March 1992

Liberalism and the Criminal Law

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John Stuart Mill was concerned with defining "the nature and limits" of society's power over an individual. One crucial concern is the state's power to legitimately criminalize an activity. Joel Feinberg's four-part work The Moral Limits of the Criminal Law *attempts to identify a set of constraints that a state (as represented by its legislature) can use to ensure that criminal legislation does not illegitimately contravene individual liberty. Feinberg believes that liberal philosophical principles can define such a set of constraints. Eds.*

A central project of liberal political philosophy is to define the extent to which the state may legitimately limit individual liberty. One of the state's most powerful means of limiting liberty is criminalizing behavior, and one significant liberal sub-project is to define the extent to which the state may limit liberty using the criminal law. I claim that liberalism cannot successfully carry out this sub-project. The reasons are significant, with implications for the overall project as well as for the appropriate goals for political philosophy in this area.

I will focus on Joel Feinberg's *The Moral Limits of the Criminal Law*.[1] This is by far the most detailed and well argued defense of the liberal position.[2] Feinberg defines the extent to which the state may legitimately limit liberty by criminalizing behavior. The harm principle and the offense principle provide the definition: if the state cannot justify limiting liberty by appeal to these two principles, it cannot justify it at all. This is "*[t]he liberal position* (on the moral limits of the criminal law): The harm and offense principles . . . between them exhaust the class of

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1. JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW consists of four separately published volumes: JOEL FEINBERG, HARM TO OTHERS (1984) [hereinafter HARM TO OTHERS]; JOEL FEINBERG, OFFENSE TO OTHERS (1985) [hereinafter OFFENSE TO OTHERS]; JOEL FEINBERG, HARM TO SELF (1986); JOEL FEINBERG, HARMLESS WRONGDOING (1988).

2. This is not intended to slight the work of Joseph Raz, *infra* note 6. Feinberg defends a traditional conception of liberalism while Raz provides a novel reinterpretation.

good reasons for criminal prohibitions."[3] This position is, as Feinberg intends, squarely within the Millian liberal tradition,[4] although Feinberg differs from Mill in explicitly holding that the state may criminalize types of behavior that do *not* cause "harm." It is enough that the behavior cause a sufficiently serious "offense."[5]

Liberalism is attractive. Confronted with the immense power of the state, it is attractive to respond by drawing a line—even a very blurry line—and saying, "This far, but no farther." Indeed, this is not just attractive, it is essential; essential at least to classical Millian liberalism. The leading idea of this tradition is not merely that freedom is of paramount importance; the powerful and alluring idea is that there is a *definable limit* the state cannot legitimately cross.[6]

Some may doubt that liberals have such line-drawing aspirations. Feinberg, after all, notes that, although "Mill claimed to [define the moral limits of the criminal law] by defending 'one simple principle' . . ., neither Mill's principle nor the principles he rejects are simple and unitary."[7] Indeed, Feinberg emphasizes that we need "maxims to mediate application of the harm principle . . . by taking moral stands about the relation of consent to harm, by recommending priority rankings of conflicting interests in situations where harm seems unavoidable, and more."[8] The same point applies to the offense principle.[9] Nonetheless, Feinberg's discussion of particular cases—e.g., his remarks on murder, mayhem, arson, rape, and burglary[10]—make it clear that, in the case of the *harm* principle, the "mediated" principle is supposed to define a line that the state may not legitimately cross. It may not be possible to draw the line *in general* with any precision but, *in a certain central core of cases*, the line is nonetheless readily recognizable. Murder, mayhem, arson, rape, and burglary are examples on one side of the line; walking, reading, conversing, and eating, are examples on the other side.[11] Essentially the same point holds for the offense principle: in certain central cases that principle draws a readily recognizable line.[12]

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3. HARM TO OTHERS, *supra* note 1, at 26.
4. HARM TO OTHERS, *supra* note 1, at 14.
5. HARM TO OTHERS, *supra* note 1, at 14.
6. A recent example is JOSEPH RAZ, THE MORALITY OF FREEDOM 412-19 (1986).
7. HARM TO OTHERS, *supra* note 1, at 25.
8. HARM TO OTHERS, *supra* note 1, at 25.
9. OFFENSE TO OTHERS, *supra* note 1, at 26.
10. HARM TO OTHERS, *supra* note 1, at 10-11.
11. HARM TO OTHERS, *supra* note 1, at 202.
12. OFFENSE TO OTHERS, *supra* note 1, at 45.

My criticism is that liberalism's line-drawing aspirations are futile: in the area of the criminal law, there is *no* bright line that defines the limit of state power. Determining this limit is not a matter of defining bright-line principles; rather, it is, as my discussion of Feinberg will show, a matter of giving an account of *practical reason*—an account of what it is to reason well about moral and political matters. A certain conception of practical reason underlies my criticism of liberalism. I will not argue for this conception of practical reason; it is widely (although certainly not universally) shared. Indeed, Feinberg himself shares this conception, as we will see. David Wiggins has aptly described the relevant features of practical reasoning as follows:

> No theory, if it is to recapitulate or reconstruct practical reasoning even as well as mathematical logic recapitulates or reconstructs the actual experience of conducting or exploring deductive argument, can treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system. *For it is of the essence of these concerns to make competing and inconsistent claims.* (This is a mark not of irrationality but of *rationality* in the face of the plurality of ends and the plurality of human goods.) The weight of these concerns is not necessarily fixed in advance. Nor need the concerns be hierarchically ordered. Indeed, a man's reflection on a new situation that confronts him may disrupt such order and fixity as had previously existed, and bring a change in his evolving conception of the point . . . or the several or many points, of living or acting.[13]

One fixes the legitimate limits of state power by adjudicating, via practical reason, among "competing and inconsistent claims." In such adjudication, the harm and offense principles play a peripheral role, if they play any role at all.[14] This is not to say that the harm principle is false. It may well be true that only "harmful" behavior should be criminalized. My claim is that the principle fails in its intended line-drawing function.

In making this criticism, I will focus exclusively on the harm principle. Traditionally, it is this principle that liberals have appealed to in

13. David Wiggins, *Deliberation and Practical Reason*, *in* ESSAYS ON ARISTOTLE'S ETHICS 221, 223 (Amelie O. Rorty ed. 1980) (emphasis added).

14. To balance my criticism, let me emphasize that there is a great deal of value in *The Moral Limits of the Criminal Law*. The detailed discussions of a wide range of issues and the important distinctions are quite illuminating and highly relevant in constructing an informative account of practical reason. Indeed, my criticism of Feinberg leaves virtually all of *The Moral Limits of the Criminal Law* intact. I am not arguing so much for a change in content as for a change of perspective on that content. We should not regard the book as a contribution to a (futile) liberal line-drawing project but as a step toward an account of what it is to reason well in the area of the criminal law.

defining the limits of state power. It is controversial whether a separate offense principle is also necessary.

I. THE HARM PRINCIPLE: FIRST PASS

Feinberg's own discussion of the harm principle lends strong support to the claim that the principle fails to draw the line Feinberg intends it to draw. The intuitive idea behind the harm principle is that "state interference with a citizen's behavior tends to be morally justified when it is reasonably necessary . . . to prevent harm or the unreasonable risk of harm."[15] Feinberg's more precise formulation is that:

> [i]t is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.[16]

Feinberg emphasizes that this principle merely says that preventing harm is *a* good reason for penal legislation, not the only such reason. However, the liberal position asserts that preventing harm is one of only two good reasons, and there will be cases—those involving "harms" as opposed to "offenses"—where preventing harm is the *only* good reason for penal legislation.

Murder, mayhem, arson, rape, and burglary are examples. Feinberg remarks, with respect to such cases, that

> [t]he harm principle as so far clarified is a clear and univocal guide to the legislator only for that range of cases where he has no need of a guide at all. He knows that he wants the law to prohibit killings, beatings, burglaries, and frauds, and to permit walking, reading, conversing, and eating, and the harm principle provides him with a ready and obvious rationale for these preferences. Killing, beating, and the like cause harm to their victims, and that fact (the harm principle tells him) is a good and relevant reason for prohibiting them. Since no equally cogent reason can be offered for permitting these patently harmful activities, the case for forbidding them is conclusive.[17]

According to Feinberg, murder, mayhem, arson, rape, and burglary differ from "[g]enuinely problematic cases for the legislator."[18] These cases

> have a common form: a certain kind of activity has a tendency to cause harm to people who are affected by it, but effective prohibition of that

15. HARM TO OTHERS, *supra* note 1, at 11.
16. HARM TO OTHERS, *supra* note 1, at 26.
17. HARM TO OTHERS, *supra* note 1, at 13.
18. HARM TO OTHERS, *supra* note 1, at 202.

> activity would tend to cause harm to those who have an interest in engaging in it . . . because . . . substantial interests of these persons are totally thwarted. In all such cases, to prevent *A* from harming *B*'s interest in *Y* would be to harm *A*'s interest in *X* . . . . So the legislator must decide whether *B*'s interest in *Y* is more or less important . . . than *A*'s interest in *X*. . . . The harm principle, as so far clarified, tells him that protecting *B*'s interest from harm is a good and relevant reason for restraining *A*, but that is all it tells him. It doesn't tell him *how* good a reason it is compared with the obvious reason, itself derived from the need to minimize harms, for permitting *A* to pursue *his* interest untrammeled. In order for a legislator, using the harm principle only, to find a sufficient reason for or against legislating constraints in these hard cases, he must have some method for comparing the relative importance of conflicting interests.[19]

The harm principle explicitly allows for "comparing the relative importance of conflicting interests."[20] According to the principle, there is a good reason for penal legislation only if it would probably be effective in preventing unjustified or inexcusable setbacks to interests, *and there is probably no other means that is equally effective at no greater cost to other values*. Feinberg remarks, however, that

> [i]t is impossible to prepare a detailed manual with the exact "weights" of all human interests, the degree to which they are advanced or thwarted by all possible actions and activities. . . . In the end, it is the legislator himself, using his own fallible judgment rather than spurious formulas and "measurements," who must compare conflicting interests and judge which are the more important.[21]

These remarks are surely correct; indeed, they express, in different language, the conception of practical reason outlined at the beginning. To apply the harm principle, one must adjudicate among competing and inconsistent claims in ways that are not necessarily fixed in advance.

However, while Feinberg clearly thinks that such adjudication—such interest balancing—can be done badly or well, he does not tell us how to distinguish good interest balancing from bad. *Yet this surely is what we need to know if we are to determine the moral limits of the criminal law, for interest balancing done badly transgresses those limits while interest balancing done well respects them*. This is not to deny that one could describe what it is to balance interests badly or well. But giving such an account is not a matter of defending some line-drawing principle;

19. HARM TO OTHERS, *supra* note 1, at 203.
20. HARM TO OTHERS, *supra* note 1, at 203.
21. HARM TO OTHERS, *supra* note 1, at 203.

it is a matter of giving an account of *practical reason*—an account of what it is to reason well about moral and political matters. Absent such an account, the harm principle (in "problematic cases" at least) draws *no line at all*—not even a blurry line. However, an account of practical reason—if it is to be at all informative—cannot take the form of a simple line-drawing principle, for, as Wiggins notes, "it is of the essence of these concerns to make competing and inconsistent claims. . . . The weight of these concerns is not necessarily fixed in advance. . . . [R]eflection on a new situation . . . may disrupt such order and fixity as had previously existed."[22] The harm principle, as Feinberg admits for the "problematic cases," does not tell us how to weigh competing and inconsistent claims and hence does not, in any informative way, delineate the moral limits of the criminal law.

But Feinberg does not concede this point for *a crucially important central core of cases*. In these cases, apparently, either there is no essential reliance on a balancing test, or the results of such interest balancing, as is necessary, are absolutely clear and uncontroversial. I take it that this is how Feinberg thinks the harm principle works in the case of "[k]illing, beating and the like"; there the principle is supposed to be a "clear and univocal guide." I will argue that *even here* applications of the principle involve a balancing test; that the results of this test are by no means clear and uncontroversial; and hence that, even in these cases, the harm principle fails to demarcate the moral limits of the criminal law.

II. THE HARM PRINCIPLE: SECOND PASS

The first step is to examine the harm principle in more detail; in particular, we need to see what counts as a harm. Feinberg argues that, in the sense relevant to the harm principle, *A* harms *B* if and only if *A* sets back an interest of *B*'s; *A*'s doing so is morally indefensible; and in doing so *A* violates *B*'s right.[23] Feinberg explains that an action is morally indefensible if and only if it is neither justifiable nor excusable.[24] He also explains that a right is a valid claim.[25] Although he does not say what he means by a valid claim, he presumably means a claim backed by a certain sort of justification. It is the justification that makes the claim "valid"; and, unless the requirement of right violation is superfluous, the

22. Wiggins, *supra* note 13, at 233.
23. HARM TO OTHERS, *supra* note 1, at 105-06.
24. HARM TO OTHERS, *supra* note 1, at 105-06.
25. HARM TO OTHERS, *supra* note 1, at 109.

justification must be of a special sort. It cannot be that one has a right to do everything one is justified in doing.[26] Feinberg, however, does not tell us what the appropriate sort of justification is. Taking these explanations into account, we can restate the harm principle as follows: it is always a good reason in support of penal legislation that the legislation would probably be effective in preventing setbacks to interest—where: (1) there is no justification of excuse for the setback; (2) the setback violates a right of *B*'s (that is, there is a certain sort of justification for not setting back another's interest in that way); and (3) there is probably no other means that is equally effective at no greater cost to other values.

The "no justification or excuse" requirement is crucial. A liberal certainly does not want the state to criminalize behavior which is fully justifiable or excusable; to do so would be to infringe on liberty without any adequate justification. What justification could one have for prohibiting that which is fully justifiable or excusable? On the other hand, it would seem that the state *justifiably protects* liberty if it prohibits behavior for which there is *no* justification or excuse. It then protects one's liberty from intrusions by others that ought not to have happened, and the state would appear to be justified in preventing what ought not to happen. The "no justification or excuse" requirement plays an essential role in picking out the class of cases that are appropriate for criminalization. Nonetheless, the nature of justification and excuse is such that the inclusion of the "no justification or excuse" requirement in the definition of what a harm is means that the harm principle cannot possibly fulfill its intended line-drawing function.

To see this, some remarks about the concepts of justification and excuse are in order. There are three points. First, a justification for an action is a consideration that, in a principled and non-arbitrary way, weighs, to some degree, in favor of the action. The rationale for the "to some degree" qualification is that, to count as a justification for an action, a consideration need not be an *overriding* justification, a justification that shows the action to be better justified than any other alternative. The requirement is merely that the consideration weigh to some, perhaps minimal, degree in favor of performing the action. As far as excuses are concerned, it is sufficient to note that there may be an overriding justification for *not* performing an action, yet that action may nonetheless be excusable—not one for which we hold the agent culpable. For example, there may be an overriding justification for Smith not to assault Jones, yet we may not hold Smith culpable if the assault was the result of his

26. *See* HARM TO OTHERS, *supra* note 1, at 113-14.

completely involuntary intoxication. I will focus exclusively on justification in what follows; however, what I say generalizes *mutatis mutandis* to excuse.

Second, in the harm principle's "no justification or excuse" provision, "justification" should be interpreted to mean *overriding* justification. Feinberg is clearly committed to this interpretation. Consider his remarks on "genuinely problematic cases":

> Genuinely problematic cases for the legislator have a common form: a certain kind of activity has a tendency to cause harm to people who are affected by it, but effective prohibition of that activity would tend to cause harm to those who have an interest in engaging in it . . . because . . . substantial interests of these persons are totally thwarted. In all such cases, to prevent *A* from harming *B*'s interest in *Y* would be to harm *A*'s interest in *X*. . . . So the legislator must decide whether *B*'s interest in *Y* is more or less important . . . than *A*'s interest in *X*.[27]

Both *A* and *B* have some degree of justification for their activities as they each have "substantial interests" that would be "totally thwarted" by prohibition of the activity. If "justification" in the harm principle meant only some degree of justification, a consistently liberal legislature could not criminalize the behavior of either *A* or *B*.

The same point holds even for non-problematic cases—e.g., burglary. Suppose *A*'s children are starving and *A* has no means other than burglary of obtaining enough food for them. *A* then has a substantial interest in burglarizing *B*'s Beverly Hills home, and there is certainly *some* justification for the burglary. If this seems counter-intuitive, recall what a justification is: a consideration that, in a non-arbitrary way, weighs *to some degree* in favor of an action. A justification is not always an overriding justification; indeed, the degree of justification may be quite minimal. In the present example, keeping one's children from starving certainly provides *some* degree of justification. In general, even in less extreme cases, there is probably always *some* justification for the burglary. Furthermore, what is true for burglary is true for murder, and mayhem. In many cases, there may be *some* degree of justification—however minimal—for the crime.

Third, the discussion which follows turns crucially on the following general truth about justifications: Whether there is an overriding justification for an action depends on the context against which we assess the action.

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27. HARM TO OTHERS, *supra* note 1, at 203.

An example will make this clear. Suppose, to satisfy my desire for heroism, I suggest that you go swimming in an area of the ocean that I know contains dangerous riptides. My plan is that you should succumb to the riptides and be in danger of drowning; then, I will rescue you. *Given that you are about to drown*, is there an overriding justification for my rescuing you? Of course. On the other hand, is there an overriding justification for my pursuing my plan of first endangering your life and then rescuing you? Of course not. *It should never have happened that I rescued you*; it is something that I could, and should, have made sure never happened. Now, what about the question, is there an overriding justification for my rescuing you? *The question has no clear answer.* The answer is "yes" if we are asking the "given that you are about to drown" question; "no" if rescuing you is set in the context of my overall plan.[28]

To see how this last point about justification bears on the harm principle, we need to be clearer about the question the harm principle is supposed to answer. Feinberg imagines himself addressing a legislature that is considering a proposal to criminalize a certain kind of behavior. The question he answers for them is, what sorts of behavior may the legislature justifiably criminalize? The question, however, is ambiguous: there are two ways to understand criminalization. Criminalization can refer only to the prima facie case, or it can refer to the prima facie case plus the defenses. To see why the harm principle fails we first need to note this ambiguity.

Consider murder. Smith shoots Jones through the heart intending to cause his death, which he thereby immediately causes. Smith fulfills the requirements of the prima facie case for murder. There is: an action (the shooting of the gun); a mental state of the requisite sort (the intention to kill); cause-in-fact; and proximate cause. Depending on the details of the case, Smith may be arrested and charged with murder. To be charged with murder is to suffer a major intrusion on one's liberty. Irrespective of the trial's outcome, the sequence of events from arrest to trial are themselves an intrusion on Smith's liberty. Defining a certain behavior as fulfilling the prima facie elements of a crime is one way to "criminalize" that behavior. So, *one* question to which we clearly want an answer is, what sorts of behavior may the state rightly count as fulfilling the prima facie elements of a crime?

28. Another way to make this point is that actions are justified only under a particular description. Different descriptions of "what I do" are possible: "rescuing you from drowning," and "first placing you in danger and then rescuing you." What I do is justified under the first description but not under the second.

Of course, even if Smith fulfills the prima facie elements of murder, it does not follow that he has committed the crime of murder (or any other crime). He may have an adequate defense—e.g., he may have killed Jones in self-defense. Smith commits the crime of murder if an only if he fulfills the prima facie case, *and* lacks an adequate defense. So, to know what types of behavior may be justifiably criminalized, we also need to know what defenses there should be to a criminal charge. There is a simple answer to this question: a defense is any set of considerations that shows that one has a legally valid justification or excuse. However, this answer is little more than an empty formula, for what counts as justification or excuse depends on the context in which the action is assessed, and the "answer" does not specify how to fix the context.

The law typically contains more detailed answers, answers that specify the relevant context by identifying what is relevant to the existence of a justification or excuse. For example, the common law defense to murder of self-defense consists of fairly specific conditions that must be fulfilled for the defense to be available. It is a complete defense to a charge of murder that: (1) one reasonably believed that it was necessary to use force to repel an immediate danger; (2) the danger was (or was reasonably believed to be) immediate; (3) the danger was (or was reasonably believed to be) unlawful; and (4) the force used was proportionate to the danger.[29] Specifying defenses in this way is essential to protecting liberty. Suppose one were charged with a crime, and one knew only that one could defend oneself by providing a legally valid justification or excuse. One would not know what to put forward as defense, and this would greatly reduce one's ability to defend one's liberty against the state. *Any criminal justice system acceptable to a liberal must include a specification of defenses.*

Feinberg does not distinguish between prima facie cases and defenses. He simply asks what sort of behavior the state may legitimately criminalize. Sometimes one has the impression that Feinberg thinks that criminalization involves only specifying a prima facie case. However, it is fair to demand that the liberal position yield answers to both the question about prima facie cases and the question about defenses. Feinberg certainly wants his arguments to apply to our criminal justice system, and we have the distinction. Furthermore, as we have seen, specifying

29. Under various circumstances, the defense is not available even if all these conditions are fulfilled; for example, it may not be available if one has provoked the assault. *See, e.g.*, People v. Holt, 153 P.2d 21 (Cal. 1944).

the defenses is a necessary feature of any criminal justice system acceptable to a liberal.

Now let us return to the harm principle and focus on the case of murder—considering both the prima facie case and the defenses. The prima facie case raises no problems for the harm principle, but it is worth brief consideration for the sake of completeness.

The prima facie case for murder identifies a certain type of behavior: intentionally causing the death of another person. Under the "harm" principle, the state is justified in making a type of behavior satisfy the prima facie elements of a crime only if doing so would probably be effective in preventing unjustifiable or inexcusable setbacks to interests. It would appear that this condition is satisfied. There is a strong presumption against the intentional killing of one person by another. This presumption is so strong that it is unlikely that there will be an overriding justification or an adequate excuse for the killing. Furthermore, let us grant that criminalization deters the type of action criminalized. Then, making the intentional killing of another count as fulfilling the prima facie case for murder should help prevent unjustified or inexcusable setbacks to interests.

Problems about the notion of justification emerge when we turn to the question of what *defenses* should there be to a charge of murder. Let us focus on the defense of self-defense. Given that the prima facie case for murder is intentional killing, it is clear that a liberal must recognize a defense of self-defense. Virtually all liberals would agree that there are cases in which there is an overriding justification for killing in self-defense: for example, where one is the totally innocent victim of a violent assault, and killing the attacker is the only way to prevent one's own death. Since there is an overriding justification for such killings, criminalizing such killings could not possibly be effective in preventing *unjustified or inexcusable* set backs to interest. It follows from the liberal position that there is no good reason to criminalize such killings. Consequently, the liberal must recognize the defense of self-defense. The elements of this defense will consist of conditions that pick out those cases in which the killing in self-defense has an overriding justification.[30]

30. It might be sufficient if *by and large* there was an overriding justification whenever the elements of the defense were satisfied. Suppose there were a few cases in which the elements were satisfied and there was no overriding justification, and suppose we could not amend the defense in any reasonable way to rule these cases out. Recognizing the defense would still further the liberal goal of preventing unjustified setbacks to interest.

But—in an important sense—there are no such conditions, at least not the conditions the liberal needs for the line-drawing project. To see why, recall the common law on self-defense: it is a complete defense to a charge of murder that: (1) one reasonably believed that it was necessary to use force to repel an immediate danger; (2) the danger was (or was reasonably believed to be) immediate; (3) the danger was (or was reasonably believed to be) unlawful; and (4) the force used was proportionate to the danger. Is it the case that, if these four elements are fulfilled, there is an overriding justification for the killing? The answer is "yes and no."

Commonwealth v. Kendrick[31] illustrates the point. Kendrick, a married forty-four year old rural mail carrier, was having an affair with Mrs. Giangreco, who lived with her sixty year old husband. Kendrick was the father of a child born to Mrs. Giangreco in 1964. Since 1963, Kendrick had planned to divorce his wife, and he and Mrs. Giangreco hoped that her husband would grant her a divorce. In September of 1964, Kendrick went to see Mr. Giangreco at the latter's home; his plan was to talk about the possibility of a divorce for Mrs. Giangreco. On the porch of the house, before Kendrick went inside, Mr. Giangreco attacked him with a fireplace poker. Kendrick responded by stabbing Giangreco to death. Giangreco was known for his violent temper and had begun to suspect his wife was having an affair with Kendrick.

Suppose, for the sake of argument, that Kendrick fulfilled the four elements of the self-defense defense.[32] Then it may seem obvious that there was an overriding justification for Kendrick's killing Giangreco. Imagine Kendrick trapped on the porch by Giangreco's attack; unless he defends himself, he will be killed. Surely, Kendrick does not have to submit passively to the attack. He may defend himself, and he may do so in an effective way. Unfortunately, the only effective defense is to kill Giangreco. Surely then there is an overriding justification for Kendrick's killing Giangreco.

However, it is possible to argue with equal cogency that there is no overriding justification for the killing. Suppose the following story were true. Kendrick had no intention of really marrying Mrs. Giangreco; he was merely playing a part to continue his liaison with her as long as possible. He fully intended to end the affair before he actually married

31. 218 N.E.2d 408 (Mass. 1966).

32. This is probably not true; among other things it appears he used excessive force. *See id.* at 412. The trial court convicted him of second degree murder; they were reversed on appeal for refusing to instruct the jury that Kendrick's imperfect self-defense defense might still be grounds for reducing his crime to manslaughter. *Id.* at 414.

her, but he wanted the gratification of knowing that she would leave her husband for him. His goal was to separate Mrs. Giangreco from her husband and then abandon her, leaving her distraught and alone. His visit to the house would, he knew, upset Mr. Giangreco, and he thought there was a chance that Giangreco would lose his temper and attack him. In fact, he hoped for an attack as this would elicit sympathy from Mrs. Giangreco and would put her husband in a very bad light.

Let us assume that there is no overriding justification for Kendrick's pursuing his plan of leaving Mrs. Giangreco distraught and abandoned. Given that he was at the Giangrecos' home solely in pursuit of this plan, there is no overriding justification for his being at the house. He should never have gone there.

So was there an overriding justification for Kendrick's killing Giangreco? Yes, if we are asking whether Kendrick may defend himself *given that he was attacked*. No, if we are asking whether Kendrick was justified in pursuing the plan that led him to the Giangrecos' home and ultimately to the killing of Mr. Giangreco. That killing is something that should never had occurred. Kendrick could, and should, have avoided that eventuality by abandoning his overall plan. The answer then is both "yes" and "no." In general, whether there is an overriding justification for an action depends on the background context against which we assess the action.

However, the harm principle does not specify the relevant context of justification for its "no justification or excuse" requirement. Yet, if we do not know that context, we do not know what type of behavior should qualify legally as self-defense. In other words, we do not know whether Kendrick should have a valid defense of self-defense to a charge of murder. If we do not know what type of behavior should qualify legally as self-defense, we do not know what type of behavior constitutes the crime of murder. One commits the crime of murder if and only if one satisfies the prima facie case, and one has no adequate defense. So the harm principle is not a "clear and univocal guide" even for murder.

This example illustrates that Feinberg has overlooked the problems that arise in specifying legally valid defenses. The common law conditions for the defense of self-defense essentially fix the context of justification by specifying what factors are legally relevant to justifying killing another in self-defense. What Feinberg overlooks is that in specifying such a defense one is balancing competing and conflicting interests much the same as in what Feinberg calls "problematic cases."

The common law on self-defense illustrates the point. Ignoring various qualifications,[33] Kendrick has a defense of self-defense under the common law if the four elements of the defense are fulfilled. Typically, there is no inquiry into Kendrick's overall plans. Some inquiry might be required to establish that the force used against Kendrick was unlawful, but typically, at least, this inquiry would not amount to an inquiry as to whether Kendrick's plan had an overriding justification. The result is that the common law recognizes valid self-defense defenses both where the overall plan has an overriding justification and where it does not. This approach has at least two virtues. It fixes the context of justification so that, as a defendant, one knows how to protect one's liberty against a charge of murder by pleading self-defense. It also ensures that valid self-defense defenses are available in those cases in which a liberal clearly should allow them; i.e., those cases in which one is pursuing a plan for which there is (no matter how broad the context) an overriding justification; and, in which one is the victim of a violent attack and killing the attacker is the only way to prevent one's own death. But these virtues come at a price: allowing defendants like Kendrick to have valid self-defense defenses.

The essential point is that it is not at all obvious how one balances the various competing considerations involved in framing a self-defense defense. Consider three cases in which a defendant might plead self-defense.

(1) A hunter evidently mistakes a bird-watcher for a deer; the bird-watcher sees the hunter about to shoot and shoots the hunter, that being the only way to save himself. It is not hunting season. The four elements of the self-defense defense are arguably fulfilled, but this is a far cry from the typical self-defense case where the killer is repelling an attack intentionally directed against him. Is this enough like the cases that qualify as legal self-defense to count as self-defense?

(2) Jones attacks Smith with deadly force, but Smith could retreat through a door with reasonable safety. The elements of the self-defense defense do not require that one retreat in this case, but should they? Some jurisdictions do. Here one must balance (among other things) the value of life against placing on the attackee the legal burden of making an immediate decision as to whether there is a safe retreat.

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33. *See supra* note 28.

(3) *State v. Kelly*:[34] Gladys Kelly was a battered spouse who stabbed her husband with a pair of scissors. The circumstances in which she killed her husband raise the question of whether she reasonably believed she was in *immediate* danger of death. What counts as immediate? (One state's supreme court held it was reversible error to interpret "immediate" to mean "imminent.")[35] How reasonable does a battered spouse's reasonable belief have to be? Are these cases enough like typical self-defense cases to allow a self-defense defense here? How do we weigh the value of (the battering spouse's) life against the value of allowing battered spouses to defend themselves?

Balancing such competing and conflicting interests requires an exercise of practical reason, and what we need to know, to know the moral limits of the criminal law, is what distinguishes good reasoning (good balancing) from bad. But this is just what the harm principle does *not* tell us. *Even in the central core of cases*, applying the principle involves a balancing test and the results of this test are by no means clear or uncontroversial. Hence, even in these cases, the harm principle fails to demarcate the moral limits of the criminal law.

Similar problems arise with many other standard defenses, i.e., defense of property, defense of others, necessity, duress, provocation, and involuntary intoxication.[36] One may object that some of these defenses involve arguing, not that the killing is justified, but that the killing is excusable or at least partially excusable. However, similar considerations apply in the case of excuses. As examples similar to the drowning example would show, whether an action is excusable depends on the context in which we assess that action.[37]

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34. 478 A.2d 364 (N.J. 1984).

35. State v. Hundley, 693 P.2d 475 (Kan. 1985).

36. The difficulty is not confined to the defenses; it arises, for example, in the context of criminal negligence. I would argue that criminal negligence is negligence where there is a very strong overriding justification that such negligence should not occur. But if criminal negligence is understood this way, the question of the context of justification clearly arises.

37. Stephen Morse pointed out to me another, somewhat different problem with excuses. Insanity is regarded in the law as a complete excuse, yet it is not clear that the harm principle allows such an excuse. It is not clear that allowing such an excuse "would probably be effective in preventing . . . harm to persons other than the actor . . . [where] *there is probably no other means that is equally effective at no greater cost to other values.*" The question turns on whether one believes that those typically classed as having a mental disorder can control themselves, and on how one thinks the criminal justice system can best deal with such people. This is another area in which the harm principle provides virtually no guidance.

Suppose Jones kidnaps Smith's wife and child and threatens to kill them unless Smith helps him rob a bank, which Smith does. Let us suppose the circumstances are such that Smith is *not* justified in helping Jones in that there was a better alternative. Nonetheless, Smith may be partially or completely excused. He may not be culpable, or may not be as culpable as he would have been otherwise. The question turns on whether a person in Smith's circumstances could be reasonably expected to resist the threat to his wife and children. The law recognizes this by allowing duress as a defense to a criminal charge.[38] But whether duress constitutes a valid excuse clearly depends on the context in which we assess the action. Suppose Smith associated with Jones hoping that Jones would kidnap Smith's wife and child and threaten to kill them unless Smith helped rob the bank. Although Smith wanted to rob a bank, he knew he would never have the nerve to do so on his own. Then Smith has no excuse.[39]

In general, we can conclude that the harm principle fails to draw a line that defines the moral limits of the criminal law. One can object to this conclusion on two grounds. Both raise issues already discussed, but it is illuminating to reconsider them here.

The first objection is that the most I have shown is that *Feinberg's* version of the harm principle fails. What of other versions? My focus on Feinberg, after all, was merely a means to discussing liberalism generally. Against liberalism generally, I claim that similar problems will plague any otherwise acceptable version of the harm principle. Problems arise for Feinberg because he defines harm in terms of justification and excuse. Including the "no justification or excuse" requirement in the definition of a harm means that the harm principle cannot possibly fulfill its intended line-drawing function. The essential point is that Feinberg is surely right to define harm in terms of justification. Behavior which is fully justifiable or excusable should certainly not be criminal given that one wants to maximally protect individual liberty. The "no justification or excuse" requirement picks out the class of cases appropriate for criminalization. So Feinberg's problems are problems for liberalism generally.

The second objection is that there is an obvious fallback position for liberalism. A liberal theorist can claim that the harm principle is merely

38. *See* MODEL PENAL CODE § 2.09.

39. The *Model Penal Code* recognizes this point: "The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress." *Id.* § 2.09(2). However, what counts as *recklessness* clearly varies as the context varies, so this provision on its own, unsupplemented by the common law interpretation of recklessness, does not tell us when the defense is unavailable.

intended as a guide to defining the *prima facie cases for crimes*. I have not argued that the principle fails here. The problem with the fallback position is that it abandons the liberal line-drawing project. Suppose one knows only the prima facie case. Then one does not know what behavior is criminal. One only knows what behavior *might* be criminal; one only knows what behavior is *criminal absent a legally valid defense*. This is a serious deficiency. Suppose one were charged with a crime, and one knew only that one could defend oneself by providing a legally valid justification or excuse. One would not know what to put forward as a defense, and this would greatly reduce the ability to defend one's liberty against the state. *Any criminal justice system acceptable to a liberal must include a specification of defenses.*

This brings us back to the answer to the first objection, that certain considerations about justification show that the harm principle fails in its line-drawing function. In particular, the principle fails to provide a guide to specifying defenses. Thus, liberalism faces a dilemma: it must provide a guide to specifying defenses, and it cannot do so.

CONCLUSION

I will conclude with a remark of Feinberg's about "hard cases":

> In hard cases . . . there will be no automatic mathematical way of coming to a clearly correct decision. The theorist can identify the factors that must be considered and compared, but, in the end, there is no substitute for *judgment*. When the facts are all in, and the standards all duly applied to them, there is no more need for a philosopher; the judge or legislator is entirely on his own.[40]

I have, in effect, been arguing that, in conflicts between the state and the individual, *virtually all* cases are "hard cases." Virtually all cases call for "judgment." However, I do not share Feinberg's view that "when the facts are all in, and the standards all duly applied to them, there is no more need for a philosopher; the judge or legislator is entirely on his own."[41] There may be "no substitute for *judgment*," but I do not see why it is impossible to give a philosophically illuminating, and practically useful account of how to "judge" well, of how to reason well about moral and political matters. This is a proper ambition for moral political philosophy. Indeed, it was one ambition of, for example, Aristotle and Kant.

40. OFFENSE TO OTHERS, *supra* note 1, at 45-46.
41. OFFENSE TO OTHERS, *supra* note 1, at 45-46.