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BOOK REVIEW

FIENDS AND SLIME

Reviewed by Lawrence C. George*

Professor Joel Feinberg of the University of Arizona enjoys a well-deserved eminence as an original and careful critic of legal doctrine. He brings the skills of academe, rather than the forum, to his tasks, since he is not a professor of law, but chairman of a department of philosophy. The book under review1 is the first of a projected four-volume series.2 It promises to consolidate and add to the reflections on the ethical foundations of criminal responsibility that Feinberg has previously offered in his other writings. Under the scrutiny of a philosophical critic such as Professor Feinberg, lawyers can take pleasure in seeing the logical fabric of a legal principle probed, dissected, and run through its hypothetical permutations with a rigor to which our own “Socratic” tradition aspires with only infrequent success. As the organizing theme for his masterwork, Feinberg has undertaken a thoroughgoing ethical examination of the harm principle. Both common sense and such political consensus as our society exhibits seem to justify adoption of that principle as a starting place for justifying and setting the boundaries of a system of positive criminal law in a modern and liberal democracy.3

* Professor of Law, Florida State University. University of Chicago, B.S., 1956; Yale University, LL.B., 1959. This review expresses my gratitude to the 1984 Law and Philosophy Workshop sponsored and generously supported by the University of Western Ontario, where I became acquainted with Professor Feinberg’s analysis of criminal liability for omissive harm. I am also grateful to the administration of my College, which made summer leave and travel funds available for the pursuit of my interests. My colleague Lynne Henderson graciously read and offered suggestions on this review in an earlier draft. She is responsible for rescuing me from some gaffes that do not appear herein and I am guilty of those that remain.

2. The series is to be titled The Moral Limits of the Criminal Law. The next work will deal with offense to others, volume three with harm to self, and the concluding book with harmless wrongdoing. J. Feinberg, supra note 1, at vii.
3. Feinberg devotes great care to his definition of the harm principle; the exercise is one in updating and refining the analysis of John Stuart Mill. No attempt is made to deal with implementation of the harm principle in a code of positive law, either critically or instru-
As its title indicates, this first volume is concerned with the ethical foundations of our received and traditional apologetics for the substantive scope of the criminal domain. Much of the book is devoted to refinement of the concept of harm. Professor Feinberg takes as axiomatic the principle that harm, to determinate victims, is an essential precondition for any justifiably nasty means of behavioral coercion, such as the criminal law. There is nothing dull, arid, or pedantic in Feinberg's treatment of harms deserving criminal denunciation, although he shows the exhaustive patience of a philosophical craftsman in dividing and pursuing his quarry through every variety of objection and argument. Feinberg is both a creator and a retailer of fine dramatic hypotheticals, designed to focus attention on the most problematical aspects of the moral and legal beliefs that legal officials and scholars take for granted.  

This review singles out for examination a significant subtheme in Feinberg's larger argument: our common law tradition of hostility to creating, enforcing, or even recognizing the very possibility of crimes of omission. The merits of Feinberg's critical approach to criminal law are best exemplified for the general reader by considering in some detail this most controversial and venerable of jurisprudential subjects. There is something deeply puzzling to legal and lay minds alike in the curious tardiness and reluctance of modern criminal law to deal with a class of wrongdoing that appears from the viewpoint of a well established moral consensus to be incontrovertibly heinous: the deeds of persons Feinberg calls "bad samaritans." Characteristically, in undertaking to clarify the status of such (non)actors in our polity, Feinberg first presents a balanced and accurate view of the status of criminal statutes in various American and continental legal systems bearing on the subject.
The domain of omissive criminality is not empty. Feinberg cites a variety of legislation criminalizing an actor's knowing failure to provide costless life-saving assistance to a stranger. Common features of such laws are their novelty (against any reasonably commodious historical time frame), their lenience (in regard to punishment), and their low level of enforcement. The dominant background norm leaves nonrescuers and onlookers unstigmatized and unthreatened by the positive law. Feinberg undertakes to show that this state of the law cannot be explained by any principled objection (within classic liberal political or ethical theory) to criminalizing a very broadly defined category of omissive harm. In making such a claim, Feinberg is careful to establish that adequate accounts of the law's reluctance to act may indeed be provided by other disciplines. Various social sciences may offer the lawyer or philosopher important lessons concerning the prudential merits of enacting or enforcing criminal legislation of the kind Feinberg advocates, but neither instrumental reasons nor normative objections rooted in considerations of prudence can reach Feinberg's argument, which is firmly hedged to deal only with issues of legislative competence. Even then the analysis is kept strictly at the level of ethical principle.

However, law shares with ethical philosophy an essential kind of prescientific generality—a concern with the tendencies, definition, and implications of our values. This normative priority demands a parallel measure of analytical priority in legal thought for the fundamental ethical postulates which underlie doctrinal analysis. Metalegal issues of political ethics inevitably take precedence over matters of mere juris- or other "prudence." Our legal ideology's toleration (to the extent that impunity manifests toleration) of such phenomena as the Kitty Genovese misprisions is incomprehensible in the absence of a powerful and tight argument for a regime of harmful laissez-faire deduced from widely accepted first principles. Legal and ethical theories have indeed been advanced readily surveyed, since only a few jurisdictions have acted, with largely ineffectual misdemeanor statutes. French law, on the other hand, is at least nominally quite severe, with exposure to up to five years' imprisonment for the callous disregard of a stranger's peril. Id. at 127.

8. The first bad samaritan law apparently was adopted by Portugal in 1867; most such statutes date from the 20th century. Id. at 256 n.2.
9. See, e.g., VT. STAT. ANN. tit. 12, § 519 (1973) (creating a misdemeanor and imposing only a $100 fine).
10. There has apparently been no prosecution as yet under the oldest of the American laws, the Vermont statute adopted in 1971.
by a variety of legal and philosophical thinkers to account for the
wrongness of punishing morally “criminal” delicts. It is this some-
what heterogeneous body of orthodox opinion that Feinberg sets
out to refute. If his argument is successful, fair-minded jurists and
legislators may be expected over the long run to endorse, support,
and enact provisions inflicting criminal liability on the worst kinds
of bad samaritans. We might also expect to see interstitial growth
of the criminal law through precedents extending our operative
definitions of causation, duty, and perhaps, attempt.

It is doubtful whether any author approaching Feinberg’s task
from a law school background would share his optimism regarding
the tractability of the omissive harm problem. Lawyer-philoso-
phers of the emergent Critical Legal Studies school would be more
likely to take the “gap” in criminal law as a confirmation of their
assessment of liberalism as hopelessly individualistic. A defining
feature of liberal legal thought is its inability to perceive and artic-
ulate the demands for initiative and for socially responsible behav-
ior, which fall upon individuals by virtue of their definition (as po-
itical agents and rights holders) in a context of community. The
case of unpunished indifference to the extreme peril of a fellow
being could be cited by a CLS theorist as strong evidence that lib-
eral theory is incapable of resolving the tension (“contradiction”)
between the claims of others and the primacy of the isolate self.11

Nevertheless, Professor Feinberg is dedicated to showing that a
liberal theory of criminality can accommodate demands for more
solidarity, while respecting all of the traditional claims of liberals
for the sanctity of the autonomous individual.12

Having established a context both of positive law and of polem-
ics, Feinberg states his thesis and commences to defend it. Fein-
berg’s thesis is that there is no just obstacle to the enactment of

11. To illustrate with a Feinbergian example—suppose a baby is crawling toward a cliff
and the “cost” of intervention is seen by the actor as having to leave the vicinity of a tele-
phone, where he is waiting for an “urgent” message from his stockbroker regarding a major
move in silver futures. Feinberg’s definition of the bad samaritan would at most make a jury
question over the adequacy of the nonintervenor’s justification for preferring his financial
interests to the baby’s life. It is doubtful whether the Feinberg principle would reach this
nonactor in the first place, since Feinberg’s discussion of costlessness is inadequate for the
operational purposes of positive law, much less of economic theory.

12. Feinberg does not need to assert the existence of group rights in order to establish
wrongdoing of a morally “criminal” nature to the victims of omissive wrong. Solidarity is a
social value realized in a variety of fiduciary forms relating individuals by ties of obligation
arising from a preexisting juridical relationship. Cf. Garet, Communality And Existence:
values in groups and the moral values associated with individuals and society).
criminal statutes punishing (as severely as you like) consciously callous indifference to a stranger's mortal peril. Arguments against criminalization of fatal omissions take four distinguishable forms according to Feinberg: a liberty argument, a causation argument, a line-drawing argument, and enforced benevolence.\textsuperscript{13}

A line of argument, familiar to students of the common law tradition, emphasizes the distinction between "acts" and omissions. Invoking the axiom of legality, nulla poena sine lege, critics of omissive crime ask how it can be (naturally speaking) legal, or fair, to expose a person to criminal liability for doing precisely—nothing. If liberty does not immunize passivity, or if inaction is characterized as a form of legally significant action, our basic notion of civil liberty must be overhauled, perhaps drastically. Omissive crimes can be "committed" only metaphorically. Even then the "actor" is most likely to be exposed to direful criminal consequences by circumstances not of his making. Thus criminal omission statutes punish bad luck.

A philosophically more troublesome line of criticism is based upon the idea that the omissive criminal's "act" is not causally related to the ensuing harm—at least not with the stringency required by tort law and the general law of crimes. Our language provides a rich vocabulary of verb forms, drawing distinctions between permitting an event to happen and making it (or trying to make it) happen. Feinberg does not deny this, but attempts to show the moral, and potentially the criminal, insignificance of such distinctions. The argument Feinberg presents on this issue in turn makes two claims: first, that the culpability of intentional neglect of the most minimal duties of human brotherhood is an adequate basis for criminal sanctions regardless of "causality";\textsuperscript{14} second, that deaths ensuing from failure to effect an easy rescue, and similar cases, are fully determined—perhaps overdetermined—by the actor's choice not to intervene.\textsuperscript{15} Both law and common discourse have assigned such determinations (as the decision to stand aside and watch a baby drown) as causally related to the ensuing death, Feinberg claims. Indeed, when we seek by way of moral inquest to

\textsuperscript{13} J. FEINBERG, supra note 1, at 129-30.

\textsuperscript{14} "[I]t is always a relevant reason in support of criminal legislation that it is needed to prevent harm to persons other than the actor . . . ." Id. at 166.

\textsuperscript{15} Feinberg relies upon an analysis developed in THOMAS GREY, THE LEGAL ENFORCEMENT OF MORALITY (1983), to show the moral insignificance of distinctions between action and inaction, in the case for example of a heart attack victim whose pills are just out of reach, or put just out of reach by a nearby enemy. J. FEINBERG, supra note 1, at 167.
ascribe the cause of such an event by selecting one from the plethora of necessary conditions for its occurrence, we do not hesitate to taint the nonrescuer with the full measure of blame.\textsuperscript{16}

The causation argument is further illuminated by drawing distinctions that have not been considered essential to the process of legal analysis. Feinberg points out that there are only three kinds of reasons for singling out an antecedent condition and calling it "the" cause of an event: the familiar one (to gossips, lawyers, and theologians) of casting blame, the scientific one of relating instances (in their context) to general law-like rules, and the practical one of dealing with such conditions preventively or adjuvantly with a prudential eye to the future. Thus, any cause can be readily categorized as a "lamp" (for understanding the event), a "handle" (for encouraging or deterring recurrences), or a "stain" (for ascribing culpability).\textsuperscript{17} Feinberg argues that nonrescue qualifies as both a stain and a handle. Either should suffice to bring morally culpable nonrescue within the reach of criminal justice.

To appreciate the persuasive force of Professor Feinberg's justifications (on ethical principles) of a criminally sanctioned duty to rescue, the reader must consider Feinberg's full and careful survey of the legal and philosophical positions he attacks. Subsidiary points scored against spokesmen for minimalism such as Nozick and Lord Macaulay figure prominently in the advancement of Feinberg's larger demonstration. His hypotheticals, however, suggest a possible principled source of the ordinary lawyer's reluctance to adopt Feinberg's academic conclusion that bad samaritan laws are justified. At least presumptively, they are also needed to complete the just agenda of the criminal law (practical tradeoffs aside). Deficiencies in their construction or analysis might result in a failure of Feinberg's tightly reasoned and abstract discussion to account for the gap he claims to have discovered in the completeness of American criminal law's fidelity to the harm principle. The casuistic and the analytic aspects of Feinberg's style are closely related; further discussion of the hypothetical bad samaritanism of legal and philosophical discourse may prove to be worthwhile in this review.

Feinberg has the southwesterner's gusto for pure villainy. One of his favorite cases is that of "Murphy's lounger," a character who

\textsuperscript{16} J. FEINBERG, supra note 1, at 175.
\textsuperscript{17} Id. at 177. Feinberg's discussion cites his earlier article in which the categories are styled lantern, handle, and stain. See J. FEINBERG, Sua Culpa, in DOING AND DESERVING 187 (1970).
sips his mint julep beside a swimming pool in which a strange baby is drowning within arms’ reach. Too lazy to set down his drink and haul the baby out with one hand, this piece of “moral slime” (Murphy’s term, not Feinberg’s)18 is allowed to go unpunished in most American jurisdictions. If the reader is tempted to stretch the law somehow to find a way to get at Murphy’s lounger, additional and equidistant tots are tossed into the froth, creating a situation of armchair triage.19 Feinberg also posits the case of the angler on a bridge who sees a nearby fisherman (of whom he is none too fond) fall into the water, but fails to drop him a convenient life preserver.20 There are also cases from Macaulay: the surgeon too busy with his private affairs to attend a patient at some distance from his office in Calcutta,21 the jailor who won’t feed his prisoners,22 and the oldtimer who says nothing to a stranger headed for a dangerously flooded ford across the local arroyo.23 If these cases do not make a strong enough moral point, consider the sadist who complacently watches a blind man stroll towards an open manhole without raising a single whisper of warning.24 Feinberg’s literature is rich with implicit melodrama, as is the work of many of the writers he assails.

The real world affords examples of Feinbergian villainy only rarely, but that is no reason to object, in principle, to having a law in place to deal with egregiously bad samaritans when they present themselves. The outer reach of such legislation might extend to less depraved characters, such as the habitues of rapists’ saloons, witnesses of urban violence, and other bad citizens who fail to recognize or fear to take exigent initiatives. Professor Feinberg is aware that his adversaries have acknowledged (with extreme regret for the law’s impotence) the force of his case for criminal punishment by the secular courts, as well as the everlasting torments that religion may prescribe for the very worst samaritans. Feinberg’s more astute adversaries shrink (as he does not) from adopting proscriptions and reprisals for bad samaritanism because they fear that the transition from the natural (or “moral”) to the positive

18. Murphy, Blackmail: A Preliminary Inquiry, 63 The Monist 156, 168 n.6 (1980), cited in J. Feinberg, supra note 1, at 130.
20. Id. at 172-73.
21. Id. at 152-53.
22. Id.
23. Id. at 152.
24. Id. at 163-64.
law in such cases would have at least two evil consequences.

Criminal sanctions would mean prescribing a positive duty to rescue, warn, or otherwise intervene in the course of imminent mortal perils to another. This duty, it is sometimes argued, would deprive the moral realm of an important category—the heroic or supererogatory act. It would also distribute the costs of intervention in a burdensome and fundamentally unequal (and therefore unjust) manner. The neighbor who lives near the flooded stream, the medico, the pillar of the bar whose exceptional talent may save a prisoner from the chair might all be exposed to risks of criminal accusations, just as might the hiker who happens to encounter a perishing alpinist on the lonely trail, yet elects to finish his vacation instead of retracing his ascent to seek help.\(^2\)

Moreover, opponents contend, all of the imaginable elements of mens rea which can be readily postulated for a hypothetical case designed to isolate and focus the moral issues of omissive guilt and victimization are apt in the real world to be absent or inferable only from exiguous and indecisive evidence. Opponents of criminalization seem to share a fatalistic attitude towards the calamity which befell the nonrescuer's victim—a sense that ascription of moral stain for the chain of (independent) causes leading to the death entails some kind of unfortunate moral excursion into possible but not actual worlds—realms of imagination where the death did not occur because simple measures of rescue causally "intervened." Feinberg replies to such sophisticated claims by invoking the common intuition that stain equally applies and equally justifies legal intervention, whether the actor "caused" the fatal peril or only "allowed" fatally perilous circumstances to run their course.\(^2\)

Allowing full value to this claim of moral equivalency, a question remains as to whether it really trumps the legal distinction between acts and omissions. The crucial issue, once equality of wrongfulness is established to our moral satisfaction, is whether we can specify with necessary criminal precision the omissive circumstances that constitute a felonious "allowing." Led by Lord Macaulay's brief filed more than 150 years ago,\(^2\) opponents of omissive crime question whether a principled distinction can be drawn, such that scum like Murphy's lounger are caught in the toils of the

\(^{25}\) Id. at 171.
\(^{26}\) Id. at 167-68.
\(^{27}\) Id. at 152-53.
criminal process, while all of the rest of us are exonerated from the charge of similar criminality for failing to empty our pockets to starving beggars (if we are situated like Macaulay's prosperous colonial in Calcutta). Any thorough discussion of the omissive wrong problem must find a ledge somewhere along contours of the slippery slope, which is wide enough to accommodate the vast majority of imperfect and self-seeking humanity. There is considerable momentum in Feinberg's own argument that we allow and thereby become morally responsible for whatever we can ("reasonably" or readily) prevent from happening. If this kind of responsibility is an adequate foundation for Feinberg's criminal accusations against Murphy's lounger, does it not compel a much higher and involuntary level of eleemosynary action upon the part of citizens, as well as their governments? If "charity begins at home," so that degrees of duty and concern are necessarily to be recognized by creating large exceptions within the omissive criminal regime, how can principled rules be worked out? We may not stop the discussion at the level of general principle, since everyone agrees that the terms of a criminal liability must be clearly specified in advance.

Feinberg is ready to tackle the oxymoronic objection to compelled charity and the closely related Macaulayan argument, which asks us to set the radius of our duty to prevent a drowning by venturing into the Punjab midday sun X (feet, yards, miles) distance to warn a traveller of a swollen river. The Feinberg response is a form of confession and avoidance. Feinberg sees the legal argument as typical of the forensic rhetoric which begins with the penumbral case and moves by incrementally negligible stages to the conclusion that the entire issue is but a shadow. His sensitivity to the burdens of involuntary involvement in the predicament of another is shown by Feinberg's insistence that criminal liability for omissive wrongs must be limited to cases where the defendant's trouble or expense is (in a jury's judgment—for this is a matter of community values and not of quantifiable law) trifling or nonexistent. A dime for a phone call would constitute the limiting Feinberg peppercorn in providing assurance that the rescuer's duty is truly gratuitous. If a jury is willing to exact more altruism than that, Feinberg will not object, provided that the instructions from the court make it clear that the law expects nothing heroic or even self-sacrificing on the part of the defendant. In Feinberg's moral universe, samaritanism is the least of a hierarchy of positive

28. Id. at 154-55.
duties. In this respect, Feinberg doubtlessly reflects his culture and its limits. A cynic from the opposing camp might then wonder why Feinberg feels it is worth the bother to move from no duty at all to a position of next-to-no-duty. Once arrived at the utopian point of almost-no-duty to strangers, Feinberg's principles constrain him to join the opposing group in resisting further exactions of altruism, even if he is willing to see the objects of minimal altruism multiply and diversify beyond the small category of persons in imminent mortal peril.

Feinberg is aware that his argument would be further strengthened if he could satisfy his critics that it is strictly accurate to characterize the actor's involvement in a nonrescuee's demise as "causal" in a legally recognized sense. To make a case for causal staining, Feinberg recites and updates Macaulay's extensive catalog of the recognized occasions for nonfeasor criminal liability in the common law. Almost any (indeed, it may be safe to claim that every) relationship dignified by the law with a name, such as master-servant, doctor-patient, innkeeper-guest, lawyer-client, or buyer-seller, is deemed sufficient in law to carry a positive duty in "rescuer" situations. In other words, the bad samaritan is an unusual creature insofar as he is defined subtractively by the utter absence of any tie to the perishing wayfarer beyond that of their common humanity. How then do we describe the act of a doctor who allows a "patient" to die of pneumonia when readily available antibiotics would have saved the victim's life? To make room for the doctor to be criminally prosecuted, we need to say that he killed his patient. But in this representative example of the law's "special relationships" that support omissive criminal liability, it is noteworthy that no principle of contract is needed to establish the doctor's status-driven duty. All we need to imagine is the dependency of the patient and the doctor's unique (or clearly superior) position of capacity to afford relief. The doctor may be a mere samaritan and the patient an alien stranger.

To generalize permissibly, it appears that law and language concur in using active verbs to identify the act of allowing death to ensue when it (certainly) could have been prevented, so long as the

29. Id. at 159.
30. Id. at 179.
31. In the contemporary United States, further force to the physician-liability argument would come from the obligations assumed with licensure. An unlicensed physician could nevertheless have a patient, and the duty would be all the more stringent because of the circumstance of unauthorized medical practice.
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legal (social?) relation between the nonfeasor and the victim establishes a duty. The duty may be imperfect or inchoate, as viewed from the framework of positive law. It may be only “moral” in the sense that it is so general that it is fully expressed by the notion of minimal, gut-level decency. Vagueness and generality in the specification of the duty are not objectionable so long as the law can find common language to embody its recognition of the wrongdoer’s obligation. In short, it is the conviction that an obligation exists, rather than its proper realm (in morality or positive law), that generates both vigorous language of condemnation and a corresponding readiness of the law to accommodate our hatred for such trespasses. A jailor who withholds food from his prisoners is said to “starve” them, and thereby to expose himself to criminal liability as a homicide. A lawyer who pirates an irrelevant brief and files it for his capitally convicted client on appeal thereby “condemns” his effectually unrepresented victim more intimately and savagely than even the barbarity of twentieth-century Florida law can do. The lawyer escapes blame (beyond the craftsman’s disapproval of his guildfellows) only because he is situated to protest that the appeal had no merit, that the death was in that sense inevitable—even though this position shares the ignominious form of all malpractitioners’ excuses in placing the wrongdoer in further wrongful opposition to a fiduciary dependant. 32

If we take the philosopher’s perspective and regard these cases neither ex ante nor ex post, but ex cathedra, from our armchairs, we may feel compelled to agree with Feinberg that exposure of callous nonactors to criminal liability presents in principle no insuperable problem for the ideal legislator. However, the uncertainty which frequently exists as to whether nonrendered aid would have been effectual justifies a criminal classification of the wrong in a lesser category, at least for purposes of punishment. 33 The philoso-

32. The responsibility for culpably negligent nonrepresentation closely parallels Feinberg’s nontreating doctor, save for the fact that real life provides an example. See Petition for Writ of Habeas Corpus at 12, Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984) (capitally convicted felon’s appellate lawyer changed only title page on a different client’s brief). Arguments of moral responsibility for the death are somewhat diluted by the sworn obligations of all killers for the state to restrict the set of their victims through strict application of legal formalities, without respect to policing the professional roles of participants.

33. Professor Lynne Henderson suggested a further, more conceptual or doctrinal reason to relegate crimes of neglect of duty to a relatively minor category of offense. The crime of indifference is unattemptable. Its passivity is its defining characteristic. As soon as the offender makes any gesture, however feeble, to seek help or provide it, presumably his innocence is established. We would rule out prosecutions for botched rescues, and we would expect to encounter defenses built upon minimal disproofs of the element of “total indiffer-
pher's prerogative, to eliminate an occasion for doubt by specifying that the nonfeasor's intervention must have been effectual, thus provides the beginning of an explanation, if not a justification, for the criminal law's tardiness in dealing with omissive delicts.

There is a further possible explanation, exploration of which might have served Professor Feinberg well in developing his argument. Looking at the larger frame of legal constraints upon action or inaction, we find that equity jurisdiction has had to deal with the distinction between commission and omission in providing suitors with injunctive relief. The curious aspect of equity jurisprudence is its recent emergence from an historical aversion to injunctions issued in mandatory form. Extraordinary feats of verbal contortion were practiced in the golden age of chancery, to couch a command (under pain of loss of liberty, or worse) in prohibitory forms, when the substance of the court's relief was easily described as a simple command to initiate something—to make things happen.4 The parallelism to the criminal law is obvious. Criminal theory lags behind equity in its continuing respect for the (purely verbal) distinction between rulings of a mandatory and prohibitory nature. The purpose of a bad samaritan law is simply to require the bystander to render safe, cheap, and practical assistance. But criminal rules, unlike modern injunctions, characteristically come in the form of a "thou shalt not" (e.g., "Thou shalt not suffer thy neighbor to perish by failing to go for aid"). Feinberg's argument, in this light, is seen to be a brilliant chapter in the traditional jurisprudence of American legal realism.

The Feinberg gap in the fabric of criminal law may have a still deeper explanation, however. Pursuing our tripartite distinction of analytic perspectives, a lawyer's instinct is to view even the most perfectly constructed case for a "natural law" criminal liability as it will present itself within a legal system—and that is always after the fact. The question then becomes much more procedural. A prosecutor, for example, who learns that X drowned by "falling" from a bridge with a life preserver handy, while a bystander known to be hostile to the decedent was in the immediate vicinity, might feel inclined to let the jury decide whether the decedent slipped

ence," if omissive crimes were seriously and regularly prosecuted. It would therefore be extremely incongruous to punish the nonrescuer or silent sadist more severely than the actor whose intervention appears to be morally ambiguous because of uncertain inferences concerning the balance between his malice and his ineptitude.

and fell or was pushed. Similar reasoning applies to the infantile victims of Murphy's lounger, given the moral irrelevancy of distinctions between a gentle nudge over the brink and mere spectatorship. Extending the principle by analogy, a duty to rescue may be presumed to be implicit in the present structure of the positive law to govern the case of the marginal psychopath, forcing him to the realization that some "incriminating" circumstances are best explained through acts establishing the neighbor's bona fides. For the more decent citizen, of course, the doom available from the forum of his own conscience has sufficient effect to enforce compliance with moral law.

A regrettable feature of the Feinberg argument for potential criminal liability for omissive harm is its careful and stringent limitation to cases of mortal danger. Feinberg offers no persuasive reason to exculpate the neighbor who knows the house is vacant and watches it burn instead of calling the fire department, and yet charge him with homicide or the special offense of nonrescue if the burning house is occupied. The lawyer is easily dizzied by slippery slopes that offer mere sporting challenges to the philosopher; but in this case the philosopher's solution appears to be the merely prudent observation that a beginning must be made somewhere, with its corollary that no threat to anything fundamentally important is entailed by the easy extension of the harm principle to other clear but nonlethal cases of omissive guilt. Assuming the predictability and desirability of such an extension of the criminal law, those who would fill the Feinberg gap must next contemplate the messier cases, in which multiple nonfeasors stand equally able to render assistance, or in which the course of predictable harm is adventitiously deflected by circumstances not connected with the wrongdoer. Is the wrongdoer nevertheless guilty of attempted omissive harm in the latter case? We might be inclined to answer affirmatively if the offense is classified among the relatively minor criminal categories (as it usually is in omissive crime jurisdictions), but negatively if we acknowledge the conceptual possibility of such

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35. Feinberg deals with a "logical" form of the slippery slope argument while discussing the structure of Macaulay's line-drawing objections. The "empirical" version of slippery slope arguments is left for a later volume of The Moral Limits of the Criminal Law. See J. Feinberg, supra note 1, at 151.

36. The wrong, therefore, remains as it would have under less fortunate circumstances, in the realm of things undone. Perhaps the casuistic analysis would be furthered, after all, by consideration of the attempted omission of a duty to warn or rescue, as in the case of a blind person allowed to step onto a trompe l'oeil manhole.
offenses as "murder by (untreated) pneumonia." Why should our intuitions suggest such a distinction?

Professor Mack, who is one of the most formidable critics of the Feinberg thesis, suggests that we shy from admitting the full implications of omissive liability because an actor's responsibility for a noncaused (by the actor) event is essentially different from his responsibility for "his" (positive, affirmative) act.\(^3\) Moral discourse may freely cite a nonactor's passive involvement in a catastrophe to ascribe the blame for its occurrence. Thereby our moral intuitions provide the metaphorical kernel for causal usages. There is nevertheless something ineluctably arbitrary in singling out the nonaction of D from the multitude of other necessary conditions for the catastrophic event—such as the nonexplosion of our galaxy in 1938, the extinction of the dinosaurs, and many other philosophical fantasies that manifest the poetic talents of a philosopher in full cry after a reductio ad absurdum. Mack's "clincher" is at bottom the truism that the event was determined by conditions extrinsic to the nonfeasor: what happened did happen because it had to happen (since what made the event "evitable" to the imagination was the counterfactual (possible) intervention of the nonfeasor).

Professor Feinberg seems to this reviewer to have much the better argument on this point. Professor Feinberg emphasizes the sphere of law as a species of practical reason, drawing heavily upon the lawyer's characteristic way of thinking—in terms of "handles" and of "stains"—to reach the easily accepted conclusion that the law excels at avoiding precisely what Mack regards as epistemologically arbitrary: the selection of the important, because modifiable, contingencies of human behavior from other contingencies in some sense necessary for the occurrence of an event. With great sensitivity, the law requires a degree of both physical and moral proximity to the untoward event before it considers adopting the moral posture of pointing the finger of blame. Once we are satisfied that lines (of "responsibility") can be drawn both in principle, and as part of the typical practice of legal reasoning, the only remaining issue is one that lawyers would classify under the rubric of "duty." Having posited a duty for every social connection other than common humanity itself, the law seems to be silly in boggling at the final step.

Moreover, even the causal relevance of the nonexplosion of the galaxy as a contributing or necessary factor in the harmful scenario can be distinguished from human nonintervention. Here the law’s familiar controversies over the nature and status of evidentiary presumptions may have something to teach the philosophers. Humans (as opposed to “moral slime”) may be depended upon to intervene on behalf of their fellows at least when the cost of intervention is negligible and the stakes are very high. It makes no sense at all to speak of motives or even mere velleities in the course of human nature as it observably operates under the artificial material and religious conditions of modern industrial society. Persons other than philosophers might even question the meaning and utility of talk about such nonevents as galactic explosions, when introduced into debates concerning this real (moral) world of human interaction. When a human being defies the law of his social nature by callously observing his fellow perish, we may justifiably say that he actively “did” something to the victim of his nonrescue. The corrupt jailor is prosecuted for “starving” his wards. Other cases may lack a corresponding transitive verb or be comprised in the omnibus idea of “abandonment.” The comparative poverty of both language and law in describing the Ilk-like behavior of Murphy’s lounger and his ilk are attributable to no moral impediments to punishment, but only to the gratifying scarcity of such creatures in the Hobbesian jungles of the modern corporate state.

Feinberg’s argument for the legitimacy of “bad samaritan” laws is far more carefully and extensively articulated than the foregoing summary would indicate, but in broad outline, the terms of the debate are as we have described them. It remains to observe that the cause of caution in dealing with proposals to extend the scope of criminal sanctions has still another presumption in its favor. The objects of omissive crime legislation are not, after all, Murphy’s loungers, but the spectators of the killing of Kitty Genovese: urban hobbits paralyzed by previous unpleasant encounters with officialdom, or stymied by some deeply instilled psychological imperative to conform as a faceless member of a mob doing nothing—or even, perhaps, falsely confident that the next fellow has done the right thing. Punishment of such nonfeasors may be prudentially desirable (if, as Feinberg has shown, it is morally tolera-

ble) in order to further society's minimal claims to operative solidarity. Yet these (natural) criminals are different from the others. They are more pathetic than despicable. It may be wise therefore to stay the legislative hand until language and the moral consensus of the community concur in finding words adequate to the description of the nonrescuers' unique infernal circle. Until a latter-day Dante performs this task, the law's conservative course must be to continue elaborating "special" duties to cover every likely encounter between a rescuer and a perishing neighbor.

Professor Feinberg pretermits discussion of one other important aspect of the omissive harm problem. Probably because of his system of organization, the boundary between Harm to Others and Harm to Self separates discussion of wrongdoing from the (non)actor's perspective from wrongdoing as seen in the victim's perspective. Unfortunately this scheme fences off the case of the self-harming actor whose suicidal behavior is witnessed by nonintervening others. Regardless of the position we adopt regarding the moral permissibility of suicide, nonintervention by a witness to a scene which is morally ambiguous because the imperiled other does not or cannot ask for assistance (and may not desire it) presents a distinct set of exculpatory or extenuating circumstances for the astute casuist to consider.

The most callous bad (non)actors in Professor Feinberg's catalog are recognizable as malefactors because we are given the poet's privileged access to their motives. The real world is less accommodating. Presumably, the propriety and desirability of criminal sanctions for the spectator who joins a crowd yelling "Jump, jump!" at a distressed person on a bridge are not controversial. If active encouragement of suicide is taken as one pole of a moral spectrum ranging to passive (omissive) "toleration" of a fatal course of events, then Macaulay's questions about enforced charity will reappear, in stronger form. The law which forbids shouting at the suicide will not command mere silence; it will be seen in pari materia with Feinberg's duty of forced intervention, so that individuals will be prohibited from joining to form a crowd, and the first arrival will be obliged to seek help or attempt a safe rescue. In more general terms, at least until the ambiguity of the "victim's" intentions is resolved, the criminal law under a Feinberg regime would prefer intermeddling to inaction, whenever it is difficult to distinguish between intermeddling and outright rescue. Yet at some point the just claim to physical liberty of a risk-loving actor must be taken to put him beyond the reach of intervenors meeting
an illusory crisis.

The question is how far we may or should go in presuming distress on the basis of life-threatening circumstances. Feinberg sees little difficulty in adopting the common-sense presumption that people in dire peril desire rescue and justifiably resent nonrescue. The moral attractiveness of a doctrine that encourages beneficent rather than nocent error is obvious. When moral attitudes are transformed to legal imperatives, however, the justificatory scheme must include a line-drawing process to bound the domain of volenti non fit injuria. There is every reason to suppose that Professor Feinberg will be able to justify punishment of the nonrescuer despite the difficulties in problem cases of distinguishing between rescue and intermeddling. Professor Feinberg has already suggested the appropriate strategy in his discussion of the problem of distributive guilt when large numbers of persons are similarly situated in a position to render aid, but none does so. Neither fear of the Kafkaesque consequences of "involvement" nor the irony of an "After you, Alphonse" explanation of the psychology of passivity can excuse the nonactor from moral and potentially legal guilt in the eyes of Feinberg. Only when the magnitudes become great enough to call for a systematic social response (perhaps triggered by an individualized duty to phone the police or fire departments) does Feinberg begin to classify the problem as eleemosynary rather than exigent. Numbers may dilute liability in tort, but they do not obstruct the ascription of guilt, severally, to all qualified nonintervenors. Neither should the possibility of (justified?) ingratitude exempt an onlooker from the duty to act in a way that might frustrate a suicide, an attempt to climb the north face of the Eiger, or a comeback in the boxing ring. One suspects that Feinberg's principle will reach any other officious intrusion, provided only that there is no time for referring the matter to proper authorities.

Since Feinberg's methodology proceeds invariably from the forum of conscience to the domain of legislation, it is necessary that the legislator convict a potential felon or misdemeanant of an infraction of the moral law that is embodied in the harm principle before moving to prudential considerations. The boundary between private omissions and public nonfeasances is not as clear for the moral as it is for the positive law, however. Feinberg accepts the impressive catalog of Macaulay as adequate proof that office is defined by duty, and that duty supports inculpation for any and all kinds of omissive harms caused by its neglect. However that may
be as a matter of abstract principle, the abrogation of sovereign immunity in tort and the slight expansion of criminal liability for official wrongdoing (outside the special category of impeachment) have left us with a very troublesome category of official derelictions that are immunized from legal and perhaps moral liability. Discretionary official decisions to forego warnings to persons likely to be affected by population-sized exposures to carcinogenic or other toxic hazards, for example, are doubly protected from either civil or criminal sanctions. The callous official is protected by immunities established in legislation and by the Feinberg gap in dealing with omissive wrongs, generally. If we accept the notion that the gap needs to be closed, as Feinberg has forcefully argued, then the implications for omissive misconduct at a "discretionary" level (considerably higher in the hierarchy than Macaulay's venial jailor) must be examined with the same care given to the problem of enforced charity.

Although this review has concentrated on the omissive crime problem as an example of Feinberg's analytic prowess, *Harm To Others* contains equally stimulating discussions of moral and legal guilt for instigating violence through intentional (or unintentional) dramatization of crime, for which Feinberg might impose tort, but not criminal liability, on a strictly utilitarian cost-spreading basis; licensure as a mediating concept useful in the regulation of aggregative harms, such as handgun marketing and alcohol consumption by drivers; the ambiguous senses of the word "victim" in discourse on "victimless crime"; and a variety of philosophically puzzling cases. In a very concise manner, Professor Feinberg presents a synopsis of the difficult but rewarding causal studies of Hart and Honoré and other critics of traditional legal formulations of the causal element in tort and criminal law. Any reader interested in criminal or tort theory will profit from studying the treatment Professor Feinberg gives to the hardest and most perennial cases of harm to doomed interests, attempts, and the various degrees of moral and legal complicity which have been or

40. Id. at 241.
41. See id. at 193-202.
42. See id. at 117-18.
43. See id. at 65-104 (dealing with such diverse topics as wrongful conception, harms to deceased persons, and criminal protection of altruistic interests).
45. See J. Feinberg, supra note 1, at 118-25.
should be recognized in the law.

In sum, *Harm to Others* can be recommended as a solid foundational reading in the general culture of the common law as well as the discipline of ethical philosophy.