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WHEN ARE WE RIGHTFULLY AGGRIEVED?

A Comment on Postema

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I. FEINBERG AND POSTEMA ON FEINBERG[1]

Joel Feinberg's four volume work *The Moral Limits of the Criminal Law*[2] can, I believe, be accurately characterized as a normative treatise on what criminal law theorists call the "special part" of the criminal law. The "general part" deals with the basic elements of all criminal offenses—whatever is prohibited. Thus general part theorists analyze the notions of *actus reus* and *mens rea*, the conditions that negate voluntariness in acting, the distinction between acts and omissions, the nature of causation, joint participation in crime such as complicity and conspiracy, and the various defenses labeled justifications and excuses. Feinberg has little to say about these matters. His concern is with what conduct may be forbidden and punished—the specific substance rather than the general form of the criminal law.

Feinberg argues that the criminal law can legitimately prohibit only conduct that wrongfully harms or that wrongfully offends others. Moreover, Feinberg's focus is on harm and offense, not on the adverbial modifier "wrongfully." Feinberg has little to say about what distinguishes wrongful from nonwrongful harming or offending. For example, he does not contribute to the debate over whether negligently caused harm is "wrongfully" caused or whether one who goes into business solely to bankrupt a competitor or who erects a "spite fence" on his own property has "wrongfully" harmed his intended victim. Nor does he give a full-blown account about which interests are "legitimate" such that they can rightfully be protected by the criminal law from wrongful setbacks. Feinberg scatters some hints about such matters, but he does not provide sustained arguments.

1. *See* Gerald J. Postema, *Poltics is About the Greivance: Feinberg on the Legal Enforcement of Morals*, 11 LEGAL THEORY 293–323 (2005).

2. Joel Feinberg, The Moral Limits of the Criminal Law, vol. 1, Harm to Others (1984); vol. 2, Offense to Others (1985), vol. 3, Harm to Self (1986); vol. 4, Harmless Wrongdoing (1988).

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Feinberg can be seen as a liberal descendant of J.S. Mill, engaged in working out the implications of the latter's "harm principle."[3] Jerry Postema characterizes Feinberg's work as concerned with that part of morality that focuses on individual grievances, claims individuals can make in their own names and for their own sakes.[4] Postema acknowledges that for Feinberg this part of morality is indeed just a part, not the entirety of it. Feinberg does not deny the existence of free-floating evils—nongrievance evils—though it is fair to say that much of what some might call harmless wrongdoing Feinberg would deny is wrongdoing at all.[5]

Postema characterizes the question to which Feinberg's four volumes are addressed as whether society, through its criminal law, has *jurisdiction* over all of morality or only part of it, and if the latter, which part.[6] Feinberg endorses *restricted legal moralism,* not *global legal moralism,* and, says Postema, *grievance legal moralism* is—or should be—Feinberg's version of restricted legal moralism.[7]

Postema defends Feinberg's grievance legal moralism but not Feinberg's harm and offense principles, which Postema denies are synonymous with grievance legal moralism. The harm principle covers wrongs to individuals that set back their legitimate interests. It does not apply to setbacks of illegitimate interests, nor where the victim's legitimate interests are on balance promoted, not set back, nor where the victim consents to the act in question. Nor does the harm principle cover harms to the victim that are wrongful but not wrongful to the victim, or wrongs to the victim that are not harmful to him.

Postema makes a strong case for saying that Feinberg should have included the last category, "harmless wrongs," within the legitimate jurisdiction of the criminal law.[8] Postema points out the similarity between harmless wrongs—such as harmless trespass, unconscious rape, and paternalistic interferences by private parties—and acts that cause profound offense, which Feinberg conceded may be criminalized. If offensive conduct can be a wrong to an individual that falls within the legitimate scope of the criminal law even though it does not set back the victim's interests, so, too, can these other harmless wrongs to the victim.

Postema argues that if Feinberg were to amend his position as Postema recommends, we would arrive at grievance legal moralism rather than the harm and offense principles.[9] Postema also argues that Feinberg's concessions to global legal moralism, made under the pressure of Kristol's

3. JOHN STUART MILL, ON LIBERTY, *in* COLLECTED WORKS OF JOHN STUART MILL (John M. Robson ed., 1963).
4. Postema; *supra* note 1, at 294–295.
5. *See* FEINBERG (1988), *supra* note 2, at 66, 80, 125.
6. Postema, *supra* note 1, at 295–296.
7. *Id.* at 296–297.
8. *Id.* at 299–300.
9. *Id.* at 300.

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gladiatorial contest and Parfit's malicious conception examples, are unwarranted.[10] Those cases, says Postema, can be incorporated into grievance legal moralism. Feinberg's liberalism need not be compromised.

II. ALEXANDER ON FEINBERG AND POSTEMA

Postema argues for the liberal's grievance legal moralism by denying that anyone other than the victim or the victim's agent, the state, has standing to see that wrongdoers are punished. Postema rejects, for example, Jerry Dworkin's view that moral wrongfulness provides a reason for *anyone* to condemn and punish the wrongdoer.[11] Postema says that "perhaps it is just and right that Pol Pot suffer for his sins, but it is not right for you or me to exact that suffering, to exact that justice."[12]

But why not? Consider: A murders B. B has no kin. A is no longer dangerous. (He plans to leave immediately for a desert island; or the trauma/catharsis of killing B has eliminated any remaining disposition to kill.) And no one but C knows that A has killed B. Postema implies that C may not punish A, even if C's evidence of A's guilt is otherwise sufficient, and even if C is better than any agency of the state in meting out the proper amount of punishment.

I think we should resist this conclusion. Consider this analogy to Pol Pot and to A, B, and C: Suppose Hitler did not aggress against his neighbors. Instead, he carried out the Holocaust solely against German Jews, German Gypsies, and other Germans. Would it have been wrong of non-Germans to intervene with force to stop the genocide? Postema seems to believe that it would be wrong—that non-Germans would lack moral standing—and he seeks to enlist Feinberg to his position.

Now, of course, there are victims in these examples, and they suffer wrongful harms. The problem from Postema's standpoint is that the potential intervenors are not the victims' agents. Postema cannot argue that they are the victims' agents on the ground that *anyone* can be the victim's agent when it comes to wrongful harms; that argument would license the punishment of Pol Pot by anyone, which Postema rejects.

The problems with grievance legal moralism as glossed by Postema go deeper. Postema sets forth a derivation of the state's authority to enforce on the victim's behalf the victim's moral grievance claims.[13] But why should the victim's claims justify *punishment,* and particularly *retributive* (desert-based) *punishment?* The victim's claims for compensation and restitution seem clear enough. But what licenses the victim or his agent, the state, meting out punishment? It is tempting to answer "deterrence," but the temptation should

10. *Id.* at 302–303.
11. *Id.* at 304.
12. *Id.* at 305.
13. *Id.* at 308–309.

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be resisted. Deterrence, which is purely forward-looking, can be achieved most easily by decoupling the amount of punishment from the desert of the offenders or even their guilt. Focusing on desert, however, fits uneasily with grievance legal moralism. Is Postema rejecting the legitimacy of retributive punishment, which may be greater or less than what deterrence requires?

There are other, related questions. Is punishment for attempts at crime or for reckless behavior illegitimate? Neither involves harm to a victim, and often there is no determinate potential victim. (Consider the attempter who wishes to kill a hunter—any hunter—but who fires at what turns out to be a tree stump, or the person who recklessly closes his eyes while driving through a school zone, not knowing that school is out and the area is completely deserted.) Whose grievance is vindicated by punishing these actors? Does it follow, then, that retributive punishment falls into the realm of global legal moralism even if the punishment is inflicted for acts that fall squarely within grievance legal moralism's jurisdiction?

Consider as well matters of distributive justice. Suppose we are strict welfare egalitarians. A invents something useful and refuses to share it with B, C, D, and so on. Their welfare is now unequal, in violation of our distributive principle. But has anyone been harmed? People have been wronged, but have their interests been set back? Is violation of a distributive principle a "harm" if one's position has not been worsened in absolute terms?

Postema might argue that this case is like his harmless trespass and other harmless wrong cases, and perhaps he would be correct. But suppose A, representing the "haves," claims the right to secede and thus protect himself against the redistributive implications of strict egalitarianism, under which he is a net loser. If he is not harming the others but only failing to benefit them as egalitarianism requires, what brings him within the jurisdiction of their egalitarianism? He may be a bad Samaritan for seceding, but so what?

Feinberg places loss of valuable ways of life in the category of free-floating evils rather than in the category of harms subject to the harm principle.[14] (And as Postema points out, even as a free-floating evil, loss of a valuable way of life is not, for Feinberg, a very serious evil.)[15] Postema raises no objection to Feinberg's taxonomy on this point. But why does an individual not have a legitimate interest in maintaining a valuable way of life, an interest whose setback gives rise to a valid individual grievance? Of course, if one could enforce the maintenance of a way of life, the result would surely look illiberal, as others' decisions about what lives to lead would be preempted. But whether the result would be illiberal is a separate question from whether one has a legitimate individual grievance when one's way of life is undermined by others' pursuit of different ways of life.

14. FEINBERG (1988), *supra* note 2, at 80.
15. Postema, *supra* note 1, at 294.

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A similar point can be made about an individual's concern with others' moral character. A valuable way of life may ultimately depend on the moral character of those in one's community. If one can have a legitimate interest in maintaining a valuable way of life, it follows that one can have a legitimate interest in seeing that others' character is adapted to that way of life. Again, this argument has profoundly illiberal implications. But that cannot be the reason for rejecting it without begging the question in favor of liberalism. What one needs is an argument for why individuals have no legitimate grievance when others undermine a valuable way of life through their conduct or their character, attitudes, and the like.

Of course, leaving aside whatever interest people might have in living in a community of people who lack bad character traits, if certain character traits increase the chance that those who possess them will violate interests that are squarely within grievance morality—if, for example, Kristol's gladiators, when coarsened by gladiatorial combat, are quite likely to become killers or rapists—the criminal law's concern with character-coarsening conduct would fall within the jurisdiction of grievance morality. But such a theory of imputation (of interest violations to prior acts of character formation) would surely blur the line between grievance and global legal moralism.

Then there is the question of whether Feinberg's offense principle, which Postema seems to accept as part of grievance morality, is properly included within it, and if so, whether it brings global legal moralism in its wake. I have argued in two earlier pieces that cases of seriously offensive conduct are always cases where the offense is "moralized"—where the offense comes from the offended person's *knowledge* that a social *norm* has been flouted.[16] Some forms of offense are nonmoralized—for example, the smell of sulfuric acid or the sound of fingernails on a chalkboard. But serious offense comes from the violation of norms of conduct.

Moreover, it comes from knowledge of the violation and not necessarily from direct perception of it. Direct perception is merely one way we can acquire knowledge that a norm is being flouted. To think otherwise is to think, erroneously, that there is some difference in kind between "direct" and "circumstantial" evidence. There is not. Some social norms do make reference to places—"don't go nude *in public*," or "don't copulate *in public*." But if one observes a couple under a blanket in Central Park who are obviously copulating—they are moving in a characteristic way, sighing, and moaning, with contraceptive packets and lubricants on the ground next to them—they are violating the norm against public copulation, and one may rightly be offended even though one does not directly perceive but merely infers their copulation.

16. *See* Larry Alexander, *The Legal Enforcement of Morality, in* A COMPANION TO APPLIED ETHICS 128–141, 135–140 (R.G. Frey & Christopher Heath Wellman eds., 2003); Larry Alexander, *Harm, Offense, and Morality,* 7 CAN. J.L. & JURISPRUDENCE 199 (1994).

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In other cases, violations of norms can occur even behind the locked doors and pulled blinds of a private home. Imagine we were to discover, perhaps through very discreet advertisements, that the Joneses were hosting:

(1) "Sex with animal partners. Tuesday it's donkeys. Come and get your kicks"; or
(2) "Corpse cooking contests. Wednesday it's best appetizer recipe for Aunt Emma's shanks. Prize is Grateful Dead CD."

In such cases we would be rightfully offended by the Jones's conduct even though it takes place "in private," and even though we only know about it circumstantially.

The point I am getting at is this: if the norms the violations of which give rise to offense are nongrievance moral norms—if nongrievance immorality is not an empty set—then the offense principle and global legal moralism may be coextensive. The offense that the offense principle picks out—profound offense—is always the product of the flouting of a norm. It is moralized offense. And it is caused by knowledge of the norm violation whether or not the knowledge comes from perception.

Now, one might still argue that even if the extension of the offense principle is identical to that of global legal moralism, they are nonetheless different principles. Under global legal moralism, the justification for criminal punishment arguably runs as follows:

(1) Your conduct violated a moral norm.
(2) We know about it.
(3) We punish you for that violation, which punishment expresses our indignation, which we feel as offense.

Under the offense principle, the justification for punishment is (arguably) different:

(1) Your conduct violated a moral norm.
(2) We know about it.
(3) We are indignant, and we feel that indignation as offense.
(4) We punish you for wrongfully causing our offense.

So in the case of Pol Pot, if Postema is correct that we cannot punish him under grievance legal moralism for violating the rights of his victims (because we have no standing to vindicate their grievances), we may still be able to punish him based on our offense at what he has done. The offense is *our* grievance. But that is still not global legal moralism even if it is extensionally equivalent, since our offense at Pol Pot's immorality is our justification for punishment, and not his immorality by itself.

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I think these arguments taken together leave Postema's grievance legal moralism on shaky ground. Of course, he could jettison the offense principle, or retributive punishment, or certain distributive justice principles, or certain notions of legitimate interests. Jettisoning some might be more costly in terms of the intuitive plausibility of grievance legal moralism than jettisoning others.

Finally, let me discuss Postema's handling of the Kristol gladiatorial contest and of Parfit's malicious conception. Postema is moved, as is Feinberg, by the force of the examples, but he, unlike Feinberg, believes they can be handled within the boundaries of grievance legal moralism. I think Feinberg, not Postema, has it right.

A. Kristol

Postema argues that the gladiatorial contest can be brought within grievance morality by recognizing limits on the power of consent and deeming some rights to be inalienable, specifically those on which autonomy depends.[17] If gladiator 1 attacks gladiator 2, Postema contends that the former wrongs the latter even though the latter has consented. But why? Remember, we cannot say that gladiator 2 may not risk his life or risk autonomy-undermining injury by rock climbing, coal mining, hockey playing, boxing, or bungee jumping without bumping up against the antipaternalism principle that both Feinberg and Postema accept.[18] If Postema is going to accept Feinberg's antipaternalism, the mere fact that gladiator 2 is risking his life or his autonomy cannot make his consent ineffective and gladiator 1's act wrong. But why, then, does gladiator 2 have a grievance against gladiator 1 if both the quality of gladiator 2's consent and his interests at stake are no different in the gladiatorial contest from how they are in these other activities?

Postema argues that gladiator 1 owes gladiator 2 a duty even if the latter waives it.[19] That may or may not be so. But if it is, that duty cannot be derived from grievance morality. I believe Feinberg was correct in seeing that if one rejects the immunity of Kristol's contest to the reach of the criminal law, it must be because one has accepted global legal moralism. (I also think that if chattel slavery is in all circumstances morally wrong even if entered into voluntarily and for excellent reasons, the moral wrong must be located beyond grievance morality.)

B. Parfit

Postema believes that, say, a couple's intentionally conceiving a severely retarded child because they want a child who will never leave home is not

17. Postema, *supra* note 1, at 315–318.

18. *See id.* at 306–307, 318; FEINBERG (1986), *supra* note 2. (An aside: I find Feinberg's attempt to distinguish soft from hard paternalism based on whether the actor has given voluntary and informed consent to the harm or risk to be quite problematic, although that is a topic for another day.) *See* Larry Alexander, *Scalar Properties, Binary Judgments* (forthcoming).

19. Postema, *supra* note 1, at 316.

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only wrong but a wrong that falls within grievance morality and hence the legitimate scope of the criminal law.[20] There is a grievance here, and it is the child's, says Postema, even though there is no possible world in which *this* child is born without severe retardation.

Postema gives two arguments for why the child has a grievance, neither of which I find persuasive. One argument is that the child is harmed because he endures the retardation.[21] The other is that the child is harmed because he can rightly complain of his parents that "to serve your needs, I must suffer."[22]

To see why those arguments do not work, imagine that a genie had offered *your* parents a pill that, had they taken it prior to conception, would have enabled them to conceive a child with godlike capacities and talents, one whose happiness would have exceeded anything we can imagine. However, they declined the genie's offer and instead had *you,* with all your all-too-human limitations and conditions. Would *you* have a grievance against *them?* I think not. But the case seems to me to be on all fours with Parfit's.

There is one final issue that Postema does not address but that bears on global versus grievance legal moralism. Unfortunately, it is an issue to which Feinberg himself devotes inadequate attention. That issue is whether and why the criminal law is different from other legal techniques to influence behavior. If we may not criminalize prostitution because it is not a violation of grievance morality, may we nonetheless refrain from giving it the subsidies or tax breaks we give activities that we regard a less morally discreditable? When does a failure to subsidize become a penalty, and are failures to subsidize that are meant to deter subject to the moral limits of the criminal law if they, though (by definition) punitive, are not retributive?

20. *Id.* at 319–320.
21. *Id.* at 320.
22. *Id.* at 320.

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