p. 9.
2. Ibid. p. 10.
3. Ibid. p. 11.
4. Ibid. p. 65.
5. Ibid. p. 81.
6. Ibid. p. 32.
7. John Stuart Mill, *Utilitarianism*, ed. George Sher, (Hackett Publishing: 1979), p. 3.
8. Ibid. p. 9.
9. John Stuart Mill, *On Liberty, p. 10.*
10. *Ibid. p. 95.*
11. J. Feinberg, *Harmless Wrongdoing*, pp. xvi-xvii.
12. Ibid. 9-10.
13. Ibid. p. 12.
14. Loc. cit.
15. Ibid. p. 18.
16. Ibid. pp. 12-14.
17. Ibid. p. 106.
18. J. Feinberg, *Harm to Self*, p. 6.
19. Ibid. p. 53.
20. Loc. cit.

21. J. Feinberg, *Harmless Wrongdoing*, p. 61.
22. Ibid. p. 104.
23. Loc. cit.
24. Ibid. p. 106.
25. Loc. cit.
26. Ibid. p. 117.
27. Ibid. pp. 117-119.
28. Ibid. pp. 4-6.
29. Ibid. pp. 20-24.
30. Ibid. p. 36.
31. Ibid. p. 37.
32. Ibid. p. 18.
33. Ibid. p. 19.
34. Ibid. p. 33.
35. Ibid. pp. 23-25.
36. Ibid. Ibid. pp. 20-24.
37. Ibid. p. 23.
38. Ibid. p. 217.
39. Loc. cit.
40. Ibid. p. 9.
41. Devlin, *The Enforcement of Morals*, p. 89.
42. H.L.A. Hart, *Law, Liberty and Morality*.
43. J. Feinberg, *Harmless Wrongdoing*, p. 9.

44. *Ibid.* pp. 9-10.

45. *Ibid.* p. 19.

46. 46. Joel Feinberg, Harmless Wrongdoing (1988), at 328.)

47. 47. Ibid. pp. 159–206.

48. 48. Ibid. p. 79.

49. 49. Ibid. p. 79.

50. 50. Ibid. p. 66.

51. 51. Ibid. p. 125.

52. 52. Loc. cit.

53. 53. Ibid. p. 80.

54. 54. Ibid. pp. 66–67.

55. 55. Ibid. p. 13.

56. 56. Loc. cit.

57. *Ibid.* p. 67.

CHAPTER FIVE

5. A CRITIQUE OF FEINBERG'S LIBERALISM

Chapters Three and Four of these dissertations were specifically devoted to x-raying the structure and contents of Feinberg's the *Limits of Criminal Law*. Doing so as explained at the introductory sections of those chapters was in consonance with and part of the overall efforts to bring about what was set out ab initio as the objective of this study, namely to demonstrate that Joel Feinberg's liberalism is basically, both logically and factually flawed. Apart from few highlights here and there, there was no direct attempt in those two chapters to formally and critically engage Feinberg's ideas as such engagement, it was assumed, would amount to unnecessary preemption and repetition of a function already designated to this final chapter.

Therefore, this chapter is saddled with the burden of showing that while Feinberg's pristine effort in the *Moral Limits of Criminal Law* is inimitably commendable in many ways, it fails to achieve what it sets out to achieve: to show that Feinberg's version of liberalism has succeeded in resolving the age-long problem of reconciling the conflict between authority and freedom on the one hand and freedom and human flourishing on the other hand; that is, that Feinberg's liberalism is the best political order compatible with human freedom and flourishing. In the main, this chapter will argue contrary to Feinberg, that moral determinants of criminal law should not be restricted to the Harm and Offense Principles alone but should be expanded to incorporate legal Paternalism, legal Moralism and more depending on the specific need of the society making the legislation.

5.1. Evaluation

To begin with, anyone who has had the privilege of perusing through the *Moral Limits of Criminal Law* cannot but admit that it is the stroke of a genius in legal philosophy. The work, as B. Harcourt has argued and correctly so too, offers the most sophisticated, logically consistent and emotionally satisfying defense of liberalism since Mill.[1]

One of the things that make Feinberg's contribution outstanding in this regard is his power of analytic engagement. In fact, his creative use of both hypothetical and factual instantiations is only matched by very few scholars who have worked in the field of analytic jurisprudence. No wonder, his creative application of the Bus Rid Experiment still generates accolades and admiration even by those who disagreed with the overall proposals of the *Moral Limit.* Recounting Stanley C Brubakerz glowing tribute to Feinberg's incredible analytic rigor and imaginative power is in other:

> To my knowledge, the concept of offense has never been given as clear, penetrating, and imaginative analysis as in this book. The product of decades of reflection, the work magnificently combines the analytic rigor of contemporary philosophy with a poetic gift of imaginative illustration and phrasing. Often, as I worked my way through an argument and objected, 'Okay, but what about x, y and z*?'*I turned the page to discover Feinberg considering not only x, y, and *z*, but *zz*, and with hypotheticals more threatening to his position than any I had imagined. In these four volumes, Feinberg … achieve[d] his goal of making "the best possible case for liberalism" and the work … well deserve[d] a place next to Mill's *On Liberty*.[2]

Furthermore, Feinberg's detailed and sophisticated treatment of the concepts of harm and offense highlights the complex and controversial relationship between authority and liberty the way it was never handled before by any scholar. His treatment of these

concepts shows clearly that matters of legislation and adjudication are serious business of state that deserves not just special training but the unremitting attention of all and sundry. Harlon L. Dalton captures these contributions in the following excerpts:

> Joel Feinberg has provided intellectual grist for at least a generation of philosophers, jurisprudence, psychologists, and cultural anthropologists. He has shown, by his own example, how these scholars can design concrete rules that regulate our behaviour and reflect our aspirations. He has engaged us all in the singularly important task of moral justification, of matching our laws to our better selves, and he has given us hope that the effort can make a real difference in how we live our lives. On a more personal note, Feinberg's work has enabled me to think more creatively than I otherwise might have about an issue that has been gnawing away at me for some time now: How should we as a society respond to behaviour that disgusts (a large segment of) us?[3]

Such personal interest as Dalton points out in this quotation can only be elicited by not just a work that deals with issues as exciting and engaging as liberty and authority but one that comingles passion and incisiveness in the manner that Feinberg brings on board in the *Moral Limits.*

Added to these accolades is Feinberg's legendary academic honesty. This is particularly illustrated in his admission that some counter-instances (as we shall see) do not only pose serious challenge to his liberal theories but that such challenges necessitate the rethinking of these theories in such a way that they in most extreme cases warrant the vacation of his position. Most importantly, the fact that Feinberg does not in the face of these counter-instances attempt to deploy bulwarks to shield the system he invested so much energy and time developing from refutation makes him a symbol and worthy recommendation to other scholars for his of academic honesty. B. Harcourt alludes to this attractive quality when he contends:

> Feinberg's experience with the harm principle mirrored, in significant ways, Mill's own experience.

> Like Mill, Feinberg's confidence in the robustness of the original harm principle eroded somewhat over the course of his writings. Whereas Feinberg originally defined liberalism, in his own words, 'boldly' relying exclusively on the harm principle (supplemented by an offense principle), Feinberg concluded the fourth and last volume of *The Moral Limits of the Criminal Law* by softening his claims about the critical role of the harm principle.[4]

Harcourt classified Feinberg within the context of this intellectual transition as Feinberg the bold liberal and Feinberg the cautious liberal. According to him:

> Feinberg concluded his treatise with the following 'cautious' definition of liberalism:[W]e can define liberalism cautiously as the view that as a class, harm and offense prevention are far and away the best reasons that can be produced in support of criminal prohibitions, and the only ones that frequently outweigh the case for liberty. They are, in short, the only considerations that are *always good reasons* for criminalization. The other principles [moralist or paternalist] state considerations that are at most sometimes (but rarely) good reasons, depending for example on exactly what the non-grievance evil is whose prevention is supposed to support criminalization. As this passage makes clear, the original harm principle remained, even by the end of Feinberg's treatise, one of the two main limits on state regulation of moral offenses.[5]

Nevertheless, as it is not always easy for a poet to give up on a beloved poem, the child of his brain, or a scientist on his pet theory, it was not also easy for Feinberg to give up easily on a theory he spent years developing. Thus, as it is obvious in this extract and as Harcourt himself confirms: "…even under the more cautious version proposed by Feinberg at the end of his treatise, the qualified harm principle still played a dominant role."[6]

Overall, there seems to be a unanimous agreement among Feinbergian scholars, including his detractors, that Feinberg's *Moral Limit* is a masterpiece. Vincent Blasi who devoted almost a life time of scholarship criticizing Feinberg could still not restrain himself from paying the following glowing tribute to the *Moral Limits:* "It is among the most balanced, comprehensive, and rigorous treatises of recent times."[7] Kent Greenawalt, on his own appraised the project as a "nuanced and exhaustive treatment of the subject."[8]Richard J. Arneson, contends that Feinberg "argues brilliantly" for his positions and his work is characterized by "sensitive and precise conceptual analysis."[9]Finally, Robert P. George claims that Feinberg's work is "a model of clear, rigorous, and fair-minded philosophical treatise.[10]

This notwithstanding, following in the tradition of Aristotle who once remarked that he loves Plato his master but that truth must come before friendship, Feinberg's stunning success and stupendous achievement should not be the reason to turn blind eye to his shortcomings, especially on matters as important as issues of liberty and human well-being. In the light of this, the remaining part of this evaluation will concentrate on excavating these shortcomings in view of making recommendations on how they can be overcomed.

However, before accentuating these loopholes in Feinberg's liberalism, this dissertation will first of all sketch the issues at stake between Feinberg and other advocates of his version of liberalism on the one hand and those who are opposed to his view on the other hand. This summary is necessary for two reasons: it will facilitate not only a proper understanding of Feinberg's weaknesses but will also be in line with the promise made in the introduction of the dissertation to carry the audience all the way alone as we transverse the difficulties involved in analyzing Feinberg's liberalism. Above all, the sketch will form a background for the critic and conclusion about to follow.

5.1.2. Varieties of Legal Moralism

In the previous chapter, Feinberg's liberalism or moral theory was described as grievance morality. The sketch we wish to draw here requires that we clarify this issue a bit. Lord Devlin correctly distinguishes two critical questions: (1) "If a society has the right to pass judgment [on all matters of morals], has it also the right to use the weapon of law to enforce it?" (2) If it does have that right, when "ought it to use that weapon . . . [and] on what principles?"[11] The first question concerns whether a political community is entitled or has the moral standing to use the criminal law to enforce (perhaps some portion of) morality; the second concerns the proper exercise of that entitlement. According to Mill, the first concerns society's jurisdiction, the second, society's justification.[12]Answering the first and more fundamental question is the following thesis:

Moral Entitlement Thesis (MET): Political communities are entitled to use the criminal law to enforce moral values or principles as they see them.

Nearly all parties to the debate assume a positive answer to this thesis. The question for liberals, Feinberg writes, "is not whether society can pass judgment in all matters of morals, but rather which matters of morals are its proper business."[13] Like Devlin, Feinberg assumes that the moral entitlement thesis in some versionis true. He disagreed about its scope, not its truth. Those who side with Devlin—including some who are inclined towards liberalism—accept:

Global Legal Moralism: A political community is entitled in principle to enact and enforce *any* moral value or principle.

Since this is a principle of jurisdiction, not justification, so global legal moralists do not tell us anything yet about what forms of social behaviour are justifiably punished by law or even what principles of political morality carry the greatest weight in answering such questions. They merely claim that political communities are entitled to consider and weigh any and all such principles. Clearly, Mill rejects this view; yet he accepts the moral

entitlement thesis, albeit in a more restricted form. He and Feinberg following him, embraces:

Restricted Legal Moralism: A political community is entitled to enact and enforce *some* but not all moral values or principles.

Mill, of course, seeks to restrict this entitlement to considerations of harm to others. Since Mill, this has been the core of a distinctive liberal view on the legal enforcement of morals. We should note, however, that it is possible to hold both global legal moralism and something like Mill's restriction of the state's entitlement to enact and enforce moral standards to matters of harm to others. This is the case for those liberals who believe that morality is restricted to matters of behaviour imposing or threatening harm to persons other than the agent. On a harm-centered view of morality, the harm-restricted entitlement to enforce morality is consistent with global legal moralism. On this view, the dispute between liberals and their conservative opponents is not over the scope of the entitlement of a political community to enact and enforce morality but, rather, a more fundamental dispute over the scope of morality itself. This is not Feinberg's liberalism. Feinberg's liberal embraces restricted legal moralism, and that thesis limits a political community's entitlement to some proper sub set of genuine moral principles, values, or concerns.

Understood in this way, we can see that Feinberg endorses the restricted legal moralist thesis in a specific version, namely:

Grievance Legal Moralism: A political community is entitled to enact and enforce only grievance morality.

This is a form of the restricted thesis because, as noted above, he believes that grievance morality is just one department of morality. However, we must refine this one step further, for Feinberg holds that the contours of grievance morality are defined by the harm and offense principles as he meticulously articulated them. Thus, he gives his

liberalism the precise shape of grievance legal moralism as defined by the harm and offense principles. Thus the pivotal point of disagreement between Feinberg's liberals and their opponents concerns the scope of legal moralism; it is not a disagreement about the feasibility, cost-effectiveness, or ultimate justification of criminalization of any particular form of social behaviour. Feinberg, at least early on, accepts the view that moral arguments for and against use of the criminal law must pass through a kind of filter: political communities have moral standing to consider only those arguments that meet the test of the harm and offense principles.

This way of setting up the enforcement-of-morals debate forces us to ask two questions of the Feinberg's liberalism that are rarely asked: (1) Why accept the moral entitlement thesis? This first question is relatively simple and easy to answer and in answering it, Feinberg, like Mill before him, thinks it is intuitively obvious that MET is true, and since it is common ground between him and his conservative opponents, he does not feel the need to spend much energy defending it directly. (2) Since there is logical space for a number of alternative versions of restricted legal moralism, why restrict it to grievance morality, and in particular to the harm and offense principles? It is as well the case that Feinberg does not directly address this second question but answer to the question is available in the resources that Feinberg provide. To this question therefore we shall begin our case against Feinberg.

Feinberg's answer to the second question is better explained by a distinction philosopher have come to make between principled and unprincipled criminalization on the one hand and critical morality and conventional morality on the other hand. Principled criminalization is the claim that criminalization should be based on some distinct principles that are not only transcultural but are also universally acceptable. Unprincipled criminalization on the other is the contention that such principles assumed by principled moralists and not just necessary but are epistemologically untenable as individual law makers are socially located and can only legislate based on knowledge available to them

in their social context. In other words, advocates of unprincipled criminalization argue that legislators as socially situated individuals should be free, unconstrained by principles to confront criminal challenges as they arise in the society.

Like principled criminalization, critical morality is the assumption that certain moral principles are transcultural, that is, are not constrained by social contexts but are universally applicable and acceptable by people everywhere. Advocates of this view, see critical morality as the true morality. Contrary to critical moralists, conventional morality is the view that morality is socially and culturally bound/situated such that contrary to the claim of critical moralists that certain moral principles are universally meaningful conventional moralists think that moral principles make meaning only within social and cultural contexts.

The famous debate between H.L.A. Hart and Lord Devlin was about principled and unprincipled criminalization. Hart argues that there was no principled justification for criminalizing many of the activities that Lord Devlin advocated criminalizing, such as homosexuality or prostitution. Hart thus advocates for principled criminalization, which he suggested would be criminalization that could be justified by pointing to critical moral standards. He took the view that culpable harm provided a critical moral justification for criminalization—that is, a justification that is universally right.[14]In the same token, Joel Feinberg refers to critical morality as true morality, which according to him is "a collection of governing principles thought to be 'part of the nature of things,' critical, rational, and correct."[15]Like Hart also, Feinberg asserts that a positive justification for criminalization is only valid to the extent that "it is also a correct rule of morality, capable of satisfying a transcultural critical standard."[16]

5.1.3. The Conventional Nature of Law

In the preceding subsection, we see how Feinberg attempts to limit criminalization by arguing that only critically or universally normative or objective moral accounts of harm

and offence can be employed to justify penal censure. The point here is that Feinberg and other critical moralists[17] seem to take the view that deep personal conviction or practical reasoning allows moral agents to identify objective or normative accounts of harm and offence. However, this identification is experientially unsustainable because many conventional harms impact real victims in social contexts. The best that we can do is to scrutinize our conventional conceptualizations of harm and offence, but that scrutiny is constrained by the limits of epistemological inquiry and our capacity for rationality at any given point in time. Many acts are criminalizable because they violate social conventions that are shareable by communally situated agents. This is the case because moral agent is nothing greater than a communally situated human being. In other words, if practical thinkers are merely communally situated human beings trying to solve conventional conflicts, then it is fairly clear that it is impossible for such creatures to identify fully "correct" accounts of harm, offence, badness, goodness, rightness, wrongness, and so forth. Standards identified by human thinkers cannot be truly correct because it is impossible for us to know whether a standard is truly correct.

Furthermore, in practice all reasoning (notwithstanding the belief of some commentators that these standards are mind-independent) is influenced by societal evolution, convention, and human biases. The human mind is not a computer! It is not possible to claim that certain conventional wrongs are truly wrong, bad, or harmful in a transcultural sense, but principled justifications can be supplied for criminalizing many conventionally contingent wrongs. There is no doubt that intersubjective deliberation will give us better results, but it cannot tell us whether a particular moral standard is correct.

The point this dissertation is striving to underscore here becomes clearer if we realize that criminalization is a process of labeling certain actions as punishable by the State in order to solve social conflicts and problems with cooperation that arise in competitive plural societies.[17]As such constraints, such as those of harm and offence, are only objective to the extent that there is deep conventional agreement about what constitutes a punishable

harm and offence. However, once we get into territory where there is disagreement about what ends are inter-subjectively shareable by all communally situated agents, a principled case for criminalization is difficult to identify. Furthermore, it is almost impossible to identify a critical moral account of criminalizable harm and offence. At the inter-jurisdictional level there is deep agreement about the badness and wrongness of acts that result in primitive harm, such as gross physical harm (e.g., biologically painful harms such as starvation, blinding, amputation, and torture). Beyond those primitive harms, however, agreement is totally contingent on jurisdictional and cultural conventions. On this ground, following Bentham who highlights the conventional nature of property in the following phrase, "Property and law were born together, and would die together," one can say that Conventional harms and offence and conventions are born and must die together.[18]

Consequently, many criminal laws are codified and deeply held conventional commands, such as laws against rape, assault, murder, theft, fraud, and so forth. A given criminal law will have authority regardless of whether it serves a legitimate purpose, but the criminal law as a general institution of social control will retain its legitimacy and authority only if the bulk of its commands are understood as principled—that is, understood to be fair in accordance with our conventional understandings of justice and fairness. It is not possible to state the cut-off point in numerical terms, but if more than fifty percent of a given state's laws served no legitimate purpose (that is, some goal that is understood to be legitimate by communally situated moral agents), or were unjust and draconian, then the result might be revolution. For instance, most people in Nigeria would not tolerate jail terms of fifty years for shoplifting. People can also be socialized so as to tolerate the criminalization and punishment of harmless wrongs such as kissing in public. The majority in a given community might not see this as being draconian. For instance, while a couple kissing in the streets of New York or London can hardly be noticed, it is a jailable offence to kiss (even a peck on the cheek) in public in Dubai.[19]

We have deep conventional understandings about the trivial nature of the harmfulness of shoplifting and therefore do not see lengthy jail terms as a necessary government response. When the bulk of a state's laws, whether they are private laws or public laws, serve some legitimate purpose (purposes that are conventionally understood and accepted as legitimate), the law in that state will retain its posited authority. Although there are many perceivably unjust criminal laws that serve no legitimate purpose,[20] the bulk of jailable offences in Nigeria do seem to be aimed at genuine wrongs. Even many apparent *malum prohibita* crimes such as prohibitions concerning parking cars (laws allowing for fair use of public spaces) and rules about which side of the road to drive on (laws facilitating the free and safe movement of people) serve the well-being and advancement of humanity by allowing for the benefits of co-operative living to be realized.) Arguably, many unjust laws retain their authority because the general institution of criminal law and punishment retains its authority.

5.1.4. The Vacuity of Feinberg's Harm and Offence Principles

Feinberg suggests that an objective account of harm offensiveness can be discovered and therefore can provide a critical moral justification for or against criminalization. Nevertheless, the harm and offense principles themselves are conventional constructs, and conceptualizations of harm and offense depend on convention too. Also, Feinberg claims that culpable harm and offense provides a critical moral justification for criminalization. The problem with offensive conduct and harms is that there is no deep or constant (intersubjectivity shared) agreement about the badness or wrongness of such acts. Many examples on this abound but nudity in ancient art, movies, and modern art, might be sufficient for tentatively claiming that exhibitionism has not been constantly considered to be bad, harmful, or wrong.

The contention therefore is that we are able to draw on our deeply held conventional understandings of harm and offensiveness (including our scientific and biological accounts of harm and bad consequences—in addition to conventional understandings

about privacy and autonomy in modern society) in order to formulate a case either for or against criminalization. We may change our minds about what is, harmful, and offensive depending on the social context. Hence, our conceptualizations of harm and wrong depend on conventional understandings of harm and on socialization. We may therefore claim that something is objectively harmful within a certain conventional context, but this is entirely different than claiming that something is bad or harmful in a transcultural critical objective sense.

It might be argued that for the most part, at the most basic level all societies have similar conventional understandings about the badness, wrongness, and harmfulness of conduct such as genocide, murder, starvation, torture, and so forth. Such understandings have emerged because humans have drawn on basic biological information, human instincts, and evolving social norms to solve conventional conflicts. Transculturally, there are shared understandings about the badness and harmfulness of fairly primitive harms such as wantonly amputating another's hand. For instance, in some countries the justification for chopping off a thief's hand for shoplifting hinges on an understanding that it is bad and harmful to wantonly amputate a person's hand. It is because hand amputation is understood to be bad and harmful that it is used as a punishment rather than a reward. We do not know of any state where the conventional understanding is that hand amputation is good and thus should be used as a reward. The same might be said for the death penalty. There is no transcultural disagreement about death (capital punishment) or hand amputation as bad and harmful. Rather, the disagreement is about whether such punishments are proportionate or necessary given our respect for humanity and life.

However, this does not mean those acts are truly harmful or offensive in a critical moral sense as Feinberg would have us believe. Empirical information (i.e., biological, scientific, and medical explanations of pain and damage) and our conventional understanding of pain, hurt, and culpability, are more than sufficient for providing an objective account of the harmfulness of wanton hand amputation; this alone, however,

cannot be used to prove that it is objectively harmful in a critical moral sense. Rather, it is conventional agreement about the harmfulness and offensiveness of certain acts, such as murder, that provide a principled-harm argument for outlawing it. This provides a strong conventionally objective case not critical moral case for outlawing such wrongs. That is why Ashworth's claim that the criminal law has been influenced by the political demands of the day is beyond dispute, and unless we can identify appropriate conventional moral constraints, it might be impossible to have a principled criminal law.[18]

J. L. Mackie made a case for this conventional moral objectivity within the context of his discussion of the problem of justification of retribution. According to him:

> In this lies the solution of our paradox of retribution. For what we have sketched is the development of a system of sentiments (which, through objectivization, yield beliefs) which from the point of view of those who have them are both originally and persistently retrospective. They are essentially retributive, essentially connected with previous harmful—or, occasionally, beneficial—actions. When we seek to rationalize our moral thinking, to turn it into a system of objective requirements, we cannot make sense of this retrospectively. We either, with the utilitarians, attempt to deny it and eliminate it or to subordinate it to forward-looking purposes, or, with their retributivist opponents, try various desperate and incoherent devices, none of which, as we have seen, will really accommodate the principle of desert within any otherwise intelligible order of ideas. But if we recognize them simply as sentiments—though socially developed sentiments—we have no difficulty in understanding their obstinately retrospective character.[19]

In addition, Feinberg is particularly critical of Lord Devlin's positive morality[19]but it is not clear that Feinberg's offence principle rests on anything more than positive or conventional morality. Feinberg does not explain why culpable offence-doing is inherently wrong in a critical moral sense rather than a conventional sense—or why

standards cannot be developed from conventional morality to provide principled justifications for criminalization. If the harm and offence principles do not provide critical reasons for constraining criminalization, then it might not be possible to distinguish Feinberg's justifications for criminalization (culpable harm and culpable offence) from those of Lord Devlin. Consequently, we will be right to argue that both Hart and Feinberg were wrong to assume that there is a critical moral type of harm and offensiveness and a conventional moral type of harm and offensiveness. We take the view that what Feinberg calls culpable critical moral harm and culpable critical moral offence only provide conventional justifications for criminalization.

The point here is that the meta-ethical foundations that he claims for his harm and offence criteria are open to question. Feinberg promises a normative conception of wrong distinct from the positive one upon which Lord Devlin relies, but "offence to others" delivers a conception that is indistinguishable from a merely positive one. If harm or offence is anything that a person *subjectively* perceives to be harmful or offensive, then Feinberg's principles are vacuous. To counteract this possibility, Feinberg argues that the harm or offence must be objective or normative. Feinberg seeks to base his harm and offence principles on objective foundations, but fails. When it comes to the offence principle, the weakness of Feinberg's critical objectivity claim is most evident.

The implication of the foregoing analysis is devastating for Feinberg's liberalism. In the main, if we are correct in our claim that the understandings of harm and offence are conventionally constructed and as such can vary according to society and time, it follows first of all, that Feinberg errs in his assumption that that there are critical moral principles that are universally and transculturally applicable. Secondly, since basically, our notions of harm and offence are both socially and culturally constructed it follows therefore by Feinberg's own admission that the function of deciding for or against criminalization is the duty of the society. As such it is also the responsibility of every society based on their peculiar experience to determine what should proscribed by the criminal law. On this

account the society, based on what it considers good and wrong can decide collectively to use its own evolved principle(s) discourage behaviour it thinks is inimical to its collective wellbeing and encourage behaviour it thinks promotes human flourishing.

Therefore, if Feinberg and countless other liberals want to dismiss Lord Devlin's positive morality, then they must show why their accounts are different. Furthermore, Feinberg's claim that only critical moral conceptualizations of harm and offence provide principled justifications for criminalization, is nonsensical because he has not shown why his accounts of harm and offence are critical. As we shall show latter, conventional harms and offence, as identified inter-subjectively by communally situated deliberators, is sufficient to scrutinize criminalization decisions and to identify a principled case for criminalization.

5.1.5. The Intrinsic Link between the Offense Principle and Harmless Wrongdoing

There is a logical link between offensiveness and harmless wrongdoing that if one endorses anyone of these principles, he has implicitly accepted the other. Unfortunately, Feinberg does not only not seem to notice this mutual interconnectivity and logical interdependence, but also thinks that he can consistently legitimize one and delegitimize the other as liberty limiting principles. Let's highlight this oversight. With some plausibility, Feinberg insists that no plausible liberal position can entirely ignore significant cases of offense—either major nuisance or matters of profound offense. He carefully circumscribes his offense principle, of course, but recognizes that even if no serious setback of legitimate interests is caused, certain kinds of offensive behaviour are properly regarded not merely as a free-floating evil but as wrongs done to the victims—offense evils directly suffered by specific persons. "Their victims are wronged even though they are not harmed."[25] Thus, by adding the offense principle to the liberal position, Feinberg's moralism already admits some harmless wrongdoings.

The contention therefore is that Feinberg fails to account for why some actions are considered offensive. He does not answer the question on why people take offense with

some behaviour. That is, whether offensive actions are considered offensive and therefore criminalizable because they are wrong or the fact that they are offensive is what makes them wrong.

Feinberg's claim on this is that the cases covered by public decency laws—e.g. a husband and wife stripping naked in a crowded public park—are like the nuisance cases because we think that there is nothing wrong with the couple's nudity in private. It is wrong only because it occurs in circumstances where it is likely to disturb (embarrass, disgust, distract, cause unwilling voyeurism in) others, interfering with their own use of the park. Its offensiveness is what makes it wrong rather than its believed wrongness making it offensive. Robert George and Larry Alexander rightly argue that this is a mistake. The only reason why public nudity (copulation, urination, etc.) offends is that it is thought to violate a moral norm. The norm in question forbids the acts only when done in public, but it forbids them whether or not they produce offense in nearby spectators. Thus, Alexander claims, "eliminate the norms and you eliminate the offense."[26]George says:

> 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.[27]

George and Alexander suppose that the offense occasioned by public nudity is in some people parasitic on their belief that conservative sexual norms are true. If this is true as we believe it is, then Feinberg's offense principle fails to capture the reasons why these individuals support public decency laws. The implication therefore is that Feinberg does not appreciate the pervasive influence of socialization on morality and by extension criminalization. This explains the reason why he thinks it is possible demarcate offense to others and legal moralism the way he does but we have shown this demarcation is not logically consistent.

5.1.6. A Case for Legal Paternalism and Legal Moralism

Feinberg substantially changed his view regarding the *status* of his harm and offense principles relative to the global legal moralist principle in the course of writing *The Moral Limits of the Criminal Law.* In its initial volumes, Feinberg seeks to determine the *legitimacy* of the exercise of political power.[28] "Liberty limiting principles" state reasons that a political community could *legitimately* use to ground proposals to interfere with individual liberty. While legal moralism in its global version treats any recognizable and valid moral reason as a legitimate ground, liberalism is seen as restricting legal moralism to reasons recognized by the harm and offense principles. Liberalism also rejects paternalism, which recognizes harm to the agent as a legitimate ground of interference with the agent's liberty. On this view, the harm and offense principles alone determine the political community's legitimate "business"—what falls within the scope of its authorized concern.[29]

In the concluding volume, however, Feinberg backs off this view, abandoning the thesis that the harm and offense principles exhaust the class of morally relevant grounds for criminal law[30] harmless immoralities are no longer always irrelevant to the debate over criminalization of behaviour. He replaces talk of "legitimacy" of reasons with talk of their "goodness." Non-grievance evils (both free-floating and paternalistic) are regarded as relevant to questions of criminal prohibition of conduct that causes or constitutes them, he maintains; there is "room to entertain" them but, he adds, they are hardly ever good reasons and *never decisive* reasons for doing so. In contrast, he claims that prevention of harm and offense are always good and often decisive reasons for interference.[31] He concludes that in (almost) every case, it would be mistake for a political community to rely on free-floating evils or harm to self as grounds for criminal legislation.

But his view of the nature and basis of this exclusion is very different in the concluding volume. They have standing in public deliberations about the scope and direction of criminal legislation, but in most cases, we can dismiss them as insufficient because they

almost always lack the moral weight to contend against considerations of personal autonomy and individual interests. Because considerations of grievance morality generally outweigh other moral considerations when it comes to enforcing morality, we can comfortably reject global legal moralism and embrace grievance legal moralism, subject to those few exceptions in which a free-floating evil presents a morally compelling case for criminal prohibition.

Feinberg makes this adjustment largely in response to two powerful counterexamples to the liberal position he defends in the earlier volumes of *Moral Limits.* The two counterexamples are: (1) the *malicious conception* case, suggested by Parfit, in which a woman intentionally or recklessly conceives a child knowing it will be condemned to a life of suffering and severe disability but that is still in some sense worth living; and (2) Irving Kristol's chilling *gladiator contest* in which volunteer gladiators fight to a gory death, urged on by a ticket-holding crowd of thousands.

Irving Kristol for example, invites us to reflect on the spectacle of paid professional gladiators fighting to the death before a throng of enthusiastic New Yorkers thirsting for blood in Yankee Stadium. Consenting adults all, the New Yorkers, the popcorn vendors, the huge national closed-circuit television audience, and even the gladiators, ask only to be left in peace to pursue their "harmless· amusements." Thanks to the closed circuit television revenues, the loser's heirs will receive ten million dollars. For that kind of money, not a few people will probably enter the arena quite willingly. Whatever the resulting harm to the slaughtered gladiator and the maimed survivor, the evil is a non-grievance one for those who voluntarily undertake the risk. Moreover, this evil is not welfare-connected. The gladiators share the view that they are made better off by the prospect of ten million dollars and a blaze of macho glory than they would have been by the prospect of increased longevity. The liberal doctrine of the absolute priority of personal autonomy, which Feinberg endorses, requires that we accede to the gladiators' judgment on this matter. On Feinberg's analysis, this spectacle is a multi-faceted free-

floating evil. Besides the physical evil to which the gladiators voluntarily propose to subject themselves, there is the voyeuristic evil committed by the spectators, and the economic exploitation undertaken by the promoters. How is the discomfited liberal supposed to respond to this morally repulsive tableau?

At the outset of *Harm to Others,* Feinberg adopts a position which I will call *bald liberalism*, asserting his ambition to establish that "the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions. Paternalistic and moralistic considerations, when introduced as support for penal legislation, have no weight at all."[32]In Harmless Wrongdoing however, has quite self-consciously abandoned this project in favour of two less ambitious alternatives which he labels bold liberalism and cautious liberalism. Feinberg the bold is a toned-down version of Feinberg the bald liberal. The bold liberal declares that the harm and offense principles provide the only *good* reasons for criminalization of some activity; paternalistic and moralistic considerations are always trivial (but not non-existent) by comparison.[33]

Feinberg the bold liberal dismisses the troublesome features of the gladiator case by arguing that it is disturbing only because of the prospects for unconsented-to indirect harms: the effect when the barbarous mob in Yankee Stadium is unleashed on the innocent citizens of the Bronx. If Kristol argues that we should assume instead that the carnage in Yankee Stadium serves as a beneficial cathartic outlet for pent-up neuroses afflicting New Yorkers, Feinberg the bold liberal will reply that the example has now lost most of its force, and we can in fact tolerate such abhorrent behavior.[34]However, it is obvious that the moral suasion of the gladiator example do not hinge on the welfare of the denizens of the Bronx. Cathartic or not, the image of fans in Yankee Stadium drooling over the prospect of live gore is quite appalling enough in its own right. This reduces us to Feinberg's second alternative, cautious liberalism, under which Feinberg is prepared to concede that moralistic considerations might occasionally, albeit very rarely, provide

good reasons for criminalization. Feinberg the cautious liberal will concede that the conflict between preserving liberty and preserving morality is a close call in Kristol's gladiator example. Feinberg then seeks some comfort in the observation that this case is merely hypothetical. Real life cases of free-floating evils, Feinberg claims, are much tamer stuff. Those who advocate the prohibition of prostitution, obscene books and the like are making mountains out of moral molehills.[35]

Feinberg himself seems to be tom between cautious liberalism and bold liberalism. However, the logic of his reasoning in *Harmless Wrongdoing* makes the cautious variety Feinberg's only viable option, and that real-life examples analogous to Kristol's fictitious one is readily available. Although cautious liberalism should be no source of embarrassment for the liberal, it is nonetheless a major concession to the moral conservative. For now, there is a new agenda: just how many exceptions to the harm principle are we inclined to permit? Devlin would say that the battle has already been won with Feinberg's concession.

These intuitively troubling cases challenge the liberal claim that the moral considerations they bring forcefully to our attention must be filtered out of our public deliberations about whether to prohibit and punish such behaviour. It is a tribute to Feinberg's intellectual integrity that when he was unable honestly to dismiss these rare cases of intuitively legitimate if not fully justified criminal interference, he moderated his earlier statement of the liberal position so as to recognize their force.The theoretical price Feinberg was willing to pay to accommodate our intuitions in these cases, however, was high. He did not merely weaken his liberal position just enough to admit these very rare cases; he *abandoned* the liberal project of drawing a line on a principled basis between those considerations that may ground criminal interference with individual liberty and those that may not. This is no merely marginal adjustment; it is a change that goes to the heart of the liberal project as Feinberg (following Mill) and many others have understood it. No longer may Feinberg's liberal talk of society's jurisdiction being limited to grievance

morality, for on Feinberg's account, *all* of morality falls within that jurisdiction, just as it does for the global legal moralist. Feinberg's adjustment committed him, in effect, to global legal moralism.

He may disagree with others about the moral significance of non-grievance evils, but that is a disagreement globalist have all along recognized. The point has always been that resolving *that* disagreement is the only game in town. The liberal position Feinberg earlier defended sought to change the game; his late shift in position put him back in the globalists' game. This shift did not commit him to illiberal support for the intrusion of the criminal law into our lives, of course, but then, nor is Devlin committed to such a view. Devlin just argues, with Feinberg's agreement, it now appears that considerations of various kinds of free-floating evils cannot be ruled out of discussion. Devlin may be right after all; maybe liberal limits on the deployment of the criminal law must be argued out publicly strictly on their merits.

5.1.6.1. Consensual Cannibalism

The main counter-instance which inspired this dissertation and by extension convinced us that Feinberg's anti-paternalism is basically flawed is the case of consensual cannibalism. We believe that the plausibility of hard-paternalism is bolstered by a real case of consensual cannibalism and other bizarre (but real) cases of self-sanctioned harm. The story of consensual cannibalism is presented here as a model example of these self-sanctioned harms that pose serious challenge to Feinberg's liberalism.

Armin Meiwes had fantasized about eating human flesh since he was a young German boy. After his father left him to be raised by his mother, Meiwes would imagine that he had a younger brother whom he could consume, he said, "to become part of me."[36]In 2002, at the age of 39, and two years after the death of his mother, Meiwes took steps to bring his fantasy into reality. After collecting graphic images from the Internet, he placed an on-line advertisement for a "well-built man, 18-30 years old, for slaughter."[37]Four hundred thirty people answered his ad. While most were interested in role playing rather

than actually becoming a meal, some were serious. Of the serious respondents Meiwes rejected two because neither was the kind of man he wanted to eat. Alex from Essen wanted to be beheaded and then have Meiwes eat him, but Meiwes declined Alex's offer because Meiwes thought he was "too fat."[38]Matteo from Italy told Meiwes that "he wanted me to burn his balls with a flamethrower and hammer his body down with nails and pins while he was whipped to death." But Meiwes rejected him, because, as he later publicly explained, "I found that a bit weird."[39]

Other would-be victims backed out of their agreements. Meiwes described a man named Andreas who "wanted me to pick him up in a cattle truck and slaughter him like a pig." After meeting, Meiwes reported that, "I wrapped him in cling-film ready for slaughtering. But he backed out so we drank some beer and ate some pizza and he went home."8 In the case of Jorg Bose, Meiwes strung him up on a pulley, but as Meiwes later recounted, "his ankles hurt. We tried again. I put on my steel-capped boots and taped it on video. I found the video particularly beautiful." In the end, however, Bose wanted to leave rather than be slaughtered, and Meiwes let him.[40]Another would-be victim, Dirk Moller, also changed his mind. Moller came to Meiwes' house where Meiwes chained him to a bed and stuck pins in his body to mark out his liver, kidney, and other organs. Moller, however, began to get cold feet, and they went to see the movie *Ocean's 11*. When they returned Meiwes showed Moller the video he had made of Bose suspended naked on a hook. At that point Moller retracted his offer, deciding that merely fantasizing about being eaten was enough.[41]

One respondent did not back out. Bernd Juergen Brandes was a forty-three-year-old computer engineer with a fetish for being bitten, especially on his penis. He had previously gone as far as offering his boyfriend 10,000 deutschmarks to bite his penis off.[42]When he saw Miewes' ad he wrote back, "I hope you are serious because I really want it. My nipples look forward to your stomach…"[43] After talking with Miewes on the phone, Brandes wrote out his will, had it notarized, told his boss that he was taking the

day off “to attend to some personal matters,” and bought a one-way ticket to Meiwes’ hometown.[44]When Brandes arrived at Meiwes’ home, Meiwes showed him the special room he had constructed to slaughter people. Meiwes captured the events that followed on videotaped. At Brandes’ request Meiwes cut off his penis, and then cut it in half so they could share it. They tried to eat it, but they failed. Uncooked they found it “too tough,” and when Meiwes tried to cook it, he burned it so badly they both found it inedible. Brandes retired to a bath after telling Meiwes that if he was still alive in the morning maybe they “could eat his balls together.”[45]He bled in the bath for eight hours while Meiwes went to another room to read a *Star Trek* novel. When Meiwes returned at 3:30 a.m. Brandes was unconscious. He removed him from the bath, told him, “I can’t do anything else,” and stabbed him repeatedly in the neck.[46]He would consume about 20 kg of Brandes’ body and use one of Brandes’ feet as a table decoration before being arrested. In Meiwes’ first trial the prosecution argued that he should be convicted of murder. Meiwes’ defense attorney argued that his actions were really a case of mercy killing because the victim consented to the act. The original trial court found him guilty of an intermediate offense, “killing on demand,” a crime akin to manslaughter. The conviction was later overturned because a higher court found it too lenient, and Meiwes was found guilty of murder.[47]

Most readers will undoubtedly find the above case disgusting and disturbing, and think that it ought to be illegal to kill and eat someone, even if they consent. We might also think that it is a straightforward problem for Feinberg’s liberalism; if liberalism is not concerned about preventing harm people do to themselves, or sanction having done to themselves, it would appear that liberalism would have to grant Brandes a “right to be eaten.” While Feinberg never discussed consensual cannibalism, it is clear that he would not have argued for such a right. He supported laws that prohibited voluntary slavery, duelling, and consensual killing. The case of voluntary slavery is particularly a difficult one for the liberal. When J. S. Mill considered the case, he abandoned his principled opposition to paternalism and argued that in this special case individuals had to be

protected from themselves. Feinberg, however, thought that the move to paternalism was unnecessary. His main argument focused on the difficulty of establishing voluntariness. How do we know if the would-be slave's desires are voluntary? Demanding simple consent will often be insufficient because coercive forces can easily sway choices. Even if we set up a complicated procedure to test for voluntariness Feinberg wonders if it wouldn't be fallible or cause harm to others through its sheer cumbersomeness and expense. Thus, the legal machinery necessary to determine voluntariness could be so problematic that the state might legitimately exclude all such contracts. So Feinberg believes that the liberal can ban voluntary slavery without giving up her objections to hard paternalism.

It would seem natural for Feinberg to make a similar response to the case of consensual cannibalism. Thus, he might say, while there is no valid legal objection to consensual cannibalism in principle, it would be too difficult, cumbersome, and/or expensive to determine that individual cases of cannibalism were truly consensual. While the prohibition may look paternalistic on its face it is really based on concerns about voluntariness and the harm to others principle. There certainly is some merit to this argument. Trying to determine whether a person really wanted to be someone's meal would be difficult. We would need to make sure that the individual was not under the influence of coercive forces, or under the influence of delusion. In general, we would need to make sure that the decision was really his and in real cases this could be complicated. Because of its complicated nature we might never be assured that we could develop a reasonable principle to establish voluntariness and hence make the practice illegal on principle. This as goes is yet again another case where Feinberg accepts though grudgingly, that his liberalism in general and anti-paternalism in particular are dogged by counter-instances that render them not only logically inadmissible but also experientially narrow.

5.1.7. Conventional Account of Criminal Prohibition

To navigate through the problems that dogged Feinberg's liberalism there is need to answer this question, what are the moral aims of the criminal law? The object and function of law generally is not too different from that of conventional morality. Mackie provides a superlative précis of the function of morality and its relation to law:

> Protagoras, Hobbes, Hume, and Warnock are all at least broadly in agreement about the problem that morality [and ultimately law] is needed to solve: limited resources and limited sympathies together generate both competition leading to conflict and an absence of what would be mutually beneficial cooperation.[48]

Mackie also explains that:

The essential device for creating society and co-operation is a form of agreement which provides for its own enforcement. Each of the parties has a motive for supporting the authority that will himself have the job of punishing [or awarding private law remedies such as damages, injunctions, and so forth] breaches of the agreement (and will himself have a motive for doing so). Consequently each party will have a double reason for fulfilling his side of the bargain: the fear of punishment [or having to pay damages, for example] for breaking it, and the expectation of benefits from keeping it, because the fulfillment by the [majority of] other parties of their sides of the bargain are fairly well assured by the same motives.

Consequently, whether we are talking about morality by agreement[50]or the social contract more generally,[51]there is ample empirical evidence to support the claim that society is formed by some kind of agreement and also that some individuals will not keep their side of the bargain in such a big web of complex agreements and inter-agreements. Consequently, informal moral commands are codified into law so that violations will be deterred with punishment or private law remedies. We benefit from aviation,

telecommunications, university education, and travel; that is, from property, and services, and the laws that are designed to regulate the fair distribution of such goods and services. It is in these areas that the law is also needed to prevent harm to others. For example, health and safety standards, and regulations against fraud and deceptive practices, are designed to reduce harm. Since the State and its institutions advance co-operative living and, ultimately, human flourishing, each individual has an interest in maintaining them.

Raz notes that law serves a number of social functions including the prevention of undesirable behaviour mainly achieved by enacting criminal and tort laws through the provision of facilities and mechanisms to allow private arrangements to be regulated and protected between individuals; through the provision of services and the redistribution of goods; and through the provision of facilities for solving unregulated disputes.[52]Since society is necessary for the advancement and well-being of humanity, it is maintained both directly and indirectly by law. Laws cover many areas because of the complexity of modern living. We have criminal law, contract law, family law, trust law, consumer protection law, tort law, environmental law, tax law, and so forth. Tax law, for example, has both a direct and indirect impact. It forces individuals to hand over a portion of their income, but that income is spent on communal infrastructure. Tax law allows revenues to be collected in a transparent way so that the public may benefit indirectly from the provision of universities, schools, roads, courts, police, welfare for the poor, and so forth. The provision of these services reduces conflicts that might arise from the extreme distribution disparities that flow from inability.[53]

Based on this conventional nature of law, principled criminal laws should be formulated by drawing on rationally constructed principles of justice, that is, principles that have evolved from deeply held conventional understandings of justice and fairness. Principles of justice such as the harm principle, the autonomy principle,[54] the culpability principle,[55]and the equality principle, among others have been developed and constructed by humans, and have improved as humans have gained better insights. Of course,

accounts of harm will vary given the limits of epistemological inquiry and of human rationality. Human agents invent crimes to manage conventional conflicts that arise from communal living. Criminal law is a system of social control that allows a given community to manage itself.[57]It is used to manage genuine conflicts, but unfortunately, also to criminalize conventionally harmless wrongs and to control less powerful groups in society.[58]

Criminal laws that proscribe wrongs that are not harmful, or do not violate the autonomy of others, are unprincipled. For example, the acts referred to by Lord Devlin are not conventionally harmful or oppressive to the autonomy of others because even conventional accounts of harm and wrong cannot explain how consenting adults engaging in homosexuality or prostitution could harm or violate the autonomy of others. Lord Devlin does not run into error by suggesting that without criminalization of these acts, society would disintegrate, but rather he runs into error by postulating that certain *harmless* violations of conventional norms would cause social disintegration and thus should be criminalized. There is no empirical support for his claim that activities such as homosexuality or prostitution would cause the same type of social disintegration that would transpire if wrongful harms such as murder, rape, theft, and robbery, were not criminalized. Rational deliberators should draw on the best social information available—including deep conventional understandings of justice, harm, privacy, autonomy, and so forth—when making criminalization determinations.

The evolution of criminal law has often been shaped by unjust considerations because of lawmakers who were not sufficiently enlightened and rational at various stages in our history to understand the injustice of some of their decisions. In the sixteenth and seventeenth centuries, the masses lacked the context to understand that humans could not really be witches, and therefore many women were criminalized for allegedly engaging in witchcraft. As ADJ MacFarlane notes, two observers from the time, Sir Thomas Browne and William Perkins, expressed the belief that even if an illness was explicable by

medical theory, it might still originate in the evil will of another person. Here they were making the distinction between a cause in the mechanistic sense — *how* a certain person was injured — and cause in the purposive sense — *why* this person and not another was injured. When people blamed witches, they did it not out of mere ignorance, but because it explained why a certain misfortune had happened to them, despite all their precautions; why, for example, their butter did not 'come'.[59]

We no longer criminalize witchcraft as we have sufficient empirical information to be able to rationally understand that humans cannot have supernatural powers. The issue of objectivity, even in the limited conventional sense, is fundamental as it can explain the wrongness of actions such as genocide, murder, rape, and so forth. Reason allows intersubjective thinkers to see that the gross physical harm-doing involved in culpable genocide is objectively bad and wrong, regardless of the context or circumstances. Conventionally, it is understood as a gross and wanton abuse of human life. The same deliberator would also understand that the wrongness of exhibitionism is conventionally contingent—to ascertain its badness and ultimately its wrongness, the deliberator also has to consider the underlying social norms that inform it.

Wrongness grounded in critical morality is *inherent* wrongness—that is, those wrongs that are truly wrong. Objectivity here, claims that the proposition "*X* is wrong" is an absolute truth. Wrongness that is supposedly discovered as a truth (ethical wrongness grounded in moral and epistemological realism) is distinguishable from wrongness that is derived from communally situated agents inter-subjectively reflecting on evolving standards of justice. The latter considers how your culpable actions will impact the interests of others in certain social contexts. The union of bad acts and consequences with culpability, as it is conventionally understood, is sufficient for establishing wrongness and thus a conventionally objective case for criminalization. This case for criminalization may not be objective in a critical moral sense, but it may be the best that we can do. A communally situated moral agent can act rationally and can be a detached observer who

is appraised of the principles of justice that have evolved (such as the harm principle, the culpability constraint, and so forth), and the relevant social facts and conventions; and thus this agent can be in a position to reason and understand that certain culpable actions are wrong and worthy of punishment.

The conventional account is more constructive in criminalization ethics because it allows the theorist, philosopher, politician, and citizen to draw not only on abstract concepts such as justice, autonomy, harm, fairness, equality, and humanity that have been thought about and developed by thinkers for generations, but also empirical information, context, convention, social practice, and so forth, in order to formulate practically useful guiding principles for constraining unjust criminalization in competitive societies. The reflective endorsement approach is about applying the criminalization label to violations that humans can reason are wrong because of their impact on genuine human interests in organized, cooperative, coordinated, and civilized societies. The constraints against unprincipled criminal law might include criteria such as harm and culpability. Critical moral accounts of harm and offence proposed by Feinberg differ from conventional morality in that such harms are always harms regardless of the time or context.

The most extreme form of Feinberg's objectivity or normativity come from his moral claim that certain actions are wrong in a mind independent way—that is, wrong regardless of whether there are humans (including socially conditioned humans) available to conceptualize their wrongness. As Nicholas Rescher puts it:

> The issue of "objectivity" in the sense of mind-independence is pivotal for realism. A fact is *objective* in this mode if it obtains thought-independently—if any change merely in what is thought by the world's intelligences would leave it unaffected. With objective facts (unlike those which are merely a matter of intersubjective agreement) what thinkers think just does not enter in—what is at issue is thought-invariant or thought-indifferent.[60]

However, it is nonsensical to argue that the consequences of death, physical pain, or harm are bad consequences in thought independent terms, not only for humans but also for animals, trees, and all life forms on the planet. The ontological idea that the consequence of death or physical harm to a life form really would exist, and would in fact be bad in strong mind-independent terms, is oxymoronic because it relies on human preconceptions of the "what if". The bad consequences that would allegedly exist independently of human thought, such as an earthquake wiping out a species, are only bad according to a human conceptualization of "bad".

Feinberg's realist claim is that it is not that this would not be bad without humans, but that it would exist as something different. Maybe it would have a different label, but it would be the exact same physical set of events. Furthermore, wrongness is a human construct that rests on culpability (*mensrea*)—that is, human intentions. Animals instinctually avoid harm and death. Even if humans did not exist and could not conceptualize a snake biting and killing an elephant, merely because it erroneously feared that the elephant was going to stand on it, the death of the elephant would exist. However, the snake cannot be culpable. Thus, it can harm the elephant (harm as conceptualized by humans) but it cannot wrong it, because it cannot *know* any different. Putative self-defense might justify a human acting as the snake did, but a snake does not have the capacity to comprehend wrongness and thus does not need to defend its actions. Likewise, a volcano might harm a species by wiping out the rainforest on which it depends for food, but the volcano does not thereby *wrong* those creatures.

Domestic cats have a tendency not only to kill birds and mice for food, but also to torture such creatures by playing with them for many hours before eating them. In some cases, the cat will not even eat the bird or mouse, but will merely use it for the fun of playing with it. When a human sees a bird or mouse being tortured as a cat plays with it, the tendency is to try to rescue the prey—especially if it is a bird—due to conventional norms about birds being good and mice being vermin. The human intervener sees the

cat's wanton use of its prey as bad. However, no one would consider punishing the cat, as rational humans realize that a cat does not have the reflective and rational capacities of a human being and therefore does not bring about the bad consequences culpably.51

Per contra, when a person intentionally aims to bring about avoidable bad consequences for others, it is the person's moral culpability and the badness of the consequences (harm to a fellow human being) that provides the lawmaker with a conventional justification for criminalization. It is fair to punish those who deliberately harm others because harm-doing produces bad consequences for those who are harmed, and the harm-doer *knows* that they are committing a wrong by inflicting such harm. It violates the genuine rights of the victims.

A more sophisticated of this realist argument is that certain acts are wrong in a mind-independent sense. Science-based ontology might be useful for claiming that biological harm such as blinding a human, amputating their legs, or subjecting them to a lobotomy, for example, is truly damaging and painful in an ontological and scientific sense, and thus bad. But how could intentional human actions (blameworthy actions, such as those involving culpability) be mind-independent? Surely the intentional harm-doing has to be carried out by a creature of human intelligence with a mind that is in operation in order for it to be willed and intended. It is our conventional conceptualization of culpability and harm that is doing all the work in these moral theories.

When a human think, plans, deliberates, and then harms others, the willed harm could hardly be mind-independent. It can only be understood as wrong if there is a human knower to grasp its wrongness. It is wrong because a creature (a human being) that has enormous intelligence, and has evolved and socialized itself for millennia, is able to draw on its intellect, rational capacity, social convention, empirical and biological facts, and conventional understandings, in order to realize the wrongness of intentionally harming others. When conflicts or clashes arise between human agents, the same intersubjective agents reflect to determine which party is intentionally, or recklessly, acting unjustly—

that is, committing a wrong. For instance, the idea of queuing for customer service is a convention that evolved to solve the conflict that would arise if everyone tried to be served at the same time. Likewise, the culpability constraint evolved aiming to bring about avoidable (culpable) bad consequences for others were different from accidentally doing so. The deliberator does not have to reflect too deeply to understand that those who fail to queue without excuse or justification act at the expense of all those who have.

To summarize the foregoing, a conventional approach acknowledges that acts are only wrong for humans if humans conceptualize them as being wrong, bad, and harmful—and that for humans to do this, they must draw on social and contextual information. Blame and fault are conventional concepts that have evolved from human rationality—that is, human reasoning about fairness and justice, and the related institutions and social practices that have evolved as humanity has become civilized and socialized.

Therefore, it is unproductive to attempt to demonstrate as Feinberg tried doing that criminal wrongs are objectively wrong in the critical sense. That is, incorporating the complex question of truth into criminalization decisions does not seem to achieve anything. Moral principles such as the harm and offence principles are instantiated in the world, but are human constructs. The culpability condition requires a mind of some kind (mind-dependence rather than mind-independence) and rationally grounded social transactions. A cat torturing a mouse is not a rationally grounded social transaction because cats lack rationality and operate outside our social milieu. Soldiers, by contrast, are rational human agents who are able to draw on principles of justice and social norms in order to engage in rational social transactions. Consequently, if a group of soldiers were to torture prisoners of war, they would be acting irrationally and would also contravene deeply held social rules about not torturing others. The soldiers have sufficient rationality and empirical information to understand the relevant social information and conventional implications of their actions so as to identify the wrongness of torture.

Even if it is possible to determine the absolute truth of certain moral propositions about the inherent wrongness of certain crimes or the metaphysical status of offending others, there are many crimes, such as exhibitionism, that cannot be explained as having truly bad consequences for all people at all times.[62]There is hardly a convincing account of the truth of the proposition that being naked in public is truly wrong in an inherent universal sense. It is not a mere case of whether offence and disgust are properties that are instantiated in the world, but whether exhibitionism does in fact produce an inherently bad consequence. Socialization seems to provide the better explanation of the disgust-causing properties of public nudity.

There is nothing inherently wrong with the nudist using a public beach—one hundred years ago, wearing a modern bikini in public would have been the equivalent of being nude today, and one hundred years from now nudity might be the norm on beaches. Nevertheless, we might regulate public nudity for the sake of solving co-operation problems concerning the ethical use of public spaces in complex, plural societies. Critical moral accounts of the badness of offending others—such as that provided by Feinberg—have failed to demonstrate the inherent wrongness of public nudity, because outside of human thought, socialization, context, and convention, it does not produce a bad consequence and is not absolutely wrong in a universal sense.

It is not only the wrongness of offensive acts that is conventionally contingent since genuine harms are also conventional. The objective wrongness of conventional harms and offences can only be ascertained by considering contextual, circumstantial, social, and empirical factors. Therefore, the objectivity of this type of harm is conventional, and thus is subject to all the inconsistencies and biases that affect the reasoning of communally situated intersubjective agents. Remember, our communally situated agents do not have the supernatural capacity envisaged by Nagel, Kant, or Korsgaard. They are just socialized humans drawing on societal practices to try and work out what conventional

values should be protected through criminalization. In this sense, it is necessary to understand conduct in light of the social norms that inform it.

> Objectivity within this conventional system is derived through a deliberative process: Agreement of rational, reasonable, and competent deliberators, resulting from an ideally operated deliberative process, may be our best mark of correctness of the judgments in question; but that agreement does not make the judgment correct. ... In this point, objectivity as publicity fits Kant's view that... if the judgment is valid for everyone who is in possession of reason, then its ground is objectively sufficient. This is sufficient for objectivity, but not for correctness.[63]

To this end, this dissertation is in agreement with J Postema, submission that objectivity in law within the conventional system is understood as intersubjective validity demonstrated by the agreement of all those possessed of reason. Nevertheless, this in itself does not constitute correctness as Feinberg argues in his critical morality but it provides the "touchstone" whereby we assure ourselves, from where we are, that our sense of the truth of judgments we accept is not idiosyncratic.[63]

5.1.8. Conventional Morality: Liberalism or Conservatism

An important question arises at this point for this dissertation. The question concerns whether the conventional account of criminalization defended in this work can be classified as a liberal or conservative position. Tackling this question is necessary because first of all, the dissertation is an examination of the liberal/conservative dichotomy and secondly it will show in the final analysis whether this researcher as well as the position he has adopted is liberal or conservative.

As has been cumulatively enunciated in the preceding chapters, on the one hand, liberalism is a political doctrine that freedom is the most important value and therefore should take precedence over and above every other value in society, conservatism on the

other hand believes that the ability of a society to survive is a measure of the adherence of its citizens to societal mores. Thus, conservatism encourages state intervention even at the expense of freedom since a society that wants its citizens to be free must have to survive first.

Nevertheless, both liberalism and conservatism understand the need for the regulation of freedom, where they disagree is what should be the roles of the state and citizens in this regulation. For conservatism, the power of the state to regulate freedom is determined by the state or its agents. That is not so for liberalism. Liberalism agrees with conservatism that freedom must be regulated for peaceful co-existence in society but insists that the basis of such regulation must be achieved through consensus, especially following the principles of liberal democracy.

This last point is very important because it does not only underline the difference between liberalism and conservatism, it most importantly underscores the fundamental difference between Feinberg's position and the position this dissertation is advocating. Feinberg's contention that criminalization should be determined by certain mind-independent principles of harm and offense in this regard smacks of conservatism because it takes the decision on criminalization out of the hand of citizens and gives it to principles which like natural laws are the same in all circumstances and places. Contrary to this, the conventional account defended here is liberal because deciding what should be criminalized and what should not is determined by citizens whether through referendum or through their elected representatives. Consequently, the position presented in this dissertation is a more comprehensive defense of liberalism than the much self-touted Feinberg's liberal position.

5.1.7. Nigeria's Criminal Justice in the Light of "The Moral Limits of Criminal Law"

One of the best ways, or perhaps the best way, to test the theoretical validity and more importantly, the practical applications of Feinberg's proposals in *The Moral Limits* and the conventional model recommended in this dissertation is to examine how each proposals measures up or fits into a real life criminal justice system and no such system is more suitable than Nigeria's since this dissertation has been using the country as its immediate context. To this extent, this section will examine the theoretical and practical implications of Feinberg's theory and this dissertation's proposal within the circumference of Nigeria's criminal justice system.

One thing anyone, whether a lawyer or not, who has had even a moderate acquaintance with the content of Nigerian criminal justice, would notice is that the country has a very rich criminal instrument. In other words, the problem with Nigerian justice system majorly is not legal instruments but the political will to implement the contents of the legislations, whether we are taking about the criminal code of Southern Nigeria, the Penal Code of Northern Nigeria or the different Acts of national and state legislatures.

While the lack of vigorous implementations of Nigerian criminal law can easily be attributed and explained away as a result of corruption which has been the bane of the country since or before its creation in 1960, the more fundamental reason is that the implementation of Nigerian criminal instruments is to a great extent determined by public opinions. In other words, while politicians enthusiastically run to implement criminal legislations that are favoured by public opinion, they tend to refrain or are lukewarm about implementing criminal legislations that go against public opinion.

Before we draw the implications which this state of affair has both for Feinberg and our proposals in this dissertation, let us first look at those instances where Nigerian criminal laws have affinity with Feinberg's *The Moral Limit.* While an exhaustive list and consideration of these affinities cannot be undertaken here, the following will be

considered: law on hate speech, law on lesbian, gay, bisexual, and transgender (LGBT), law on suicide and laws against nudity and sex trafficking.

As indicated at the introductory part of this dissertation, the coming to power of President Muhammadu Buhari in 2015 with his anti-corruption war and the renewed agitation for Biafra by Nnamdi Kanu's led IPOB (Indigenous People of Biafra), there have been accusations and counter-accusations of hate speeches. Consequent on this, Vanguard Online News reports that:

> Officials of the federal government and the various state governments have continued to express concern over the growing wave of hate speeches in the country. To curb the menace, a new law is being proposed which will categorize hate speech as 'terrorism'. At the last meeting of the National Economic Council it was agreed by the federal and state governments that a special court be established for the arrest and prosecution of purveyors of hate speeches, kidnapping and terrorist acts.[65]

However, countering the call for a new legislation to counter hate speech, a senior advocate of Nigeria, Femi Falana, claims that such legislation is unnecessary. According to him: "Before further energies and resources are dissipated by the government on the enactment of a new hate speech law it is pertinent to point out that the country has enough laws to deal with the menace. What is however lacking is the political will to arrest and prosecute those who contravene the provisions of the relevant laws."[66]

Falana goes ahead to delineate the various provisions where these relevant instruments can be found in the Nigerian criminal justice system. It is worthy quoting him in extensor here:

> …offences which include criminal defamation, inciting statements, breach of the peace, criminal intimidation, publication of statement, rumour or report which may disturb public peace, false publication etc. attract

> penalties by imprisonment or payment of fines in sections 59-60, 373-381 of the Criminal Code (applicable in the southern states) and sections 391-40, 417-418 of the Penal Code (applicable in the northern states). Section 95 of the Electoral Act 2010 provided that no political campaign or slogan shall be tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings. Also, in enacting the Cyber Crime (Prohibition, Prevention ETC) Act, 2015 the National Assembly took cognizance of the public concern over the use of social media to promote bigotry and hatred in the society. Hence, the law has far reaching provisions to prohibit any form of cybersquatting and prevent anti-social individuals and groups from subjecting the Nigerian people to racist and xenophobic attacks in any part of the country.[67]

In spite of his strong conviction in the responsibility of state to curb hate speeches, Falana still maintains that everything should be done to discourage state officials from using state machinery to silence opponent. He invokes a case that happened in Southern Kaduna to illustrate this point:

> For instance, the Kaduna State government has had cause to drag a journalist to court for allegedly exaggerating the number of people that were killed in Southern Kaduna by gunmen during a recent civil disturbance. However, to ensure that public officers do not use the machinery of the State to silence their opponents or cover up corrupt practices and shield themselves from public scrutiny the provisions of the Criminal Code on seditious publications were declared illegal and unconstitutional by the Court of Appeal in the case of Arthur Nwankwo V the State (1985) 4 N.C.L.R. 228.[68]

On the whole, what is instructive here is that Feinberg's proposals have remarkable affinity with the instruments in Nigerian justice system. Particularly, worthy of note in these regards is Feinberg's mediating principle and Falana's recommendation that public officials should be prevented from using the criminal system to fight their opponents. Important also is Falana's comment on the lack of political will by Nigerian politician to

make use of existing legal instruments to fight hate speech. In other words, criminal legislations and the political will to implement them are more or less influenced by public opinions not by some mind independent transcultural principle as Feinberg would have us believe.

The second item penciled down for discussion in this subsection is law on homosexuality. Like most countries in sub-Saharan Africa, Nigerian population is decidedly anti-gay. According to the 2007 *Pew Global Attitudes Project,* 97 percent of Nigerian residents believe that homosexuality is a way of life that society should not accept, which was the second-highest rate of non-acceptance in the 45 countries surveyed.[69] Commensurably, this anti-gay attitude by the Nigerian population is what has influenced gay legislations in the country. For instance, World Fact book reports the following about the legal condition of gays in Nigeria:

> Lesbian, gay, bisexual, and transgender (LGBT) persons in Nigeria face legal and social challenges not experienced by non-LGBT residents. The country does not allow or recognize LGBT rights. There is no legal protection against discrimination in Nigeria—a largely conservative country of more than 170 million people, split between a mainly Muslim north and a largely Christian south. Very few LGBT persons are open about their orientation, and violence against LGBT people is frequent. Edafe Okporo fled Nigeria to the United States seeking asylum based on his sexual orientation and was granted political asylum in 2017. LGBTQ Nigerians are fleeing to countries with progressive law to seek protection.[70]

This is why both male and female same-sex sexual activity is illegal in Nigeria. The maximum punishment in the twelve northern states that have adopted Sharia law is death by stoning. That law applies to all Muslims and to those who have voluntarily consented to application of the Sharia courts. In Southern Nigeria and under the secular criminal

laws of Northern Nigeria, the maximum punishment for same-sex sexual activity is 14 years' imprisonment. The Same-Sex Marriage Prohibition Act passed by the National Assembly in 2013 and signed into law in 2015 by President Goodluck Jonathan criminalizes all forms of same-sex unions and same-sex marriage throughout the country. Reporting on the bill signed by Jonathan Guardian News Online notes that:

> Nigeria's President Goodluck Jonathan signed a bill on Monday that criminalizes same-sex relationships, defying western pressure over gay rights and provoking US criticism. The bill, which contains penalties of up to 14 years in prison and bans gay marriage, same-sex amorous relationships and membership of gay rights groups, was passed by the national assembly last May but Jonathan had delayed signing it into law. A presidential spokesman told Reuters he had now done so. As in much of sub-Saharan Africa, anti-gay sentiment and persecution of homosexuals is rife in Nigeria, so the new legislation is likely to be popular. Jonathan is expected to seek re-election in 2015 but is under pressure after several dozen lawmakers and a handful of regional governors defected to the opposition in the past two months.[71]

Two important points in this citation which supports our earlier claim that passage and implementation of criminal legislations are determined by socio-political exigencies and public opinions are the observation that anti-gay legislation is popular in Nigeria and that Jonathan signed it, defying western pressure because he believes it would boost his chances in the 2015 presidential election.

The other issue in Nigeria criminal legislation that has affinity with Finberg's proposal in *The Moral Limits* is the law on suicide. Attempting suicide is a criminal offense in Nigeria, under Section 327 of the Criminal Code Act, and carries a penalty of up to one year in prison. A holdover from when Nigeria was a British colony, the law was abolished in Britain under the Suicide Act of 1961, which happened after Nigeria gained

its independence in 1960. Nonetheless, in spite of the fact that this law is still in place in Nigeria today, individuals are hardly prosecuted or charged with criminal offenses for attempting suicide. The reason for this lack of prosecution is obvious, public opinion is in disfavour of charging individual who attempt suicide with criminal offence. Rather as a one-time Lagos State Attorney General and Commissioner for Justice, Adeniji Kazeem told CNN:

> …although attempted suicide is criminalized in the country, the state does not recommend that anyone should be locked up. The recommended action is hospitalization. The law does not say anyone should be incarcerated. It shows some form of disorder which needs medical attention. My office has not prosecuted anyone. The state government does not prosecute attempted suicide victims. We are not aware of any prosecutions, if it was brought to my attention, we would advise against it.[72]

This shows that the understanding in Nigeria has shifted from seeing suicide as a crime to be punished to seeing it as health issue that requires compassion and medication. This again, seems to be against Feinberg's assumption of an almighty universal harm and offense principles that should determine all issues of criminal legislations.

The last issue slated for discussion here are laws on nudity and sex trafficking. Prostitution in Nigeria is illegal in all Northern States that practice Islamic Penal Code. In Southern Nigeria, the activities of pimps or madams, underage prostitution and the operation or ownership of brothels are penalized under sections 223, 224, and 225 of the Nigerian Criminal Code.[73] Even though Nigerian law does not legalize commercial sex work, it is vague if such work is performed by an independent individual who operates on his or her own accord without the use of pimps or a brothel. Additionally, the Nigeria criminal system prohibits national and trans-national trafficking of women for commercial sex or forced labour. Nigeria is a signatory to the 2000 United Nations

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

Furthermore, Nigerian criminal system is against public indecency. The provisions of Section 26 of the *Violence Against Persons Act 2015* is explicit on this. The Act states that:

A person who intentionally exposes his or her genital organs, or a substantial part thereof with the intention of causing distress to the other party, or that another party seeing it may be tempted or induced to commit an offence under this Act, commits an offence termed 'indecent exposure.

(2) A person who intentionally exposes his or her genital organs, or a substantial part thereof, and induces another to either massage, or touch with the intention of deriving sexual pleasure commits an offence.

What is most important about this Act is that the culprit of such an act according to Section 26(3) will be liable upon conviction by a court to a term of imprisonment not less than 1 year or to a fine not exceeding ₦500,000 or both. In other words, if the Act were seriously implemented, some ladies or women (married and or unmarried) will become suspects by their indecent exposure and shall be liable upon conviction to imprisonment for a term of not less than a year or to a fine not exceeding five hundred thousand Naira or both. Though, in my humble view, with due respect, this provision is truly a proper provision considering the rate of cases of indecent sexual assault and rape (including gang-rape) in Nigeria. Nevertheless, these laws are hardly implemented because of the interaction between political will and public opinion.[74]

In the final analysis two observations can be gleaned on the relationship between Nigerian criminal system and Feinberg's proposal in the *Moral Limit* on the one hand, and Nigerian criminal system and the conventional approach we recommended in this dissertation, on the other hand. The first in these two observations is that there is a remarkable degree of mutuality between the content of Nigeria criminal system and

Feinberg's recommendations in the *Moral Limits.* Nevertheless, the major difference between the two legal documents is that while Feinberg's proposal is interested in considering for criminalization, activities that causes public offense, the Nigerian system is interested in outlawing acts that considered moral wrong irrespective of whether carried out in private or public. The second observation is intrinsically linked to the first, because it concerned the implementation of criminal laws. On this we see that the implementation of criminal sanctions in Nigeria is basically influenced by public opinion which is in turn influenced by cultural and social mores.

What these observations demonstrate is that the enactment and implementation of Nigerian criminal instruments are influenced by what Nigerians see as right and wrong. This therefore, shows that our proposal in this dissertation which claims that criminal legislation rather than been the measure of the harm and offense principles as purported by Feinberg is determined (even if unconsciously), by the consensual agreement of rational agent living within a given society.

Conclusion

Attempts to delineate the relationship between morality and law on the one hand and to reconcile the conflict between authority and liberty on the other hand have been the gravest socio-political and legal problems that confronted both philosophers and jurists of all time. While these two questions are substantive and have both attracted due attention throughout the history of scholarship, the second question has been the focal point of unprecedented controversy and debate. The debate has both a broad and narrow dimension. The broad perspective is the attempt to formulate a theory that will provide a justification for all the corpus of relations, including the relation between the State and the individual and between individual and individual in society. The narrow dimension of

the question concerns what principle(s) should regulate the relationship between authority and liberty or state interference with individual liberty.

Of all the attempts to articulate and address this second question, the contribution of Joel Feinberg is outstanding both in its stupendous scope and astonishing claims. Consequently, this dissertation is a spirited effort to investigate how successful Feinberg is in his endeavor to resolve the authority-liberty dichotomy. As we saw in chapters three and four, Feinberg following in the footstep of Mill holds that prevention of culpable harm is always a justifiable reason for criminal prohibition or state interference with human liberty. However, unlike Mill whose idea it is that the harm principle exhausts the legitimacy for criminalization, Feinberg supplemented the harm principle with an offence principle claiming that the two principles duly defined clarified exhaust the justifiable requirements of state interference with individual liberty.

However, as it turns out, this dissertation discovered that this Feinbergian claim is basically flawed on a number perspective. Specifically, Feinberg's contention that his liberalism is grounded on critical morality which according to him is universally applicable irrespective of time and place is found not only to be logically unsustainable but also factually untenable. The dissertation found that rather than pursuing the quest for moral principles that are transculturally correct but that are epistemologically unrealizable it is better to pursue a more modest conventionally normative moral principles that are intersubjectivity by rational moral agent situated in particular social contexts.

Furthermore, the dissertation as well discovered that Feinberg in the final volume of his magisterial corpus, *Harmless Wrongdoing*, had in the face of some special and very troubling counter-instances made far-reaching concessions to his opponents that fundamentally undercut his liberalism. In the end Feinberg as we interpreted him here grudgingly and with some qualifications conceded that criminalization is not something decided using some mind-independent and universally valid principles of harm and

offense but something that is conventionally determined by rational moral agents who are socially located within specific societies. It is therefore the conclusion of this dissertation that because of the dynamic nature of the human society and conventional nature of morality itself, rather than being based on the harm and offence principles as Feinberg advocates, principled justification for criminalization should not only incorporate those principles rejected by Feinberg but much more depending on the need of the society.

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