A CRITIQUE OF THE INDEPENDENCE OF THE 'OFFENSE PRINCIPLE' IN THE LEGAL PHILOSOPHY OF JOEL FEINBERG*[1]

Abstract

Many scholars have offered their different opinions and views about the notion of offence. Some of them have traced this concept back to Joel Feinberg, as the first to give it a holistic intellectual approach. Feinberg uses the term 'offense' as a shorthand for a whole miscellany of disliked mental states--disgust, shame, hurt, anxiety, disappointment, embarrassment, resentment, humiliation, anger and the like--which for him, are not in themselves necessarily harmful. It follows then that if one is to use the law to punish those who inflict such states on others (i.e. those who are offensive), one cannot justify so doing by resort to the harm principle, but must instead call upon a separate and distinct offence principle. Feinberg therefore creates a clear-cut demarcation between harm and offence. While the former falls under the legislative action of the state and the instruments of the law, the latter should not be based on any strong legal policy or criminal law, but on simple moral principles. This study is a theoretical insight into the complexity of offence principle as a social reality in human affairs, with a view to tackling the problems associated with it.

Keywords: Feinberg's Offense Principle, Legal Philosophy, Independence, Legality, Morality, *Critique*

1. Introduction

Although Feinberg seems to have offered an express explanation about the concept of offence, its legality and morality, as well as the right of both the offended party and the so-called offender still constitute a subject of serious debate. For example, Feinberg believes that offensive behaviours constitute a grave moral evil which the legislator cannot easily ignore in his legislative duty. Therefore, the person who offends another person harmfully should be punished by the law. So despite Feinberg's strict liberal position, he affirmed this obvious fact. However, in order to prevent a situation where the rights to 'liberty will be unduly limited by those instances of offensive behaviour that warrant legislator's action, Feinberg further proposed the use of mediating maxims or a form of balancing. That is, if a certain offence does not cause harm to others, it should not be treated seriously like harm under any criminal law, when there are other modes of regulation that can do the job efficiently. Feinberg's explanation seems plausible but inexhaustive and contradictory with many questions- if offence can cause discomfort, inconvenience and unpleasant feeling, then it is capable of causing harm and therefore it is evil. At what point then, can an offence be purged of its inherent evil which is capable of harm, if not treated seriously like harm? Therefore, as good as the mediating maxims seem to be, it is deficient because of the undue advantage given to individual autonomy based on strict liberal considerations. The search for the veracity of an offence both moral and legal and otherwise, which must be acceptable by all parties is the utmost motivating factor in this investigation.

From the above explanations concerning our subject matter, some fundamental questions arise: Is Joel Feinberg's postulation in his work quite exhaustive? Has he truly solved the nagging and recurrent issue of offence and its strong relationship with harm? How is his position relevant to the enormous social, political, legal and ethical problems bedeviling the contemporary society? Is it justifiable to conclude that offence is different from harm? What are the problems associated with the prohibition of offences that seem to be different from harm? These are certainly numerous, including government's failure to enforce nuisance laws meant to safeguard public places like parks, markets et cetera from obscenity; other similar offences include noise pollution, which is a conscious violation of public peace, little or no enforcement of due process and rule of law in most cases; often times, the

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offended party does not really get justice based on the fact that what he considers offensive may be considered harmless and so, it is not legally binding to punish the offender. Hence, the problem of offence and harm often resounds in almost every facet of the society, thus, eliciting another fundamental question: can harm be totally eliminated from offence? Or, can the two be actually treated differently/separately? This is still problematic and forms the rationale for this study. This article therefore critically examines Feinberg's sharp separation of offence/offensive actions from harm/harmful actions, so as to proffer solution to the numerous problems hitherto created in the society by the fusion of these two concepts.

2. Regulation of Shame and Disgust

Many scholars have alleged that Feinberg's harm principle does not exclude offensive conducts, and implicitly the offence principle. This is because in his analysis, Feinberg describes harm as a 'setback to an interest', and legally cognizable harm as 'wrongful' setback to an interest.[2] He then defines 'interest' as having a 'stake' in something such that one gains or loses depending upon its condition.[3] Thus, if it is possible to have an 'interest' or 'stake' in not being subjected to offensive conduct, then a wrongful setback to that interest could be governed by the harm principle, In order to clarify this notion, Feinberg seeks to explain when a conduct is said to be legitimately criminalizable, because, according to him, it is not actually every kind of offensive conduct that should be criminalizable under the harm principle. He therefore tells us that, 'offense is surely a less serious thing than harm,[4] and that, 'offense is not strictly commensurable with harm... (because) offenses are a different sort of thing altogether with a scale all of their own'.[5] Hence, it is a misconception to judge the two of them as the same. Therefore, most offensive conducts such as shame and disgust must be treated independently from the harm principle; hence, the need for the independence of the offence principle. Feinberg's purpose is to fully determine which governmental restrictions and suppressions against the citizens are morally legitimate and permitted by the law. For example, he insists that in assessing the reasonableness of offensive conduct, legislators should take into account the conduct's 'personal importance' to the actor and its value to the society. From these two considerations, Feinberg elaborates the 'free expression' corollary: 'expressions of opinion . . . must be presumed to have the highest social importance in virtue of the great social utility of free expression and discussion generally, as well as the vital personal interest most people have in being able to speak their minds fearlessly.[6] As a result, the 'non-offensive utterance' of an opinion, even of an offensive opinion, is a kind of 'trump card'[7] in the application of the offence principle. Feinberg further maintains that, 'the standards of personal importance and social utility confer on it an absolute immunity; no amount of offensiveness can enable it to be overridden'.[8] Thus, Dalton Marion asserts that, without even using mirrors, Feinberg removes from the ambit of the offense principles virtually all behaviours that are verbally expressed and assertive in nature.[9] Even without the free expression corollary (the derivation of which is far from obvious),' Feinberg also asserts that the degree of offensiveness in the expressed opinion itself is not sufficient to override the case for free expression, although the offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts and ways. For example, he concludes from the 'personal importance' standard, that all forms of private consensual sexual activity, as well as public 'natural and spontaneous... gestures of affection even among 'deviant˙ groups,'[10] are exempted from 'prohibition.'[11] From the foregoing, it is therefore obvious that without full independence and autonomy, devoid of unnecessary interference from the state, offence principle may not be able to actually set the moral pace which it is determined to set for the benefit of every citizen in the state. Although, Feinberg did not explicitly streamline the nature and modus operandi of this autonomy and independence, his various explanations point at one direction, namely; independence of the offence principle without intrusion from the state's criminal law and the harm principle, *et cetera.*

In an answer to the question: 'should shameful and disgusting conducts be subjected to the criminal law?' In his review of Feinberg's *Offense to Others,* Marion L. Dalton toes the line of thought of Feinberg, as he maintains that disgusting conducts should rather be placed beyond and not within the purview of the criminal law. He gives three reasons for his answer: the first reason is the fact that the feelings of disgust arc culturally derived and subject to change. According to him, the fact that a conduct engenders disgust is not a legitimate reason to make it a

[2] J Feinberg, *Harm to Others: The Moral Limits lo Criminal Law,* New York: Oxford University Press, 1984. p.31.
[3] Ibid., p.33.
[4] J Feinberg, *Offense to Others: The Moral Limits to Criminal Law,* New York: Oxford University Press, 1985. p.2.
[5] Ibid, p.4.
[6] DL Harlon, 'Offense to Others', *The Yale Law Journal,* Vol. 96: 881, 1987, Faculty Scholarship Series. Paper 2047, htlp://digilalcommonsJaw.yaie.edu/fss_papers/2047, Google search, 10/3/2016, p.890. Accessed on 5/5/2020.
[7] Loc. Cit.
[8] Ibid., p. 891.
[9] Loc. Cit.
[10] Loc. Cit.
[11] J Feinberg, *Offense to Others,* p 44-46.

crime. This is because little of what disgusts us is absolutely rooted in human nature, or divinely ordained. Rather, our sensibilities are, in general, culturally contingent and surprisingly plastic. And so, 'even basic sensory reactions, despite being the direct product of our perceptions and, as such, scarcely mediated by our intellects, are not fixed'.[12] He further opines that:

> Culture plays an even greater role in determining what offends our sensibilities. Notions about what, if anything, constitutes 'unnatural' or 'perverted' sex are the product of, inter alia, individual psychology, upbringing, peer attitudes, education, religious teachings, and experience. The desecration of a flag would be meaningless (or, at any rate, no more meaningful than the shredding or burning of old rags) were it not for a series of perfectly arbitrary social conventions. Similarly, a t-shirt depicting Jesus on the cross with the caption, 'Hang in there, baby!' is not inherently insulting, vulgar, or even shocking. If there is insult or shock, it is because the depiction challenges the observer's belief system..... Finally, our attitudes toward such matters as nudity, public displays of affection, and audible bodily functions may have more to do with the size of our childhood homes than with universalizable standards of decency.[13]

The sum-total of Dalton's argument is that disgust-based prohibitions can lay no claim to respect, except as the byproducts of chance acculturation. More so, 'that which prompts us to register disgust is uncertain, arbitrary, and changeable. As such, it is poor soil in which to root the criminal law.[14] Again, Dalton's second reason why disgusting conducts should not be subjected to the criminal law is that, permitting the majority to define and punish disgusting behaviour poses an unacceptable risk of cultural domination. He further argues that the power to punish disgusting conduct is actually a dangerous weapon, because:

> we find it hard to maintain perspective on the behavior of others when we are affronted or experience revulsion. We also find it difficult to imagine that someone else in our situation might feel differently. Moreover, our feelings of disgust tend to center on people and practices beyond our ken, because we get used to and favor the familiar. Even if we do not abhor behavior simply because it is different, that which we abhor tends to be different. When we punish people who have different sensibilities, we label them bizarre as well as deprive them of liberty. This creates a curious problem; The so-called criminals may have as much difficulty empathizing with our feeling of victimization as we have in accepting their desire to victimize. The punishment we levy may seem entirely unfair and nonsensical to the punished.[15]

Lastly, Dalton equally argues that the criminalization of disgust and the enforcement of morals are intertwined. He observes that we frequently attach the label 'immoral' to any behaviour that disgusts us. People often attach the label 'disgusting' to any behaviour they also consider as immoral. This according to him does not suggest that, conduct can never be one or the other, or distinctly both, but simply that the two reactions are often intertwined.[16]

3. Offence Principle and Judgmental Obscene Expressions

Feinberg first affirms that obscene materials, whatever they may be, are offensive materials. However, he observes that the usage of the term 'obscene' is far from being clear-cut. This is because something can offend one person and not another. Again, given the great diversity of mankind, there may be hardly anything that does not offend someone or another. Hence, it would be absurd for philosophers to waste time disputing over it. Feinberg therefore gives general characteristics of our subject matter and its important uses. According to him, the word 'obscene'

> 1. A standard aptness word, with predictive, expressive, and endorsing elements, meaning roughly, 'disgusting/ 'shocking,' or 'revolting.'
> 2. A standard gerundive word used only to endorse a certain kind of emotional reaction as appropriate, and having roughly the meaning that 'disgustworthy' 'shockworthy,' or 'repugnanceworhty' would have if there were such words.
> 3. A nonstandard aptness word used primarily or exclusively to predict the response of other people, actual, or hypothetical, to the materials or conduct in question.[17]

For example, for one to say that 'X is obscene' means that X is apt to offend almost anyone'.[18] This is to interpret 'obscene' as what P.M. Nowell-Smith has also called an 'aptness word/ one which 'indicates that an object has

[12] Harlon, 'Offense to Others', *The Yale Law Journal*, Op cit, p. 901.
[13] Ibid., p. 902.
[14] Loc Cit.
[15] Ibid., p. 903/904.
[16] Ibid., p. 906.
[17] Feinberg, *Offense to Others*, Op. Cit., p. 107.
[18] Ibid., p. 102.

certain properties which are apt to arouse a certain emotion or a range of emotions'.[19] Nowell-Smith however contrasts aptness word with purely descriptive words such as 'red,' 'square, 'tall', and 'wet. Not that aptness words cannot suggest that the objects to which they apply have certain properties, at least within a range, but rather that they do more than merely 'describe' their objects in the limited way. To say that the view from a certain location is sublime is perhaps to imply that it is extensive and panoramic, but it is also to say, according to Nowell-Smith, that it is apt to arouse an emotion of awe or a stirring, breathtaking reaction, in one (anyone) who experiences it.[20] Nowell-Smith further makes a list of typical aptness words to include the following; 'terrifying, hair-raising, disappointing, digusting, ridiculous, funny, amusing, sublime,'[21] According to him, 'disappointing' means 'apt to disappoint' 'disgusting' means 'apt to disgust'; 'amusing' means 'apt to amuse' and so on. Hence, logically speaking, obscenity by its standard has a negative/disgusting motive. Nowell-Smith therefore concludes that:

> obscene conduct is not merely in bad form/ ungracious and unseemingly; it is conduct in the worst possible form, utterly crude, coarse, and gross. The adjectives that regularly consort with the noun, 'obscenity' fully reveals its extreme and unqualified character: the obscene is pure and unmixed, sheer, crass bare, unveiled, bald, naked, rank, coarse, raw, shocking, blunt, and stark. It hits one in the face; it is shoved under one's nose; It shocks the eye. The obscene excludes subtlety or indirection, and can never be merely veiled, implied, hinted or suggested...[22]

An obscene person is therefore one whose character or conduct is extremely deficient, crude, and coarse, who is apt to offend anyone and in response to whom offence is an appropriate response too.[23] Feinberg finally upholds that the main feature that distinguishes obscene things from other repellant or offensive things is their *blatancy:* their massive obtrusiveness, their extreme and unvarnished bluntness, their brazenly naked exhibition. However, Feinberg make a sharp intellectual turn by equally listing actions and conducts that are prone to be judged as obscene but are not. Subtle offensiveness according to Feinberg is not obscene; a devious and concealed immorality, unless it is an extreme violation of the governing norms, will not be obscene; a veiled suggestiveness is not obscene. A gradual and graceful disgarbing by a lovely and skilled strip-leaser is erotically alluring, but the immediate appearance on the stage of an unlovely nude person for whom the audience has not been prepared is apt to seem, for its stark blatancy, obscene. 'And even for the most lascivious in the audience, wide screen projections of highly magnified, close-up, color slides of sex organs, will at the very least be off-putting.[24]

Feinberg similarly asserts that there are three classes of objects that can be called 'obscene', namely: obscene natural objects, obscene persons and their actions, and obscene created things. For him, the basic conceptual distinction is between the natural objects whose obscenity is associated with their capacity to evoke disgust and the others, whose obscenity is a function in part of their vulgarity. Obscene natural objects are those which are apt to trigger some reactions. These reactions according to Feinberg are usually pale, strange, unnatural, and inhuman. Obscene persons and actions are those which are coarse and vulgar to an extreme, or those which are brazenly obtrusive violations of any standard of properly. Feinberg holds that 'when we condemn them as morally wrong, we pronounce judgment on them; when we condemn them as obscene (for having offended or shocked the moral sensibility) we make the most extreme kind of ... judgment.'[25] Obscene created things are blatantly shocking depictions or unsubtle descriptions of obscene persons, actions, or objects. Representations of disgusting objects can themselves be disgusting to the point of obscenity in which case obscenity is an inherent characteristic of the representation itself. Feinberg asserts that in other cases, obscenity is a 'transferred epithet'[26] referring indirectly to the vulgarity of the creator. In neither case is the ascription of obscenity to the created object a kind of aesthetic judgment.

Having made the above distinctive analysis, Feinberg conclusively offers three ways to ascertain when objects of any of these kinds can be offensive to the point of obscenity, namely: by direct offence to the senses; this is so because some totally unrecognized objects may not be easily noted to be obscene to the sense of touch. The second one is by offence to the lower order sensibilities; example is an object recognized as a dank cavernous fungus or a slug or a dead body. The last according to Feinberg is by offence to higher sensibilities. He holds that the latter category includes blatant exhibition of tabooed conducts such as eating pork, or inappropriate responses such as lewdly reveling in death, or revolting violations of ideals or principles like bloated profits, cynical irresponsibility.

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[19]PH Nowell-Smith, *Ethics* Harmondworth, Middlesex: Penguin books, 1954, p. 72.
[20] Loc Cit.
[21] Loc Cit.
[22] PH Nowell-Smith, *Ethics* in Joel Feinberg, *Offense to Others*, p. 109.
[23] Ibid., p. 107
[24] Ibid., p. 124.
[25] Loc Cit.
[26] Loc Cit.

The corruption, perversion, depersonalizing, or mere parodying of a human being is likely to strike any observer as obscene... as they are the most amazingly obvious immoralities, done in crass disregard of ethical principles.[27] Feinberg concludes that at any point of commission of the above offences, ii is the duty of the offence principle to regulate and proffer the appropriate prohibitive and not prosecuting sanctions.

4. Obscene Words, Social Policy and the Offence Principle

Feinberg holds that the primary function of obscene words is simply to offend and that it is probably more accurate to say that the immediate effect of obscene words is to conspicuously violate taboos (prohibitions). Hence, obscenities by virtue of their function as taboo-breakers have unavoidable immediate effects on the feelings of the listeners and can therefore be referred to as an offence. This is because an unsuspecting and unprepared listener will always be put in an unpleasant state upon hearing such words. The listener will be shocked, alarmed, made anxious or uneasy, angered, or repelled. Obscene words according to Feinberg sometimes do this partly by virtue of their literal references, and even non-obscene words used to describe or narrate inappropriate subject matter can also have the same effect. Hence, even when obscene words refer to nothing at all, they still have that impact simply because they violate and defy taboos by the uttering of certain (obscene/prohibited) sounds or the writing of certain marks. Feinberg further asserts that the first and fundamental thing that obscene words do is to defiantly violate norms, although the norms they violate are contextual rather than absolute prohibitions. Citing Cockburn, J., in *R.v. Hicklin* (1868), Curzon corroborates Feinberg's position when he holds that the test of obscenity (especially in common law) lies in 'whether the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands this sort may fall.'[28] Therefore, words considered as obscene must be weighed in line with its kind of expression and the individuals involved. To further back up this position, Curzon quotes the American Obscene Publication Act of 1959, 1(1): 'For the purpose of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it'.[29]

Having fully acknowledged that the primary function of obscene words is simply to offend and violate norms and taboos, Feinberg sharply observes that the more exact truth about obscene words is more complicated and even somewhat paradoxical. For example, in his article titled, 'Some Collective Expressions of Obscenities in Africa/ in the *Journal of the Royal Anthropological Institute of Great Britain and Ireland,* Vol. 59, Evans-Pritchard agreeably asserts that 'in more religious times and places, to utter the unutterable name of God or other profanities ever was to commit a dreadful sin.'[30] But the prohibitions against sexual and scatological obscenities, according to him, are typically not so far reaching. This is because everyone knows and understands these terms and their practical uses. Feinberg similarly alludes that almost everyone is prepared to use them with some trusted friends when sufficiently provoked. There are some contexts in which it is universally understood that they are permissible, and others in which they are not. In the barracks for example, they cannot reasonably be expected to, offend listeners, though of course they are recognized by anyone who understands the language as words which may not be safely used in the public contexts or formal situations.

For Feinberg therefore, the paradox of obscene words grows out of the bold assertion that the primary and immediate job of obscenities is to violate the general norms and taboos against their usefulness. But considering this position from a utilitarian point of view, Feinberg however maintains that it seems that the main point of having the taboos (prohibitions) in the first place is to make possible their violation so that certain 'derivative[1] purposes can be achieved. Hence, what seems paradoxical according to him is that perhaps the obscenities enable us to express personal disavowals of prevailing pieties in a uniquely emphatic manner. Feinberg slates that: 'Obscenity, as we have seen, is above all else the language of impiety, irreverence, and disrespect. Sometimes we are tempted to use it to convey a disrespectful attitude towards a particular person, or our rejection of a particular platitude. Others use it habitually to reject the prevailing norms of propriety generally to express a certain attitude towards life, and to convey an image of cynical tough-mindedness. Such persons want us to know that they have no reverence for 'bullshit stuff; they see through sentimentality, patriotic cant, and the like'.[31]

From our analysis so far, it is possible to conclude that as a Liberal, Feinberg does not intend to take a harsh and hard standpoint with regard to the sanction or punishment necessary for obscene related offences. This therefore elicits some questions: Should such offences be neglected or treated as harmful and criminal? Or at what point

[27] Ibid., p. 125.
[28]LB Curzon, *Criminal Law* 4th edition, England: The Chaucer Press limited, 1984, P228.
[29] Loc Cit.
[30] EE Evans-Pritchard, 'Some Collective Expressions of Obscenities in Africa', *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, Vol. 59, 1929, p. 311.
[31] Feinberg, *Offense to Others*, Op. Cit., p. 251.

should it be subjected to any kind of legislation? Or should it be entirely the business of the offence principle? Feinberg asserts that the offence principle cannot justify the criminal prohibition of the bare utterance of obscenities in public places even when they are intentionally used to cause offence. He however observes that, 'just as speech that is ordinarily free might be punishable if it is defamatory or fraudulent, or if it is solicitation, or incitement to crime, so obscene speech, while ordinarily free might be prohibited (...under the offence principle...) if in its circumstances it is a public nuisance or falls under some other recognized heading of exception'.[32] Feinberg further gives some striking conditions upon which the use of obscene words can rightly be made criminal. This according to him is when there is an unjustified and deliberately imposed nuisance; that is when:

> (a) the words are used deliberately to shock, annoy, or offend their auditor for no respectable ulterior purpose (as when their motive is spiteful, vindictive, or malicious); (b) the auditor has not consented to the conduct in question and makes every reasonable effort to escape it: and (c) the words used, by virtue of their quality and quantity, were antecedently likely to cause intense and durable offense to their auditor and this was known to their user. This form of nuisance in short, is a kind of harassment, and the fact that it employs obscene words is by no means essential to its moral gravamen.[33]

Feinberg eventually concludes that the criminal codes should include as crimes, forms of deliberate conduct meant to cause severe and prolonged annoyance, even without actual harm or the threat of harm to the victim.

5. Mediating the Offence Principles

Feinberg holds that some evils are more evil than others, that while some are offset by the good they produce, some are simply consented to, and that some others may be avoided by the victim. He equally assumes that the terms 'evil' and 'illegal' are not necessarily synonymous. An action may be evil in nature but not actually illegal and vice-versa. For instance, if assassination is a crime and illegal, what of character assassination? Can unfair discrimination against disempowered sectors of the society- people with disabilities, the elderly, the women, or people of different colour and so on, be made a crime? So how do we exactly decide when a particular evil can give rise to criminal sanctions? Therefore, a central aspect of Feinberg's enterprise is his effort to develop and refine practical guidelines that can be used to separate the fish from the foul. He calls these guidelines the 'mediating principles'.[34]

Feinberg makes the seriousness of an offence his watchdog in mediating the offence principle. First of all, he acknowledges that the seriousness of an offence varies directly with the intensity of the offended states as induced, or those that could reasonably be expected to be induced, in the mind of the observer. 'A mere weak annoyance has very little weight of its own. Hence more eccentricities of fashion or taste, for example, long hair on men or crew cuts on women, could probably never be banned by a reasonably mediated offence principle'.[35] Furthermore, Feinberg similarly affirms that the seriousness of the offence also varies directly with its actual or standard duration. Hence: a mere exiguous irritation, even if momentarily intense, would have hardly any weight in the scale and would probably be outweighed, therefore, if caused by any conduct that had the slightest bit of redeeming value, either to the actor himself or to society in general...Many kinds of public behavior cause extreme and durable offense to observers, but little or no offense to others.[36]

Again, Feinberg adopts a mediating maxim in the application of the offence principle. He calls it 'the standard of reasonable avoidability.'[37] According to him, 'the easier it is to avoid a particular offence, or to terminate it once it occurs, without inconvenience to oneself, the less serious the offence would be.'[38] On his part, Donald Van De Veer includes among his mediating standards for the offence principle what he describes as an independent 'Proportionality Standard,'[39] to the effect that the claim to restraint is proportionately stronger to the extent that the offense is severe, and conducive to further impairment of those offended, and difficult to reverse. His intention here is to ensure that offences caused especially against the weak and minority groups in the state are properly handled and prevented through the proportionality standard of the offence principle.

In addition to the use of mediating principles, Feinberg finally employs another lest for determining which evils are legitimately punishable. According to him, it is only offences and harms that have been rightly considered as

[32] Ibid., p. 168.
[33] Ibid., p. 278.
[34] Harlon, 'Offense to Others', *The Yale Law Journal*, Op. Cit. p. 885.
[35] Feinberg, *Offense to Others,* Op. Cit., p. 27.
[36] Loc Cit.
[37] Ibid., p. 32.
[38] Loc Cit.
[39] D Van De Veer, 'Coercive Restraint of Offensive Actions', *Philosophy and Public Affairs.* Vol. 8, 1979, p. 192.

wrongful that are candidates for criminalization. He clearly defines 'wrongful,' as 'right-violating.' Dahon, Marian L, asserts that Feinberg recognizes that were 'wrong' defined simply as the invasion of a legal right, the definition would be capable of rolling away. On the other hand, were Feinberg to define 'wrong' as the violation of a 'moral right' that is somehow independent of and antecedent to law, he would have found himself in a natural rights thicket...[40] Dalton asserts that Feinberg smartly evades some inherent pitfalls in his mediating principle:

> In an attempt to sidestep both pitfalls, Feinberg declares that any interest at all (apart from the sick and wicked ones) is the basis of a valid claim against others for their respect and noninterference. . . . [I]t ... follow[s] that any indefensible invasion of another's interest (excepting of course the sick and wicked ones) is a wrong committed against him as well as a harm.[41]

He however agrees with Feinberg that a broad liberty-limiting principle, such as the offence principle is of little use without mediating principles to structure its application to specific categories of conduct.

6. Evaluation and Conclusion

Joel Feinberg strongly upholds the view that 'no matter how the harm principle is mediated, it will not certify as legitimate those interferences with the liberty of some citizens ...'[42] Since this principle is preoccupied with enormous task of the regulation and prohibition of criminal activities/ offences in the state, Feinberg believes that it cannot also be properly used to regulate other mere or ordinary offences. Hence, in his masterpiece, *Offence To Others, The Moral Limits of The Criminal Law,* Feinberg painstakingly makes a critical review of this famous Harm principle. According to him, it is clearly possible that individuals who commit certain non-criminalizable offences in the state may be illegally and unjustifiably treated as criminals under the harm principle. He therefore, decides to alter the existing status quo by setting a limit to the duties and operations of the Harm Principle. Most importantly, Feinberg makes a conscious separation between the harm Principle and a principle that handles and regulates these non-criminalizable offences.

He asserts that, 'if the law is justified, then, in using its coercive methods to protect people from mere offense, it must be by virtue of a separate and distinct legitimizing principle,'[43] namely the offence principle. Jean Jacques Rousseau foresaw this in his work, 'The Social Contract/ when he sought to 'find a form of association which may defend and protect with the whole force of the community, the person and property of every associate, and by means of which… remain as free as before'.[44] He thus underscores and upholds the non-negotiable fundamental right of freedom of every citizen of the state. Hence, criminalizing a non-criminalizable offence under the harm principle is therefore an infringement on the citizen's fundamental rights of freedom and liberty in the state. John Ezenwankwor affirms that Feinberg's interest in including the offence principle as a warrant for limiting peoples liberty '...is to prevent people therefore from offending and harming other people.[45] Thus, he believes that the offence principle as proposed by Feinberg 'pinpoints the fact that offensive behaviours constitute an important moral evil which the legislator cannot easily ignore in his legislative action.[46] Through this principle therefore, the citizens' rights are protected and they can also seek redress whenever they are unjustly treated. Feinberg thus makes the offence principle a formidable legal and moral framework for social control, and a template for the protection of the citizens. For him, there is no other effective principle to achieve this than the offence principle.

Despite Feinberg's fantastic achievements so far, some scholars and thinkers have tried to critically evaluate his position. They somehow, declared Feinberg's theory deficient in certain aspects. For example, in his review of Feinberg's *Offense to Others* in 'The Yale Law Journal/ Dalton, Harlon observes that Fe in berg defines offensive conduct by giving examples of it and listing the mental states it induces. 'Nowhere does he define offence with the kind of precision he brings to the definition of harm.'[47] He further alleges that:

Feinberg offers no formal account of why the offense principle is justified. Instead, he simply assumes

> from the start that it warrants... endorsement. This failure to justify the offense principle is especially puzzling in light of Feinberg's deep attachment to the presumption of liberty. Periodically, he admonishes that {he offense principle should be applied with extreme caution, lest it opens the door to wholesale and intuitively unwarranted legal interference, Nevertheless,

[40] Harlon,, 'Offense To Others' in *Yale Law Journal,* Op. Cit. p. 885.
[41] Loc Cit.
[42] J Feinberg, *Offense to Others: The Moral Limits to Criminal Law,* New York: Oxford University Press, 1985, p. 1.
[43] Loc Cit.
[44] JJ Rousseau, *The Social Contract,* Translaled by H.j. Tozer, Wordsworth Editions limited, 1998, p. 14.
[45] J Ezenwankwor, *Law and Morality: An Appraisal of Hart's* Concept *of Law,* Enugu: Claretian Communications, 20 13, p. 159
[46] Loc cit.
[47] Harlon, *Offense to Others in The Yale Law Journal,* Vol. 96: 881, 1987, Google search, 10/3/2016. P. 889.

> Feinberg never questions the propriety of punishing as criminal at least some offensive behavior. I suspect that Feinberg has his doubts about the intuitive obviousness of the offense principle.[48]

Following other like-minds, Dalton eventually concludes that possibly, Feinberg's insistence on a separate offence principle must have arisen from the concern that without it, legislators will be tempted to water down the harm principle. 'Yet to resist expansion of the harm principle by creating an equally expandable parallel principle is scarcely a triumph.'[49] He contends that there should have been an elaborate or expanded harm principle that would incorporate its shortfalls rather than creating a new principle altogether. Worse still, Feinberg according to him struggles to explain and 'scarcely convince us that harm and offenses are different in kind, and should be treated with separate principles.'[50] Hence, Feinberg's harm principle does not exclude offensive conduct. In his article titled, 'Positivism, Naturalism, and the Obligation to Obey Law', in *Southern Journal of Philosophy*, vol. 36, Kenneth Einar Himma, also observes that the main objection towards this theory is the vagueness of the term 'offence.' He holds that:

> whether it means disgust, shame, anxiety, disappointment or something else, it would not be proper to term every person to be offended if he or she feels an uncomfortable situation or a stale of disappointments. This principle is difficult to apply because many people take offence as the result of an overly sensitive nature or because of unfair prejudice. For instance some people can be deeply offended by speeches that others find mildly humorous...[51]

Toeing the same line, Raphael Cohen-Almagor equally asserts that:

> if the offence principle is broadened to include annoyance, it becomes too weak to serve as a guideline in political theory, for almost every action can be said to cause some nuisance to others. Cultural norms and prejudices, for instance, might irritate some people. Liberal views may cause some discomfort to conservatives; conservative opinions might distress liberals...[52]

Most of these opponents of the offence principle accuse Feinberg of consciously duplicating a needless and unnecessary theory, which does not carry any intellectual weight, nor offer any new thing from the already existing harm principle. Hence, to them, Feinberg should have been advised to stick to his hitherto well-articulated harm principle. However, Bernard Harcourt disagrees with the above positions. In his article titled, 'The Collapse of Harm Principle,' Harcourt opines that;

> ...the harm principle acted as a necessary but not sufficient condition for legal enforcement. The harm principle was used to exclude certain categories of activities from legal enforcement (necessary condition),.... It served only as a threshold determination, and that threshold is being satisfied in most categories of moral offense... As a result, the harm principle no longer acts today as a limiting principle with regard to the legal enforcement of morality.[53]

The above argument raised by Bernard Harcourt thus justifies Feinberg's offence principle and disarms the position of some scholars against the offence principle. Hence, the insightful-arguments and postulations cogently raised by Feinberg are monumentally enduring and therefore difficult to be wished away. Having earlier given credence to the harm principle like J.S. Mill and other fellow liberals, Feinberg's insightful and courageous departure and eventual postulation of the offence principle remains unequalled. This is clearly evident in the wide acceptance of this principle amongst scholars. Further buttressing this point are Lehmann-Haupt and Jules L. who argue that the Offence principle of Feinberg is '...an extensive analysis of such...principles that might not justify the imposition of criminal sanctions,'[54] on the citizens in the slate. They agree that it is only when such a principle is enforced that the citizen's right can be protected and their liberty guaranteed just as it equally helps to regulate their action within the stipulated confines of this principle other than any other principle. Cognizant of the fact that every citizen seeks protection and all-round nourishing in the stale, Feinberg finally entrusts the duty of enforcing the offence principle into the hands of the state. He believes that the state should not only control and regulate harmful and criminal offences through the use of its coercive machinery. So the government also reserves

[48] Loc cit.
[49] Loc cit
[50] Loc Cit
[51] KE Himma, 'Positivism, Naturalism, and the Obligation to Obey Law', *Southern Journal of Philosophy,* vol. 36, 1998, p. 145.
[52] R Cohen-Almagor, "Harm Principle, Offense Principle, and the Skokie Affair', *Political Studies.* (1993) Accessed on 5/5/2020., p.1.
[53] BE Harcourt, 'The Collapse of the Harm Principle', *Journal of Criminal Law and Criminology* vol. 90, No.1 Northwestern University, School of Law, USA, 1999, P. 114.
[54] C Lehmann-Haupt *et al., Feinberg's Offense Principle, Google search. www.nytimes.com/2004,* P.I. Accessed on 5/5/2020.

the power and duly to control, prevent and sanction the citizen who defaults by infringing on the rights of other fellow citizens; but this must be guided by the proper and legitimate application of the offence principle.

The belief 'that no one should be forcibly prevented from acting in any way he chooses provided his acts are not invasive of the free acts of others'[55] has become one of the basic principles of libertarian politics. And as an unrepentant advocate of liberty, a famous legal, moral and political philosopher, the above assertion forms *the terminus ad quo* and *terminus ad quern* (point of departure and point of arrival) of Feinberg's intellectual journey that eventually culminated in the formulation of his groundbreaking offence principle. Joel Feinberg is undoubtedly convinced that the offence principle is a formidable alternative to the Harm principle especially as regards the legal enforcement of morality and protection of the citizen's right as well as a warrant for limiting offensive conducts in the state. Thus, Feinberg concludes in chapter eight of his work *Offense To Others that:*

> the offense principle then is hereby endorsed as one of the legislative Legitimizing principles which we have been seeking. That endorsement, however, does not directly imply approval of criminal prohibitions of any or all types of offensive conduct, for if the legislature is to avoid wholesale invasions of liberty, that are contrary to common sense and liberal convictions, it must mediate its application of the offense principle by the various restrictive standards... and balance in each type of case the seriousness of the offense caused against the independent reasonableness of the offender's conduct.[56]

Despite its perceived shortcomings (as already evaluated), *Offense to Others*- which is the fundamental offshoot of Feinberg's offence principle is a largely successful and exceedingly rich study. Dalton affirms that, 'Joel Feinberg has provided intellectual gist for at least a generation of philosophers, jurisprudes, psychologists, and cultural anthropologists. He has shown, by his own example, how these scholars can design concrete rules that regulate human behavior and reflect human aspirations. He has engaged man in the singularly important task of moral justification, of matching our laws to our better selves, and he has given us hope that the effort can make a real difference in how we live our lives',[57] in the state as free citizens. Hence, Feinberg has succeeded in presenting the best philosophical case for a liberal approach to the criminal law and indeed a lasting legacy for generations yet unborn.

[55] R Hamowy, 'Harm Principle', *The Encyclopaedia of Libertarianism*, Google search: https://en. Wikipedia.org//wiki harm principle, 2008, P.2. Accessed on 5/5/2020.
[56]Feinberg, *Offense to Others*, Op. cit. p.49.
[57] Harlon, 'Offense to Others', *Yale Law Journal*, Vol. 96, Op cit, p. 900.