MY KIND OF PHILOSOPHER: A LAWYER'S APPRECIATION OF JOEL FEINBERG

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I want to try to explain why Joel Feinberg's thought is so appealing to a law professor like me, with no formal training in philosophy. Because my specialty is legal ethics—the law and ethics of lawyering—I have tried to come to grips with the recent work on that subject by such fine moral philosophers as Michael Bayles, Alan Goldman, David Luban, Gerald Postema, and Richard Wasserstrom. This work is as comprehensible to lawyers as Joel's writing is. Yet I have some pet peeves about the work[1] which to my mind distinguish it sharply from Joel's.

The moral philosophers I mention approach legal ethics in a temper that blinds them to the possibility of learning anything of use to non-lawyers. They see nothing of general value in the way lawyers address their ethical problems, and no solutions to specific problems which are valuable as analogies in other ethical domains. Yet, precisely because law practice is full of recurring dilemmas, it strikes me that lawyers' ethical reflections (as embodied in professional ethics codes, ethics opinions, treatises, etc.) just might contain, like law itself, some hard-won moral understanding which philosophers could mine for the benefit of others. Unfortunately, one cannot expect mining from those who come to new territory as missionaries rather than prospectors. And missionaries bent on converting lawyers to a non-client-centered ethic, an ethic of superior duties to "society," an ethic that invests its adherents with lordly discretion to just "do justice," are what these philosophers have mostly been. Only the late Charles Frankel has come to legal ethics equally prepared to criticize *or* applaud the positions that lawyers conventionally take on the ethical issues that face them.[2] Only Vincent Luizzi has recently staked out the position that, because lawyers' norms are forged within a social practice and derived from role conceptions (the lawyer as advocate, negotiator, advisor, etc.) rather

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1. For references and for my criticisms, see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL ED. 11 (1991).

2. Charles Frankel, *Review*, 43 U. CHI. L. REV. 874, 883-84 (1976) (reviewing the ABA Code of Professional Responsibility).

than from vague starting points such as John Rawls' "original position," lawyers might have something important to teach philosophy about ethics generally.[3]

This would not be an unthinkable position for more philosophers to take. It is precisely Alasdair MacIntyre's view of the relationship between ethical thought within the medical profession and the recent work of moral philosophers on issues of medical ethics.[4] MacIntyre chides his fellow moral philosophers for coming to medical ethics like an "intellectual peace corps" to a "morally underdeveloped country." By taking a different approach, MacIntyre claims to have learned from ethical thought within medicine that "no one is ever an abstract moral agent" and that "moral agency is [inevitably] embodied in roles such as that of the physician, the patient, or the nurse," which are "mutually interdefined in terms of relationship."[5]

Unlike the philosophers who are writing about legal ethics these days, Joel Feinberg has a certain reverence for the institutions and the internal discourse of law (a reverence cultivated, perhaps, during the year early in his career that he devoted a year to studying law at Harvard). He learns from law and to a large extent he teaches moral philosophy through law. This is not to say that Joel always looks up to law rather than down upon it. His devastating critique in this Symposium of the view that criminal attempts should be punished less severely than completed crimes is anything but an apology for traditional doctrine. The point is, rather, that Joel comes to law prepared to find it a source of moral and political insight. Some of his most interesting work gives powerful expression to the insights that lie behind puzzling legal doctrine.

Take just one example. Although I teach torts, I was mystified for years as to how one could justify the recent judicial recognition of a right to sue for "wrongful life." I could see no basis for awarding compensatory damages to someone who is born with massive birth defects and claims that but for the negligence of a doctor he would never have been born at all. What loss, I wondered, is there to compensate? It was only upon reading Joel's article on the subject[6] that I grasped a rationale for claims of this sort. Joel did more than any appellate judge or torts scholar to help me make sense of the law in this area.

I studied law in the Vietnam War Era. One thing I remember about that time was a lot of loose talk among legal scholars and sociologists about the limits of criminal law and the need to repeal the laws creating a host of so-called "victimless crimes," including drug use, prostitution, and the sale of pornography. Some reform advocates emphasized the pragmatic point that crimes which bring forth no complaints from victims can only be enforced selectively and by unduly intrusive means. Others went further, however, and insisted that drug use, pornography, and prostitution either do no harm or at

3. VINCENT LUIZZI, A CASE FOR LEGAL ETHICS: LEGAL ETHICS AS A SOURCE FOR A UNIVERSAL ETHIC (1993). The author is a municipal judge as well as a philosophy professor. For another philosopher/lawyer's much bleaker view that lawyers have nothing to learn about legal ethics from moral philosophers, see M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9L. & PHIL. 67 (1990).

4. Alaisdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 PHIL. EXCHANGE 37 (1978).

5. *Id.* at 46-47.

6. Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHIL. & POLICY 145 (1986).

least do no harm to unconsenting parties. On this view, criminalizing these activities violates John Stuart Mill's liberal principle that conduct should not be outlawed on purely moralistic or paternalistic grounds.

Opponents of reform retorted that these activities are indeed harmful or, alternatively, that they offend public morals and can legitimately be outlawed on that ground. Unfortunately, the debate in those days did not get much beyond sloganeering, because the crucial terms "harm" and "offense" went largely undefined. Joel Feinberg's four-volume masterwork, *The Moral Limits of the Criminal Law*, has done more than anything I know to make sense of these terms, thereby giving Mill's principle some shared meaning and creating the preconditions for better debate. Again, Joel did this by taking seriously the terms of the public policy debate. He construed those terms rather than trying to deconstruct or see through them.

At a cocktail party a few years ago, I had an encounter that sums up my attraction as a lawyer to Joel's thinking. Joel told me that the administration at another university had recently placed its philosophy department in "receivership." He wanted to discuss what this meant. It soon became clear that his way of grasping the significance of the event was first to understand the definition and purpose of receiverships in law. I explained that a receiver was appointed by a court at the instance of creditors to run a troubled company; the idea is to allow the company to continue to operate by placing it in the hands of someone the creditors trust. We had a lively talk about how this concept applied, *mutatis mutandis* of course, to the case of the philosophy department. I left the conversation reassured about the value of spending my days immersed in law. I was gratified that someone who thinks as deeply as Joel Feinberg would find a distinctively legal concept a valuable means to understanding something other than law itself.

REGULAR ACADEMIC APPOINTMENTS

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The Rockefeller University, Professor 1967-77; Chairman, Department of Philosophy, 1971-77.

The University of Arizona, Professor 1977-94; Head, Department of Philosophy, 1978-81; Acting Head, 1983-84. Professor of Philosophy and Law, 1985-94; Regents Professor of Philosophy and Law, 1988-94; Regents Professor Emeritus of Philosophy and Law 1994- .

PUBLICATIONS (BOOKS ONLY)

DOING AND DESERVING (Princeton, N.J.: Princeton University Press, 1970).

SOCIAL PHILOSOPHY (Englewood Cliffs, N.J.: Prentice Hall, 1973).

RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY (Princeton, N.J.: Princeton University Press, 1980).

HARM TO OTHERS (New York: Oxford University Press, 1984).

OFFENSE TO OTHERS (New York: Oxford University Press, 1985).

HARM TO SELF (New York: Oxford University Press, 1986).

HARMLESS WRONGDOING (New York: Oxford University Press, 1988).

FREEDOM AND FULFILLMENT (Princeton, N.J.: Princeton University Press, 1992).

WORKS IN PROGRESS

THE ROLE OF LUCK IN LAW AND LIFE

ABSURD SELF-FULFILLMENT

Philosophical Memoir

BOOKS EDITED

REASON AND RESPONSIBILITY (Wadsworth, 1965)(nine editions).

PHILOSOPHY OF LAW (with Hyman Gross)(Wadsworth, 1995)(five editions).

THE PROBLEM OF ABORTION (Wadsworth, 1973)(third edition in preparation).

PHILOSOPHY AND THE HUMAN CONDITION (with J.M. Smith and Tom L. Beauchamp, 1976)(two editions).

and three others now out of print.