

Book Reviews

“Disgust” and Punishment

Offense to Others: The Moral Limits of the Criminal Law (vol. 2). By J. Feinberg.* *New York, Oxford: Oxford University Press, 1985.* Pp. xix, 328. \$29.95.

Harlon L. Dalton†

The turkey vulture,
a shy bird ungainly on the ground
but massively graceful in flight,
responds to attack
uniquely.
Men have contempt for this scavenger
because he eats without killing.
When an enemy attacks,
the turkey vulture vomits:
the shock and disgust of the predator
are usually sufficient
to effect his escape.
He loses only his dinner,
easily replaced.
All day I have been thinking
how to adapt

* Professor of Philosophy, University of Arizona.

† Associate Professor of Law, Yale Law School. I would like to thank Bob Cover, Lucinda Finley, Henry Hansmann, and Tony Kronman for commenting on earlier drafts of this essay. I benefited enormously from their encouragement as well as from their gentle but firm critiques. I would also like to say a special thanks to Bob Cover, who, by his example, taught me how joyful scholarly pursuits can be. His delight was palpable whenever ideas were being tossed around, whether the topic was “disgust” or “jurisdictional chutzpah,” “the social function of tolerance” or “the violence of the word.” I don’t think he ever met an idea he didn’t enjoy playing with; straight or off the wall, well developed or newly hatched. I, like everyone Bob touched, will miss him terribly, in more and different ways than I ever could have imagined.

this method of resistance.
 Sometimes only the stark
 will to disgust
 prevents our being consumed:
 there are clearly times
 when we must make a stink
 to survive.
 —Marge Piercy¹

How can you not like a philosopher who trains his considerable intellect on that little plumbed concept—"yukkiness"?² How can you not respect a scholar whose excuse for not completing a promised "brief chapter" is that one thing led to another and, well, he wrote a four-volume work instead?³ Joel Feinberg is that person and *Offense to Others* is his book, the second installment in a four-part enterprise entitled *The Moral Limits of the Criminal Law*.

"The basic question of the longer work," says Feinberg, "is a deceptively simple one: What sorts of conduct may the state rightly make criminal?"⁴ Alternatively, "the basic question" is "one about the moral limits within which states may encroach upon individual liberty."⁵ The alternate formulation has the advantage of making explicit the "presumption in favor of liberty,"⁶ a Feinbergian first principle that assigns the "burden of argument to . . . the advocate" of governmental intervention.⁷

Armed with this presumption, Feinberg fixes his philosopher's gaze⁸ upon four commonly proposed justifications for invoking penal law, with a separate volume devoted to each. The first volume, *Harm to Others*, defines and qualifies the "harm principle," the relatively noncontroversial but potentially all-encompassing notion that "the need to prevent harm (private or public) to parties other than the actor is always an appropriate

1. M. PIERCY, *The Best Defense Is Offensive*, in CIRCLES ON THE WATER 101 (1982). Copyright © 1969, 1971, 1973, by Marge Piercy. Reprinted by permission of Alfred A. Knopf, Inc.

2. J. FEINBERG, OFFENSE TO OTHERS 112-15, 124-25 (1985) [hereinafter OFFENSE].

3. J. FEINBERG, HARM TO OTHERS at vii-viii (1984) [hereinafter HARM].

4. OFFENSE at ix.

5. HARM at 7.

6. *Id.* at 9.

7. *Id.*

8. Feinberg's is the particular gaze of the "mid-level" philosopher, whose aim is to further practical inquiry by fleshing out and clarifying those concepts that, together with empirically derived facts, form the basis for thoughtful public policy. Feinberg himself notes that readers "unfamiliar with academic philosophy" and primarily interested in a descriptive account may find his work unduly abstract. *Id.* at 16. On the other hand,

[t]echnical philosophers too may find the approach . . . skewed, although in a different direction. They will find no semblance of a complete moral system, no reduction of moral derivatives to moral primitives, no grounding of ultimate principles in self-evident truths, or in "the nature of man," the commandments of God, or the dialectic of history.

Id. at 17.

“Disgust” and Punishment

reason for” state interference with a citizen’s behavior.⁹ In the second volume, *Offense to Others*, the focus of this review essay, Feinberg considers whether, and to what extent, the government legitimately may prohibit an individual from engaging in conduct that is offensive, but not necessarily harmful, to others. The third volume¹⁰ addresses the argument that conduct may be prohibited because it causes harm to the actor herself. The final volume will consider whether conduct may be prohibited simply because it is inherently immoral. Throughout, Feinberg’s aim is not to determine what *ought* to be included in a penal code, but simply what *may*. *The Moral Limits of the Criminal Law* is just that, “an account of the moral constraints on legislative action,” and is, therefore, “a quest not for useful policies but for valid principles.”¹¹

I. FEINBERG’S DEFENSE OF THE OFFENSE PRINCIPLE

In the volume at hand, 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, he tells us, “are not in themselves necessarily harmful.”¹² It follows, then, that if we are to use the law to punish those who inflict such states on others (i.e. those who are offensive), we cannot justify so doing by resort to the harm principle, but must instead call upon a separate and distinct “offense principle.”

As is already apparent, much turns on Feinberg’s ability to convince us, at least provisionally, (1) that harm and offense are different in kind, and (2) “that the prevention of offensive conduct is properly the state’s business.”¹³ Feinberg scarcely attends to the first task. In his introduction to the overall enterprise, he promises “to try to go as far as possible with the harm principle alone, acknowledging additional valid principles only if driven to do so by argument.”¹⁴ However, his subsequent embrace of the offense principle is presented quite matter of factly, with no justification offered. We are simply told that

9. *Id.* at 11. For a thorough discussion of the harm principle, see Thomson, *Feinberg on Harm, Offense, and the Criminal Law: A Review Essay*, 15 PHIL. & PUB. AFF. 381 (1986); see also *infra* text accompanying notes 28–30.

10. J. FEINBERG, *HARM TO SELF* (1986).

11. *HARM* at 4. In essence, Feinberg’s goal is to develop moral principles to which legislatures may repair in deciding what to criminalize. The principles, properly applied, specify what conduct may legitimately be prohibited. Within the universe of such conduct, the legislature is free to determine what to punish, based on prudential—as against moral—considerations. Feinberg’s principles are designed to facilitate this legislative balancing, and not to assist courts in deciding whether a specific crime has been committed. See *infra* text accompanying notes 21–24.

12. *OFFENSE* at 1.

13. *Id.*

14. *HARM* at 15.

[i]t is a misconception to think of offenses as occupying the lower part of the same scale as harms; rather offenses are a different sort of thing altogether, with a scale all of their own. . . . Continued extreme offense . . . can *cause* harm to a person who becomes emotionally upset over the offense, to the neglect of his real interests. But the offended mental state [as distinct from any consequent self-destructive behavior] . . . is not a condition of harm.¹⁵

Feinberg devotes much more attention to the task of convincing us that offensiveness should be curbed. In particular, he invites us to join him in an imaginary bus ride that would make Monty Python blanch. Once on the bus, a rather crowded public affair, we cannot get off without running a serious risk of being late for an appointment of some consequence. We are then treated to a variety show so crude as to almost cause us to regret the demise of *Topo Gigio*.¹⁶ Some examples:¹⁷

Story 6. A group of passengers enters the bus and shares a seating compartment with you. They spread a table cloth over their laps and proceed to eat a picnic lunch that consists of live insects, fish heads, and pickled sex organs of lamb, veal, and pork, smothered in garlic and onions. Their table manners leave almost everything to be desired.

Story 7. Things get worse and worse. The itinerant picnickers practice gluttony in the ancient Roman manner, gorging until satiation and then vomiting on to their table cloth. Their practice, however, is a novel departure from the ancient custom in that they eat their own and one another's vomit along with the remaining food.

Story 8. A coprophagic [feces eating] sequel to story 7.

.....

Story 11. A strapping youth enters the bus and takes a seat directly in your line of vision. He is wearing a T-shirt with a cartoon across his chest of Christ on the cross. Underneath the picture appear the words "Hang in there, baby!"

.....

Story 23. A passenger with a dog takes an aisle seat at your side. He or she keeps the dog calm at first by petting it in a familiar and normal way, but then petting gives way to hugging, and gradually goes beyond the merely affectionate to the unmistakably erotic, culminating finally with oral contact with the canine genitals.

Having thus circumvented our power of abstract reasoning, and having

15. OFFENSE at 3.

16. There is no easy way to explain the allusion to readers too young to remember the Ed Sullivan Show. Think of something wholesome, terminally cute, and altogether cloying. Think of Donny and Marie, or perhaps the Smurfs.

17. OFFENSE at 11-12.

“Disgust” and Punishment

riveted our attention to behavior (at least some of) which causes us to gag, Feinberg proceeds to categorize the various episodes, and to analyze what he takes to be the reader’s likely reaction to each,¹⁸ confident that he has convinced us that “to suffer such experiences, at least in their extreme forms, is an evil.”¹⁹

Well and good, but how do we decide that a particular evil may give rise to criminal sanctions? If assassination is a crime, what of character assassination? May invidious discrimination against disempowered sectors of the society (people with disabilities, the elderly, gays, women, or people of color) be made a crime? May cruelty to animals? Sadomasochism? Inane chatter? Feinberg reminds us that some evils are more evil than others, that some are offset by the good they produce, that some are consented to, and that some may be avoided by the victim. And he assumes, as do I, that evil and illegal are not necessarily synonymous. Therefore, a central aspect of his enterprise is his effort to develop and refine practical guidelines—he calls them “mediating principles”—that can be used to separate fish from foul.²⁰

Feinberg draws heavily and explicitly on nuisance law to suggest that a conscientious legislator bent on determining whether to prohibit a particular type of offensive conduct should weigh “the seriousness of the offense caused to unwilling witnesses against the reasonableness of the offender’s conduct.”²¹ The seriousness of the offense is a function of its magnitude

18. Feinberg sorts the episodes into six categories, each of which represents a different unpleasant mental state. They are: affronts to the senses; disgust and revulsion; shock to moral, religious, or patriotic sensibilities; shame, embarrassment, and anxiety; annoyance, boredom, and frustration; fear, resentment, humiliation, and anger. *Id.* at 10–13.

19. *Id.* at 14. Feinberg also uses the bus ride to make the point that “to the normal person (like the reader) such experiences, unpleasant as they are, do not cause or constitute harm.” *Id.* I am not so sure. See *infra* Parts III.A and IV.A.

20. In addition to the use of mediating principles, Feinberg employs another test for determining which evils are legitimately punishable. Only offenses and harms that are “wrongful” are candidates for criminalization. “Wrongful,” in turn, is defined as “right-violating,” with “rights” defined quite broadly. HARM at 109–14; OFFENSE at 1–2. 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 “wrong” to be defined as the violation of a “moral right” that is somehow independent of and antecedent to law, Feinberg would find himself in a natural rights thicket which, despite his prior work in this area, see J. FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY (1980), he expressly seeks to avoid. HARM at 111. In an attempt to sidestep both pitfalls, Feinberg

declare[s] 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. *Id.* at 112.

Given the breadth of that definition, it is not clear how the introduction of the concept of “wrongfulness” improves upon, or even changes, a liberty-limiting principle. Nor do I understand, despite Feinberg’s proffered explanation, *id.* at 113, what the concept adds to a scheme that only prohibits “morally indefensible” conduct, and even then only when the conduct occasions a “setback to interest.” See generally HARM at 110–14.

21. OFFENSE at 26.

(intensity, duration and extent), whether it reasonably can be avoided by the victim, the involuntariness of the experience for the victim, and its impact upon persons of average moral sensibilities.²² The reasonableness of the offender's conduct, in turn, is a function of six factors: (1) its importance to the offender; (2) its social utility; (3) the extent to which free expression is involved; (4) the availability of alternative opportunities to engage in the same behavior at a time or place that would minimize or eliminate offense to others; (5) the role of malice or spite as a motive; and (6) how common the conduct is in the locality in which it occurs.²³ Though he recognizes that in some cases a single factor can be dispositive, for instance when an offended person voluntarily assumes the risk, Feinberg is generally reluctant to assign weights to the various factors or to suggest at what point an imbalance in the direction of unredeemed offensiveness justifies prohibition of the behavior.²⁴

II. CRITIQUE

A. *Is an Independent Offense Principle Necessary?*

Feinberg would have been better advised to fulfill volume one's promise to "try to go as far as possible with the harm principle alone."²⁵ Why, we might ask, didn't he just extend the harm principle to reach egregiously offensive conduct? He tells us that "offense is surely a less serious thing than harm,"²⁶ and that "offense is not strictly commensurable with harm . . . [because] offenses are a different sort of thing altogether."²⁷ But these assertions are true only by virtue of their own self-definition.

To his credit, Feinberg does a superb job of demonstrating that there is considerable intellectual profit in treating offensiveness as an analytically distinct category of human experience, and that such an effort resonates with much of our everyday experience. No one who has ridden on Feinberg's bus will doubt that offensive behavior is something we ought to, and do, take seriously, something that has the capacity to rivet our attention and to cheapen our lives. However, neither Feinberg's description of

22. *Id.* at 34-35.

23. *Id.* at 44.

24. *Id.* at 27. Notwithstanding this intellectual diffidence, Feinberg, in particularizing the "reasonableness of the conduct" standard, forcefully argues for weighting heavily society's interest in the unfettered expression of opinion, *id.* at 38-39, and concludes that "[n]o degree of offensiveness in the expressed opinion itself is 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." *Id.* at 44.

25. See *infra* note 45.

26. OFFENSE at 2 (emphasis omitted). Feinberg grudgingly acknowledges, then undercuts, the possibility that "extreme offenses [might be ranked] as greater wrongs to their victims than trifling harms . . ." *Id.* at 3.

27. *Id.*

“Disgust” and Punishment

the bus ride nor his best efforts to develop mediating principles tell us how we should go about protecting individuals and society from such behavior.

Feinberg could easily have contended that the offense category covers a range of behavior, some of which falls within the principle and some of which does not. Though this statement might seem to undermine the utility of treating offensiveness as an analytically distinct category, that would be true only if the sole purpose of categorization were to provide an all-or-nothing answer to the question “what conduct is legitimately criminalizable?” Trust in a crime/no-crime bright line reflects greater devotion to the gods of orderliness than to the lessons of human experience. After all, lines of demarcation based on the locus of pain or discomfort may have little relation to the factors that ultimately determine when liberty may be infringed in the name of the state.

On its face, Feinberg’s harm principle does not exclude offensive conduct. Feinberg defines “harm” as a “setback to an interest,” and legally cognizable harm as a “wrongful” setback to an interest.²⁸ He, in turn, defines “interest” as having a “stake” in something such that one gains or loses depending upon its condition.²⁹ Thus, if it is possible to have an “interest” or “stake” in not being subjected to offensive conduct (whatever that is),³⁰ then a wrongful setback to that interest could be governed by the harm principle.

In practice, in a number of contexts we treat injury to the psyche like injury to the body or to property. In the realm of torts, for example, we have long recognized that suffering, as well as pain, should be compensated. More recently, we entertained the idea that close relatives who wit-

28. See HARM at 31–36. A “wrong” is defined as an “indefensible” violation of another’s “right.” *Id.* at 34. Minor setbacks to interests may not be wrongful; conversely, harmless wrongs are not setbacks to interests. In essence, Feinberg uses the concept of wrongfulness as a mechanism for establishing priorities so that when interests conflict, the most important will prevail.

29. *Id.* at 33–34. According to Feinberg, interests are of two types, welfare and ulterior. The former—interests in life, health, bodily integrity, the absence of absorbing pain, minimal security, etc.—are needs, as distinguished from wants. “[W]ithout their fulfillment, a person is lost.” *Id.* at 37. Thus, one has a necessary stake in them. In contrast, ulterior interests—in a dream house, high political office, producing a play, advancing a cause, etc.—are rooted in wants. One does not stand to gain or lose by not writing a play unless one wants to be a playwright. One does not gain or lose if the Mets lose (assuming you have not bet on the game and are neither a baseball player nor a club or league employee) unless one is a fan of the Mets or of one of their rivals. Even then, says Feinberg, the gain or loss is not the sort of stake that produces a legally cognizable interest. The sense of loss that comes from disappointment should not be confused with the sense of disappointment (and worse) that flows from a genuine loss. *Id.* at 37–45.

30. Feinberg “defines” offensive conduct by giving examples of it and listing the mental states it induces. Nowhere does he define “offense” with the kind of precision he brings to the definition of “harm.” Nor does he define moralism, or indicate how that which is immoral differs from that which is offensive. The volume in which he directly addresses moralism has not yet been published, but some foreshadowing of its argument would have been helpful.

ness certain tortious acts may collect for their own psychic injury.³¹ In some jurisdictions, that right extends even to persons with "bare knowledge" of the tort.³² Even in the context of criminal law, psychic injury or offense to sensibilities sometimes is thought to justify criminal punishment,³³ is central to the definition of certain crimes,³⁴ or is a factor in sentencing, most notably in capital cases.³⁵

Despite the apparent openness of his definition of the harm principle, Feinberg makes it impossible even to consider whether egregious offenses might sensibly be treated as harms. He does so by interpretive fiat. "It is . . . [im]plausible," he tells us, "to attribute to most people an independent, noninstrumental *interest* in being unoffended. It is unlikely then that being in an intensely offended state could *ipso facto* amount to being in a harmed state."³⁶

This strikes me as just plain wrong. While it is hard to know what Feinberg means by "independent" and "noninstrumental,"³⁷ we do know what he means by "interest. Nothing in his definition of that term keeps us from adding "freedom from gross offense to the psyche" to the list of interests he has already recognized, including "the absence of absorbing pain and suffering," the presence of "emotional stability," "the absence of groundless anxieties and resentments," and "freedom from interference and coercion."³⁸ Indeed, a good case can be made that freedom from offense is already encompassed by one or more of these interests.³⁹ Fein-

31. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 339-41 & nn.32-40 (1984).

32. See, e.g., *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979).

33. See, e.g., N.Y. PENAL LAW § 245 (Consol. 1984) ("Offenses Against Public Sensibilities").

34. For example, a key element of the crime of "menacing" is the fear engendered in the victim. See, e.g., N.Y. PENAL LAW § 120.15 (Consol. 1984). Similarly, the federal Hobbs Act defines extortion in terms of, *inter alia*, the fear actually experienced by the victim. 18 U.S.C. § 1951(b)(2) (1982); see *United States v. Mazzei*, 390 F. Supp. 1098, 1106 (W.D. Pa.), *modified on other grounds*, 521 F. 2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).

35. For example, the Florida capital punishment statute includes among the aggravating factors that justify imposition of the death penalty the fact that the crime was "especially heinous, atrocious, or cruel." FLA. STAT. § 141(5)(h) (1982). In Georgia, juries considering the death penalty may consider whether the crime was "outrageously or wantonly vile," and whether it "involved . . . depravity of mind." GA. CODE ANN. § 17-10-30(b)(7) (1982).

36. HARM at 49. Even though this assertion leaves open the possibility that some distinct minority might have an interest in not being subjected to offensive conduct, the surrounding text makes clear that Feinberg considers such persons to be basket cases.

37. Based on the overall structure of his argument, I suspect that both terms are acknowledgments that even though one does not have an interest in being unoffended, one does have an interest in avoiding offensive conduct that leads to genuine harm (because, for example, it results in serious sleep deprivation or leads to a nervous breakdown).

38. HARM at 37.

39. Like OFFENSE TO OTHERS, HARM TO OTHERS is full of interpretive surprises. For example, we are told, HARM at 49, that physical torture is not punishable under the harm principle if no lingering injuries result and if the memory of pain is somehow erased. (In Feinberg's hypothetical, a magic pill is administered by the torturer.) I find this conclusion rather odd, particularly given our long experience with simple assault and burglary—crimes that involve the malicious invasion of a

berg’s own thankfully hypothetical bus ride has convinced me that I have a genuine stake in not watching others engage in coprophagia. Whether the state should protect that interest through the criminal law is, however, another matter, one that should not be resolved by problematic *ipse dixit*.

Possibly, Feinberg’s insistence on a separate offense principle rises from a concern that without it, legislators will be tempted to water down the harm principle.⁴⁰ Yet to resist expansion of the harm principle by creating an equally expandable parallel principle is scarcely a triumph.

B. *Is an Independent Offense Principle Justified?*

Feinberg offers no formal account of why the offense principle is justified. Instead, he simply “assum[es] from the start” that it “warrant[s] . . . endorsement.”⁴¹ This failure to justify the offense principle⁴² is especially puzzling in light of Feinberg’s deep attachment to the presumption of liberty.⁴³ Although he surely could have cast the principle as a formula for the imposition of punishment, a framework for social control, or a set of rules for the protection of victims, Feinberg treats it as a *liberty-limiting* principle. This characterization reflects Feinberg’s overriding concern, manifest throughout *Offense to Others*, with the legitimacy of coercion. Periodically, he admonishes that the offense principle should be applied with extreme caution, lest it “open the door to wholesale and intuitively unwarranted legal interference.”⁴⁴ Nevertheless, Feinberg never questions the propriety of punishing as criminal at least some offensive behavior.⁴⁵

person or her property without regard for whether damage ensues. Still, inasmuch as Feinberg’s construction of the harm principle leaves bodily integrity unprotected, it is not surprising that his principle does not extend to assaults upon a person’s psychic integrity.

40. This is, of course, mere speculation, but it at least directs our attention to the “politics” implicit in Feinberg’s work. From the beginning, Feinberg owns up to having a political agenda—namely, wanting to present the best possible philosophical case for a “liberal” approach to the criminal law. Having made that confession, however, he proceeds as if his assumptions and conclusions are mandated by logic and intuition alone. One of my goals in working through those assumptions and conclusions is to illustrate some of the points at which Feinberg’s politics have influenced ostensibly neutral judgments.

I hasten to add that in my view, “political judgments” (as I use the term here) are unavoidable, and reflect choices (conscious or otherwise) with respect to subject matter, audience, methodological approach, voice, working hypotheses and assumptions, goals, the normative space within which we locate our work, our understanding of how things (objects, people, their psyches, institutions, societies, the world) operate, and the like. For me, the politics of a scholarly piece is the sum of such choices, together with the reasons underlying them and the experiential base that informs them.

41. OFFENSE at x.

42. In fairness to Feinberg, he seems to have deliberately avoided providing a “rational” justification. See *infra* note 77 and accompanying text.

43. See *supra* notes 6–7 and accompanying text.

44. OFFENSE at 26; see *id.* at 4–5.

45. In the introduction to the overall enterprise, Feinberg promises otherwise:

In the beginning I will try to placate the unreconstructed “extreme liberals” who are unwilling to acknowledge any ground for legitimate interference with liberty beyond the harm principle. My procedure, having “assumed” the correctness of the harm principle, will be to adopt a

I suspect that even Feinberg has his doubts about the intuitive obviousness of the offense principle. In defining "liberalism" early in the first volume, he observes:

[N]o responsible theorist denies the validity of the harm principle, but the liberal would prefer if possible to draw the line there, and deny validity to any other proposed ground for state interference. Most liberals, however, have been forced to give a little more ground, and acknowledge the offense principle (duly refined and qualified) as well.⁴⁶

He then explains that the force of experience, not the force of intuition, has brought about this change. "When offensive behavior is irritating enough, and those offended cannot conveniently make their escapes from it, even the liberals among them are apt to lose patience, and demand 'protection' from the state. . . ." ⁴⁷ This quasi-historical account suggests, in part, a political justification for the offense principle; the strong impulse to ward off behavior that most people find offensive forces liberals to allow that sentiment to be vented in the most extreme cases, while erecting formidable barriers to its expression in less freighted ones.

C. *The Offense Principle Is Inherently Broad in Scope*

1. *Feinberg Campaigns for a Narrow Construction of the Offense Principle*

Much of *Offense to Others* is an attempt to keep the genie in the bottle. For example, Feinberg insists that in assessing the reasonableness of offensive conduct, legislatures take into account the conduct's "personal importance" to the actor and its value to society. From these two considerations Feinberg elaborates the "free expression" corollary: "[e]xpressions 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."⁴⁸ As a result, the "non-offensive utterance of an opinion, even of an offensive opinion, is a kind of trump card

properly liberal skeptical stance toward all other liberty-limiting principles, and to try to go as far as possible with the harm principle alone, acknowledging additional valid principles only if driven to do so by argument.

HARM at 15.

46. *Id.* at 14.

47. *Id.*

48. OFFENSE at 44. Just in case we miss the point, he continues: "No degree of offensiveness in the expressed opinion itself is 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." *Id.*

in the application of the offense principle. The standards of personal importance and social utility confer on it an absolute immunity; no amount of offensiveness can enable it to be overridden [sic].”⁴⁹ Thus, without even using mirrors, Feinberg removes from the ambit of the offense principle virtually all behavior that is verbally expressed and assertive in nature.⁵⁰

Even without the free expression corollary (the derivation of which is far from obvious), Feinberg’s construction of its parent axioms limits dramatically the potential reach of the offense principle. 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,”⁵¹ are exempt from prohibition.⁵² Hence, describing how his mediating principles might be applied, Feinberg asserts that “[m]any criminal statutes that have long been part of the penal codes . . . would not pass the test of our rigorously qualified offense principle.”⁵³

The scope of the offense principle is shrunk even further by Feinberg’s treatment of what he terms “the bare knowledge problem.”⁵⁴ Briefly stated, it is this: Should the criminal law protect the sensibilities of persons profoundly offended by conduct that occurs outside of their presence? Take, for example, persons who are deeply disturbed that the lovers in the hotel room down the hall are a racially mixed couple, or are sexually non-

49. *Id.* at 39.

50. *Id.*

51. *Id.* at 43. As construed by Feinberg, the “personal value” standard would not save public consensual sexual activity (as distinct from “gestures of affection”) from prohibition. In practice, the line encircling private sex is drawn tightly around the bedroom, thus providing little protection to the many who by choice or necessity engage in sex in hotels, bathhouse cubicles, parkway rest areas, lovers’ lanes, and other roads less travelled. Even when the only person likely to stumble upon the lovers is a police officer assigned to the vice squad, courts have been notably reluctant to recognize an expectation of privacy. *See, e.g., Commonwealth v. Stowell*, 389 Mass. 171, 449 N.E.2d 357 (1983) (arrest for adultery committed in secluded wooded area).

52. OFFENSE at 46, 66. While I personally agree that consensual sex can be profoundly enhancing—psychologically, spiritually, and emotionally—without regard to the orifices, body parts, or paraphernalia involved, and irrespective of the chromosomal structure of the participants, I recognize that the point is debatable, or, in any event, hotly debated. Many courts, for example, have concluded that certain private consensual sex acts have little or no value, personal or social, and instead constitute “utterly frivolous, wanton, perverse, or gratuitous behavior” (to borrow Feinberg’s phrase of disapprobation). *Id.* at 37. Therefore, we can hardly be assured that legislators called upon to apply the offense principle would echo Feinberg’s conclusion that the personal value of such conduct overrides any offense it occasions. On the other hand, were the determination of personal value based on the actor’s subjective assessment (rather than on the legislature’s judgment), virtually all offensive conduct would have value. In such circumstances, the standard would serve to distinguish among offensive acts solely on the actors’ psychological or other investment in them.

53. *Id.* at 46. In addition to private consensual sex, statutes that would not pass a “rigorously qualified offense principle . . . [include] [l]aws forbidding mistreatment of a corpse even in the privacy of one’s home . . . [and laws against] prostitution (except for rules regulating commerce), private showings of pornographic films, obscene books, and blasphemy, among others.” *Id.*

54. *Id.* at 33–34, 60–71.

mixed. May they invoke the criminal law as a means of deterring, or perhaps punishing, their tormentors?

Feinberg's discomfort with the question is palpable, and properly so. After all, the "liberals" to whom his book is directed "[t]raditionally . . . have categorically rejected statutes penalizing harmless unwitnessed private conduct no matter how profoundly upset *anyone* may become at the bare knowledge that such conduct is or might be occurring."⁵⁵ Yet Feinberg's offense principle suggests that such conduct may be prohibited if it is upsetting enough to enough people. Feinberg responds to this dilemma in two ways: first, he argues that the relevant mediating principles, properly applied, are "not likely ever to permit offense at bare knowledge to outweigh any private and harmless offending conduct";⁵⁶ second, he insists that the offended party cannot properly be seen as a victim, and hence has no right to invoke the criminal law.

Both arguments rely on intellectual sleight of hand. The first rests on the mischievous assumption "that secret and private activity is never the object of *serious* offense, because the offense it causes cannot be as intense or widespread as that caused by directly observed conduct, and such as it is, it is always 'reasonably avoidable.'"⁵⁷ For openers, the characterization of the activity at issue as "secret" is problematic.⁵⁸ The question-begging assertion that private offensiveness, "such as it is," is always reasonably avoidable, is even more troublesome. If we locate the offense in the person of the offender, then by definition it is "avoided," since it occurs outside the presence of all who would be offended. If, on the other hand, we conclude that offense, like beauty, is in the eyes of the beholder, then it *cannot* be avoided absent the gift of forgetfulness or a change in sensibilities.

My sense is that Feinberg does not take the tautological route, but rather believes that persons burdened by the bare knowledge of offensive conduct have the capacity (or at least the obligation) to unburden *themselves*. In considering the related question of whether the responses of

55. *Id.* at 63.

56. *Id.* at 64. I think Feinberg's characterization is wrong, or at least incomplete. If one focuses on topics—homosexuality, for example—over which liberals and social conservatives are apt to divide, and with respect to which liberals are wont to extol the virtues of liberty and the evils of the state, then the quoted passage fits the facts reasonably well. If, however, we think about an area in which liberals are apt to seek governmental protection while conservatives rally around the embattled individual—the commercialization of a natural park, for example, or the destruction of the habitat of a rare tiny fish—Feinberg's heroes could be relied upon to display solicitude for the psyches of the esthetically wounded, and not to worry overmuch about whether the victims had ever actually been to California or seen a snail darter.

57. *Id.* at 64–65.

58. Clearly Feinberg does not refer to situations in which the activity escapes attention altogether, and thus no one is offended. Similarly, if "secret" refers to the fact that those who cause offense seek to escape detection, this construction renders the term "private" redundant.

“Disgust” and Punishment

“abnormally susceptible” persons should be taken into account in applying the offense principle,⁵⁹ Feinberg invites us to

assume that excessive susceptibility to extreme offense is, in most cases, something subject to the control of the susceptible person himself, something mitigable, if not totally curable. In all but pathological cases, we assume that there is something almost self-indulgent about cultivating feelings of loathing, disgust, or rage (like Bobby Burns’s sulky, “sullen dame,” who “nurses her wrath to keep it warm”), and that one can learn not to let the object of one’s feelings bother one so.⁶⁰

If abnormally sensitive people “can learn not to let the object of . . . [their] feelings bother . . . [them] so,” I must confess that I am left wondering why “normal” people⁶¹ cannot be encouraged to perform the same feat. Of course, recognition of that possibility would cause Feinberg’s entire offense principle to disappear. Why restrict the offender when exasperated persons can simply stop nursing their revulsion?

Finally, and perhaps most tellingly, Feinberg’s first response to the bare knowledge problem is premised on the non sequitur that private offensive conduct “is never the object of *serious* offense, because the offense it causes cannot be as intense or widespread as that caused by directly observed conduct”⁶² Even were the assertion beginning with the word “because” true, the sole conclusion that necessarily follows is that

59. Feinberg stipulates that abnormal susceptibility “might itself be ‘normal,’ ‘natural,’ and ‘reasonable’”; its distinguishing characteristic is its inordinate intensity. OFFENSE at 34. Curiously, he urges that “abnormal” feelings should be discounted, but that “unreasonable” ones should not, lest legislators “assume the [dangerous] prerogative of determining the reasonableness of emotional reactions.” *Id.* at 35. Legislators presumably would remain free to assume the prerogative of determining the *proper intensity* of emotional reactions.

Feinberg later makes plain the connection between abnormal susceptibility (or “skittishness”) and the bare knowledge problem. “The key assumption, of course, is that only the excessively ‘skittish’ would bolt at the mere idea of harmless but repugnant unobserved conduct.” OFFENSE at 65. He then, unaccountably, lapses into nationalistic nonsense masquerading as cultural relativism.

It is no doubt true, as a matter of fact, of the western democracies in the twentieth century that extreme, wide-spread, and inescapable offense at unobserved but disapproved harmless conduct is possible only for the morally skittish. But there is no necessity that this connection hold universally, for all societies in all ages. . . . In Saudi Arabia, it may well be that 90% of the population is morally skittish by our standards even though ‘normal’ of course by their own. [I]t is at least conceivable (barely) that almost all Saudis are put in precisely the same intensely unpleasant state of mind by the thought that wine or pork is being consumed somewhere or Christian rites conducted somewhere in their country beyond their perception as they would be by their direct witnessing of such odious conduct.

Id. at 65–66.

60. *Id.* at 34.

61. Indeed, it might plausibly be argued that persons possessing “normal” susceptibilities are in a better position than are the abnormally susceptible to “learn not to let the object[s] of . . . [their] feelings bother . . . [them] so.” *Id.* By definition, the “normal” ones suffer less and are in better control of themselves.

62. See *supra* note 57 and accompanying text.

private offensive conduct is “less serious” than directly observed conduct, less serious but possibly still punishable under the offense principle. Moreover, it is not obvious that private offensive conduct always produces less intense or widespread discomfort than does directly observed conduct. After all, the demons we imagine often are far more menacing than those we look squarely in the eye.⁶³

Feinberg’s second response to the bare knowledge predicament, namely that the offended party is not a true victim and therefore cannot invoke the criminal law, fails to explain the imperative of a determinate victim, why only that victim can complain, and why she must have a “right to complain” before the offense principle comes into play.⁶⁴ One can certainly imagine a liberty-limiting principle shorn of these elements. Indeed, in the United States, all criminal prosecutions, however justified, are pursued on behalf of and in the name of the state (or “the people”); victims rarely have rights to commence or end proceedings, or even to participate.⁶⁵ Moreover, Feinberg’s off-hand conclusion that persons offended by the bare knowledge that disgusting behavior is occurring are not really “victims” is suspect.

2. *The Offense Principle Is Infinitely Manipulable*

On a number of counts, then, Feinberg’s handling of the bare knowledge problem is unsatisfactory. But even if we ignore the theoretical difficulties that beset his various attempts to constrain the offense principle, Feinberg cannot get around the considerable elasticity of his mediating principles. They could be interpreted so as to justify a mixed bag of legislative schemes, including some that would be flatly incompatible with Feinberg’s liberal credo.⁶⁶ Thus, the principles will serve as a bulwark against “wholesale and intuitively unwarranted legal interference”⁶⁷ with liberty only to the extent that legislatures and courts⁶⁸ share Feinberg’s intuitions, sensibilities, and interpretive approach.

63. Sometimes, particularly with respect to sexual behavior, instead of imagining that which we fear, we repress it, ignoring all but the most obvious signs that it lurks just around the corner. In such circumstances, being forced to confront the feared behavior may seem much more painful than our accustomed blindness. I guess, however, that I am enough of a grandchild of Freud to believe that repression takes a bigger toll.

64. These restrictions make sense only if Feinberg views retribution as the sole purpose of punishing offensive behavior. Other goals—general deterrence, isolation of the offender, societal retribution—are not particularly well served by such a totally victim-driven system.

65. To be sure, a growing victims’ rights movement has had some success in reversing the traditional powerlessness of crime victims.

66. The difficulty is exacerbated by Feinberg’s refusal to assign weights to the various factors he would have a legislator take into account, and his unwillingness to indicate the point at which an imbalance in either direction (seriousness of the offense/reasonableness of the act) warrants action.

67. See *supra* note 44 and accompanying text.

68. Although Feinberg’s mediating principles are to be balanced by legislatures as part of the

The importance of shared subjective perspectives is especially manifest when we recall that each of Feinberg’s two mediating principles is supported by several sub-principles. Thus, estimation of the “seriousness of the offense” requires inquiry into the magnitude of the offense, its avoidability, the extent to which the victim voluntarily endured it, and the impact of the offense on a person of “normal” susceptibility. Similarly, in assessing the “reasonableness of the offending conduct,” Feinberg instructs us to look at the conduct’s importance to the offender, its social utility, whether free expression is involved, the availability of satisfactory alternative outlets, whether malice is a motive, and the tolerance of the relevant community.

Feinberg takes the position (in addressing the bare knowledge problem) that unwitnessed conduct can never achieve the same magnitude of offensiveness as directly observed conduct. This conclusion is contradicted, however, by Feinberg’s category of “profound offenses” which cause “deep, profound, shattering, serious”⁶⁹ anguish, and yet, Feinberg explains, need not be perceived directly or first hand.⁷⁰ At a minimum, the confusion created by these warring contentions suggests that more art than science goes into determining the magnitude of offensive conduct. Feinberg’s treatment of the bare knowledge problem also illustrates the ambiguity of the “avoidability” constraint. We need only recall his curious argument that private offensive behavior is always reasonably avoidable. As for determining the impact of offending conduct on a person of “normal susceptibility,” the uncertainty of that judgment piggybacks onto the uncertainty of an even more difficult judgment—how susceptible is “normal”?

As previously noted, the malleability of the “personal importance to the actor” standard permits Feinberg effectively to remove private consensual sexual activity and “natural and spontaneous” public gestures of affection from the ambit of the offense principle.⁷¹ It is far from apparent, however, that the standard must be construed in that way. A legislator might argue, for example, that it is no more appropriate to respect the “personal value” derived from inherently immoral and unnatural sex than it is to respect the pleasure (not to mention remuneration) a hit woman derives from her work. Moreover, reliance on a subjective standard of personal value is somewhat at odds with the priority that an offense principle implicitly gives to collective notions of what has value and what does not.

criminal code drafting process, courts inevitably would be called upon to interpret the resultant statutes, to determine what conduct falls within and without their terms, and to decide whether conduct captured by a statute is constitutionally protected.

69. OFFENSE at 58.

70. *Id.* at 52–58.

71. *See supra* notes 51–61 and accompanying text.

Feinberg's analysis of the Skokie dilemma⁷² further illustrates the vagaries of assessing the reasonableness of offensive conduct. Feinberg no sooner raises the possibility that the planned march involved protected "free expression" than he lowers it with these words:

[T]he point was deliberately and maliciously to affront the sensibilities of the Jews in Skokie (including from 5,000 to 7,000 aged survivors of Nazi death camps), to insult them, lacerate their feelings, and indirectly threaten them. Surely if they had carried banners emblazoned only with the words "Jews are scum," they could not have been described as advocating a political program or entering an "opinion" in "the marketplace of ideas."⁷³

To the argument that the planned display of swastikas constituted symbolic political speech, he responds: "That is almost as absurd as saying that a nose thumbing, or a giving of 'the finger,' or a raspberry jeer is a form of 'political speech,' or that 'Death to the Niggers!' is the expression of a political opinion."⁷⁴

In these and succeeding paragraphs, Feinberg writes with great clarity and passion. His arguments have considerable force.⁷⁵ They are, however, far from self-evident. For example, why isn't the slogan "Jews are scum" an opinion? Even if "Death to the Niggers" is not an opinion, why isn't it (when uttered by the American Nazi Party) a political program? My intention is not to prove Feinberg wrong, but rather to suggest once again that his mediating principles (and their sub-principles) can be construed so as to justify polar opposite results.

One last example: In applying his balancing test to Skokie, Feinberg concludes that the proposed demonstration "was clearly motivated by malice and spite."⁷⁶ He is correct, but one cannot help wondering how he would assess the bona fides of the Black men and women (and their rainbow of supporters) who a decade before Skokie marched with Martin Luther King, Jr. through the streets of the white working class town of Cicero, Illinois. Although Feinberg would consider the Cicero marchers' motivations acceptable, a case could be made to the contrary. The demon-

72. In what has become a modern day paradigm of offensive symbolic conduct, the American Nazi Party sought to march through the largely Jewish town of Skokie, Illinois in 1977 dressed in storm troopers' uniforms, wearing swastikas, and carrying taunting signs. The civil liberties community was torn apart over how to respond, given the First Amendment interests of the Nazi Party on the one hand, and the grave pain certain to be felt by Skokie's residents (especially Holocaust survivors) on the other.

73. OFFENSE at 86.

74. *Id.* at 87.

75. Indeed, they suggest to me that an equally strong argument can be made that the demonstrations in Skokie ran afoul of the harm principle.

76. OFFENSE at 88.

“Disgust” and Punishment

strators knew that the sensibilities of the citizens of Cicero would be inflamed, and still they marched. A goal of the march was to incite reaction, thereby providing dramatic evidence for the proposition that the North had a “race problem” every bit as large as the South’s. Altogether too many legislators would characterize the Cicero demonstrators’ actions as provocative, even spiteful. More important, nothing in the web of principles spun by Feinberg would rule out this conclusion.

3. *Meanwhile, Back on the Bus . . .*

Having picked on his weaknesses, it is only fair to return to Feinberg’s strength—the bus ride. In truth, Feinberg never sought to justify the offense principle by appealing to reasoning alone; indeed, he thought such an approach doomed to failure. “It is very important that the reader put himself on the bus and imagine his own reactions, for no amount of abstract argument can convince him otherwise that the represented experiences are in principle of a kind that the state can legitimately make its business to prevent.”⁷⁷

I agree with Feinberg that the bus ride offers clues as to how we as a society should respond to offensive behavior. The key is to shift our gaze from the passengers to the bus itself. Even if privately owned, the bus is a public space in the sense that unrelated individuals are free to congregate there. It is a space with particular properties, not least of which is its lack of spaciousness. Most events on a bus are potentially annoying to a passenger unable to absorb herself in a book, a conversation, or her thoughts. Sheer physical proximity to others not of one’s choosing is akin to low-level assault; the absence of choice in the matter can leave one feeling physically invaded.

When on a bus, I obviously do not control the space around me, nor even the space I occupy. Nor is that space entirely controlled by the person who stands on my foot, or exhales anchovy breath in my direction. It is therefore not surprising that in general we treat such spaces as a psychic demilitarized zone, where no one is free to inflict painful sights, sounds, smells, or even thoughts on others.⁷⁸ In contrast, within the private spaces that individuals rightfully control (e.g., home, personal relationships, interior life), anything goes with consent—and nothing goes without it.⁷⁹

77. *Id.* at 14.

78. Indeed, given the common interest of passengers in maintaining bodily and psychic integrity, simple social convention is usually sufficient to assure a tolerable ride. As the following paragraphs make clear, limiting offensive conduct (whether voluntarily or by dint of state intervention) is only one way in which disparate sensibilities can be accommodated in public spaces.

79. A less extreme position would be that absent compelling reasons to the contrary, an individual

Conceptualizing the bus as a public space opens up a host of interesting questions, among them: How do we allocate public spaces to best respect people's sensibilities? Which sensibilities? In so doing, should we take account of a "public esthetic"⁸⁰ that is somehow distinct from the psychic needs and preferences of individuals, or should our goal be simply to shelter the sensibilities of the majority (or of some other aggregate)? If there is a public esthetic, what happens when it clashes with "private" sensibilities?

Possible ways to allocate public space are many. It can be partitioned so that everyone has turf on which their tastes are the norm; it can be partitioned temporally; its use can be restricted to those willing to limit themselves to "acceptable" conduct (i.e., the public or the prevailing private norm); or *laissez faire* can prevail.⁸¹ Examples abound of each approach. The division of a public park into playgrounds, picnic areas, ball fields, trysting areas, and pastoral stretches is an example of intentional geographic partitioning. The same may be said of the Green Line in Beirut, and the Combat Zone in Boston. *De facto* partitioning operates similarly. Consider, for example, the (fast fading) invisible line across 125th Street in Manhattan, or the one that surrounds Borough Park in Brooklyn and the Castro in San Francisco. Temporal partitioning is often employed at city civic centers, and increasingly by privately owned, but nonexclusive, night clubs. Friday is disco night; Saturday, jazz. Restricting conduct is common: no loud talking in libraries; no pets in restaurants (in this country); no sleeping on bus station benches. Examples of *laissez-faire* include street fairs and my favorite beaches.

My point in spinning out some of the possibilities is to illustrate both that there are myriad ways in which we deal with clashing sensibilities, apart from tossing people in jail, and that the appropriate method depends in part on the space at issue. Given their small size and high concentration of bodies, buses are problematic; they are difficult to partition so that picnickers, lovers, bullies, racists, animal enthusiasts, and boring conversationalists all have a space.⁸² Given their specialized purposes, libraries and museums may reasonably limit the range of conduct permissible on their premises. Given the size of public parks and the symbolic appeal of open spaces, however, it seems possible and appropriate to accommodate people whose tastes radically differ.

is free to determine what conduct takes place within the space she rightfully controls. In either event, life (and theory) becomes more complicated when conduct occurring within one person's private space spills over into another's private space or into space that is the public's.

80. I use the term "esthetic" loosely. The relationship between esthetics, morality, and the miscellany of mental states at issue here presents a nice question. *See infra* Part IV.D.

81. This list is intended to be illustrative rather than exhaustive.

82. On the other hand, we do separate smokers and non-smokers on airplanes.

“Disgust” and Punishment

This analysis of the bus ride does not eliminate the need to consider an offense principle or a modified harm principle, but it does suggest that factors other than “the seriousness of the offense” and “the reasonableness of the offending conduct” may be germane. Were we to witness the same conduct off the bus as on, our reaction might be quite different. Moreover, focusing on the place where offensive behavior occurs, and in particular on who has a right to control that space, does more to inform a decision to protect offensive conduct than does focusing on such Feinbergian considerations as the extent to which conduct is directly observed, its “personal importance” to the actor, and its “social value.”

In addition to taking account of who (among the offender, the offended party, and the public) has the right to control behavior in the space where the offense occurs, a sophisticated liberty-limiting principle should factor in the nature of the psychic discomfort caused by the offending conduct⁸³ and the extent to which the affront is shared. Is the victim the only person who finds the conduct at issue disgusting (or threatening, or boring)? Does everyone in the locality? Is the conduct universally abhorred? In general, the more local the reaction, the less it need be accommodated, particularly if the only available means of accommodation is to exclude or punish the offender.⁸⁴

Curiously, Feinberg considers, then rejects, an approach similar to the above. He recognizes that instead of viewing offensive conduct through the prism of public nuisance law, he could just as easily employ privacy and property law concepts. After all,

[t]he root idea [of privacy doctrine in this country] . . . is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. . . . The area includes not only the land and buildings he owns and occupies, but his special relationships with spouse, attorney, or priest, and his own mental states or “inner sanctum.” . . . When he is forced to experience loud or grating sensations, disgusting or enraging activities while on his privileged ground, something like a property right has been violated. . . .⁸⁵

Feinberg nevertheless elects to pursue the public nuisance approach, remarking that “[t]he metaphors are different; the actual modes of reasoning are the same.”⁸⁶

83. See *infra* Parts IV.B and IV.C.

84. Under Feinberg’s approach, the “seriousness of the offense” standard takes account of the extent to which the affront is shared.

85. OFFENSE at 24.

86. *Id.*

Not so. As Feinberg himself correctly notes, a nuisance approach "lends itself naturally to talk of *balancing* . . . whereas [a privacy/property approach] . . . lends itself naturally to talk of drawing *boundaries* between the various private domains of persons, and between the private domain of any given person and the public world."⁸⁷ That describes two markedly different modes of analysis. A boundary protects that which it encloses. Balancing, however, is indifferent to the nature of the objects being weighed.

Nowhere does Feinberg explain adequately why he opted for the public nuisance model. Perhaps his choice merely reflects a fascination with interest balancing, particularly its applicability to widely varying fact patterns. But flexibility is purchased at a price—namely highly unpredictable outcomes. Because Feinberg cares very much about substantive outcomes, and seeks principles that will assist legislatures to draft morally justified penal laws, the indeterminacy of his scheme ought to give him fits.

That does not seem to be the case, perhaps because Feinberg imagines that it is he (or similar philosopher kings and queens) who will be working the balance. Mine is the skepticism of one who *knows* that he will not be in a position to assure that Feinberg's principles are properly applied, and rather doubts that Feinberg will be either. I would therefore cast my lot with privacy/property analysis, and the safety of a well-marked border.⁸⁸

C. *Feinberg's Contribution*

Despite its shortcomings, *Offense to Others* is a largely successful and exceedingly rich work.⁸⁹ Joel Feinberg has provided intellectual grist for at least a generation of philosophers, jurists, psychologists, and cultural anthropologists.⁹⁰ He has shown, by his own example, how these scholars can design concrete rules that regulate our behavior and reflect our aspirations. He has engaged us all 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.

On a more personal note, Feinberg's work has enabled me to think

87. *Id.*

88. Whether my strategy is wise depends in part on whether *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), was merely a spasm or is instead a portent of a more restrictive approach to the right to privacy.

89. I have elected to discuss only so much of it as fits squarely within the overall goals and structure of Feinberg's larger enterprise, the four-volume work-in-progress. More than half of *Offense to Others* explores, with characteristic thoroughness and insight, obscene and pornographic depictions, and the use and control of obscene words.

90. See *infra* Part IV.D.

more creatively than I otherwise might have about an issue that has been gnawing away at me for some time now: How should we as a society respond to behavior that disgusts (a large segment of) us?⁹¹ Since “disgust” is but one of many psychic states encompassed by Feinberg’s offense principle, the scope of my immediate interest is considerably narrower than his. Nevertheless, I could not help but view his treatment of offensiveness through the prism of my own concerns, and am anxious to use the balance of this essay to explore where, with Feinberg’s unwitting help, I seem to be heading.

III. DISGUSTING CONDUCT SHOULD BE PLACED BEYOND, NOT WITHIN, THE REACH OF THE CRIMINAL LAW

Although I suspect we share many values and goals, I am driven to a conclusion directly contrary to that reached by Feinberg, at least insofar as the “disgust” subset of offense-taking is concerned. In my view, when conduct provokes disgust, that is a sign that we should consider exempting it from, rather than subjecting it to, prohibition. My reasons for so concluding are at present tentative, rudimentary, and in some cases inchoate.⁹² But some strands of my thought already have begun to take shape. Three of them follow.

A. *Feelings of Disgust Are Culturally Derived and Subject to Change*

The fact that conduct engenders disgust is not a legitimate reason to make it a crime. Little of what disgusts us is absolute, rooted in human nature, or divinely ordained. Rather, our sensibilities are, in general, culturally contingent and surprisingly plastic.

Even basic sensory reactions,⁹³ despite being the direct product of our perceptions and, as such, scarcely mediated by our intellects, are not fixed. Recently I acquired a dog, or more accurately, he acquired me. Early in our life together, he found it useful to “mark” the wall outside my bedroom. In an effort to wash away the urine and mask its putrid smell, I scrubbed the area with a heavy-duty household cleanser. As the smell of

91. This question first occurred to me as I was preparing to teach a course entitled “Law and Sexuality.” After reading a string of fornication, adultery, and sodomy cases in which the judges talked of morality but could scarcely contain their sense of disgust, I began to suspect that the latter powerfully influenced case outcomes. I therefore began to wonder whether disgust is a legitimate basis for criminal prohibitions.

92. An example of the last is my informed hunch that societies somehow benefit from tolerating behavior that disgusts.

93. As used here, “sensory” refers to our tendency to experience the world more or less directly through our senses. In contrast, the term “sensibility” refers to our capacity to experience upset “feelings.” The definitions are rough and the distinction crude, but they are, I hope, sufficient for present purposes.

ammonia wafted into my nostrils, signalling to me a cleaning job well done, it suddenly occurred to me that the cleanser's odor was every bit as pungent as that of urine, and that in fact the two odors were quite similar. Different associations, however, had produced in me quite different initial reactions. I then remembered how horrified I had been when, during my very first dog-walking outing, Biko stopped several times to sniff remembrances deposited in our path by others of his ilk. Within a week my fecal distress abated, and my sole concern became the possible ingestion of parasites.⁹⁴

Doubtless there are cultures in which the goodies in Feinberg's picnic basket, live insects, fish heads, and pickled sex organs of lamb, veal, and pork are considered delicacies.⁹⁵ And the belching that no doubt accompanied the meal would, in some countries, be complimentary to the chef. Even within our own society, some of the finest restaurants serve sweet-breads and rocky mountain oysters, and some of the most soulful serve chitterlings. I confess, I have little difficulty passing up all of the above; on the other hand, I have long since grown fond of the worm at the bottom of my bottle of Tequila.

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.⁹⁶ 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, because we in this country have established an arbitrary and usually honored convention that mainstream religions are treated with reverence. 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.

Even within a particular culture or subculture at a particular point in time, sensibilities vary much more widely than Feinberg's scheme would suggest. Consider, in this regard, Feinberg's confident statement that "[n]ot even the story of the feces-and-vomit-eating picnickers . . . is more

94. I realize that these examples are rather humble, but I promised Biko I would find a way to mention him in this essay.

95. See, e.g., P. FARB & G. ARMELAGOS, *CONSUMING PASSIONS* 165-89 (1980).

96. Flags symbolize nations, and national identity is deemed important. Thus, criticizing a nation (calling it, for example, an "evil empire") leads to hard feelings, but spitting on its flag leads to war; criticizing one's own country may be acceptable, but destroying its symbol is not.

disgusting to most of us than” is the story involving bestiality.⁹⁷ My reactions to the two stories were the opposite, and Feinberg’s assertion left me feeling as if I must be something of an odd duck. I then conducted an incredibly unscientific poll of my pointy-headed intellectual friends, asking them which story grossed them out more.⁹⁸ Overwhelmingly, they said the picnic scene.

My point in relating this moving moment in contemporary sociology is not that Feinberg is mistaken, nor that I am, in truth, an ordinary duck. Instead, I conclude that we assume too easily that others share our sensibilities; we underestimate the variety of human responses to unnerving stimuli; and in characterizing a particular reaction as appropriate, or as typical of “most people,” we risk communicating to those who do not share that reaction that they are psychically marginal.

Finally, it is worth underscoring that our sensibilities change. Some changes are relatively small. I have nearly gotten to the point where I can eat everything at my local sushi bar without gagging. But the big stuff changes as well—how we approach sex and sexuality, race, gender, God, country, our bodies, our planet—and that is true for societies as well as for individuals, over periods briefer than a human lifetime.

The sum of all these observations is that disgust-based prohibitions can lay no claim to respect, except as the byproducts of chance acculturation. 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. Moreover, experience teaches us that when forced, we can come to tolerate matters that we previously found disgusting.⁹⁹

B. *Permitting the Majority To Define and Punish Disgusting Behavior Poses an Unacceptable Risk of Cultural Domination*

The power to punish disgusting conduct is a dangerous weapon. Though judgments about what is disgusting are inherently arbitrary, we tend to invest enormously in them—in part because they are responses to

97. OFFENSE at 20.

98. I asked them to assume that the dog consented and was not injured.

99. Race comes to mind. One hundred and thirty years ago, slavery was legal in this country. Some thirty years ago, segregation was legal and flourishing. Twenty years ago, intermarriage between blacks and whites remained a crime in sixteen states. The avowed purpose of such statutes was to prevent the rise of a “mongrel breed of citizens.” *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955)). That phrase captures the historic antipathy of white America towards the grandsons and granddaughters of former slaves. Yet through cases like *Loving*, and more importantly through persistent agitation in virtually every sector of life, white America has had to deal with her antipathy. And while all is certainly not well, there have been some startling developments. George Wallace, once the symbol of segregation, ended up his career reaching out to, and responding to the needs of, black voters. And Virginia, *Loving* country, now has a black Lieutenant Governor.

deeply felt but poorly understood psychic needs, and in part because they are easily confused, and infused, with moral judgments. 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. Equally troubling is the alternative: The "criminals" may, solely by virtue of our authority, accept our judgment that they have done wrong and sever their own cultural moorings. Worse, they may internalize our judgment that they are bizarre, and may suffer consequent psychic distress.

To illustrate these dynamics, consider a scenario involving flag desecration. Our desecrater is committed to world unity, and believes that the mark of a great country is toleration and fair response to criticism. In 1968, to oppose the Vietnam War, she makes paper dolls out of an American flag and burns them in a hibachi on the steps of the federal building as symbols of napalmed children. She is then prosecuted by a zealous government attorney motivated by genuine feeling for the unfathoming parents whose sons dutifully lost their lives fighting for an ideal, and perhaps by guilt that it never occurred to her to enlist.

Nowhere do the sensibilities of the two protagonists meet. The flag-burner was fighting for a noble cause, and in her estimation, fighting fairly. While she recognizes that she violated a law, she does not feel that she did anything awful—after all, there was no risk that the building would catch fire. The prosecutor, on the other hand, seeks to vindicate not only her insulted country, but also those who died and those who mourn for the dead. She finds people like the flag-burner revolting, and assumes that all patriotic Americans share that feeling.

The prosecutor enjoys the dominant position, not just because she holds the keys to the jailhouse, but more importantly because her sensibilities mirror, in 1968, those of the folks who count. Four years later, the protester's outrage over the war would be in the ascendancy, and the prosecutor might find herself instructed to offer a favorable deal, or to nolle the prosecution. Thus, the prosecutor's dominance represents not only the

“Disgust” and Punishment

power of those in power, but also the dominance of the present over the future (and the past over the present).

Feinberg addresses this difficulty in a section aptly entitled “[c]ultural change and the martyrdom of the premature.”¹⁰⁰

Reformers and trendsetters . . . those in each generation who are responsible for the movement and direction of the prevailing sensibility, may . . . have the misfortune to engage in a given type of behavior during the transitional period between the time when the qualified offense principle clearly applies and when it clearly no longer can apply[.] Some of them, no doubt, will be punished for what may be done a year later with impunity—and according to my principle, rightly so. . . .

My discomfort in this position is at least mitigated by the thought that martyrs to the cause of cultural change, in my view, should never be subject to more than very minor penalties or coercive pressure. . . . Moreover, those who are penalized for anticipating rapid changes already in progress will soon enough be vindicated by the very changes they helped to produce, which should be ample reward and compensation for most of them.¹⁰¹

That, plus a full pardon and ample money damages. But the better course would be not to punish “cultural offenses” in the first place.

Even if we accept Feinberg’s view that vindicated virtue is its own reward, this notion only applies to people whose offensive behavior is eventually embraced. But what of people whose cultural differences never catch hold? People who, instead of being “ahead” of the dominant society, are off to the side of it?

I am acutely aware that not so long ago black men in the South were routinely arrested for “reckless eyeballing.” I worry that in 1986 Rastafarians are viewed by many as dirty and crazed, their dread locks taken as proof of their incivility, not evidence of their piety. I fear that deinstitutionalized people increasingly will be treated as pariahs, and viewed as blights on the cityscape. I cringe at our utter disdain for Marielitos, whom we lured to these shores in order to score a geopolitical point. I wonder whether in the current frenzy to crack down on drug use we will pause to see, let alone respect, the humanity in people whose lives are turned inside out by their own addictions. If only we could resist the impulse to gag at the turkey vulture’s behavior, and could observe it without judgment, we might then discover that what we mistook for bad manners was in fact good sense.

100. OFFENSE at 47.

101. *Id.* at 48.

C. *The Criminalization of Disgust and the Enforcement of Morals Are Intertwined*

We frequently attach the label "immoral" to behavior that disgusts us.¹⁰² Similarly, we attach the label "disgusting" to behavior we find immoral.¹⁰³ I do not mean to suggest that conduct can never be one or the other, or distinctly both,¹⁰⁴ but simply that the two reactions are often intertwined.¹⁰⁵

Particularly where sexuality is involved, courts and legislatures have been unabashed in expressing their desire to use the criminal code to enforce *morals*.¹⁰⁶ The desire to quash behavior deemed *revolting* is occasionally manifested in statutory language. The District of Columbia sodomy statute, for example, employs the phrase "unnatural or perverted" three times.¹⁰⁷ More commonly, judges offer their disgust as a basis for upholding such statutes against constitutional challenge. A 1973 opinion handed down by the Arkansas Supreme Court is a classic example. The court begins its decision upholding the state's consensual sodomy law by observing, gratuitously, that one of the arresting officers was so revolted by the sight of a man performing an act of fellatio upon another that he "vomited thrice during the evening."¹⁰⁸

102. For example, I have been known to refer to the slaughter of baby seals as immoral. In truth, I cannot justify that position, or more accurately, have never felt it necessary to try, on the basis of the moral precepts I hold dear. Instead, my moral judgment is grounded almost exclusively in my feeling of revulsion at the image of such wide-eyed, innocent-looking creatures being clubbed to death. One might argue that I have simply attached the wrong label to my feelings, but I think my use of moral language aptly captures something genuine about my response. Professor Dworkin would disagree. "We distinguish moral positions from emotional reactions, not because moral positions are supposed to be unemotional or dispassionate—quite the reverse is true—but because the moral position is supposed to justify the emotional reaction, and not vice versa." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 250 (1978).

103. Given my web of values, it is immoral to go door-to-door in poor neighborhoods selling overpriced encyclopedias by understating their cost and overstating their capacity to lift the next generation out of the cycle of poverty. I have often referred to such high-pressured, low-principled sales as disgusting, and indeed they are, but that assessment is bottomed almost totally on my moral judgment.

104. An especially brutal murder is both offensive and immoral, and harmful to boot. The methodical mutilation of a friend's corpse, whether for pleasure or for spite, is another example.

105. Indeed, the labels may have less to do with the conduct itself, or with our reactions to that conduct, than with how we would justify those reactions if pressed to do so. Consider R. DWORKIN, *supra* note 102, at 248-53 (distinguishing between "moral" positions, which we must respect even if we think them wrong, and positions rooted in, *inter alia*, prejudice or "mere emotional reaction").

106. *See, e.g.*, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (holding Georgia sodomy statute constitutional); *Doe v. Commonwealth's Atty.*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (holding Virginia sodomy statute constitutional), *summarily aff'd*, 425 U.S. 901 (1976).

107. D.C. CODE ANN. § 22-3502 (1981). Although many modern statutes have foresworn such judgment-laden language, their predecessor statutes used the terms "sodomy," "buggery," and "unnatural" sex acts interchangeably. *See* J. DAVIS, *CRIMINAL LAW* 133 (1838).

108. *Carter v. State*, 255 Ark. 225, 227, 500 S.W.2d 368, 370 (1973). The court did not suggest that harm of the sort suffered by the officer was a natural by-product of sodomy and therefore justified including sodomy in the criminal code.

“Disgust” and Punishment

The intertwining of morality and disgust exists on the level of theory as well. Sir Patrick Devlin, perhaps the most highly regarded defender of the view that the state may enforce morality by means of the criminal law, makes the link explicit:

Those who are dissatisfied with the present law on homosexuality [in England in 1959] often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. *No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law*, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.¹⁰⁹

One would be justified in inferring from such statutes and cases that sodomy is universally abhorred in this country. Yet empirical studies reveal that the vast majority of us, straight and gay, male and female, young and old, have indulged in oral or anal sex and, more shocking still, have enjoyed it.¹¹⁰ Indeed, in at least one study, a majority of the Americans surveyed expressed the belief that “oral-genital sex leads to better and happier relationships.”¹¹¹ These findings hardly square with the view of human nature that informs much of the law.¹¹²

Of course, the objection to sodomy is generally an objection to same sex sodomy or, more broadly, to homosexuality.¹¹³ However, even as to gays and gay sex, it is misleading to suggest that the antipathy reflected in

109. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (1965) (emphasis added). Devlin never makes quite clear the precise relationship he sees between morality and disgust. At times, he seems to be saying that that which disgusts us is, ipso facto, immoral. It is possible, however, that he wishes only to make the more modest argument that liberty should not be abridged unless the act at issue is both immoral and repellent.

110. See, e.g., P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* 23 (1983); E. BRECHER, *LOVE, SEX, AND AGING* 358–59 (1984); M. HUNT, *SEXUAL BEHAVIOR IN THE 1970s* 198–99 (1974); C. TAVRIS & S. SADD, *THE REDBOOK REPORT ON FEMALE SEXUALITY* 86–89 (1975); see also A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 370–73 (1948); A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 257–58 (1953).

111. Callan & Planco, *Attitudes Toward Oral-Genital Sexuality*, 42 *CONN. MED.* 500, 502 (1978).

112. It is, of course, possible that we find sodomy disgusting even as we enjoy it, rather like the Miss America pageant, or Amos and Andy reruns. If so, we would have to conclude that disgust is an infinitely more complex (and less unredeemable) emotion than we generally are wont to recognize. Or it may be that judges, legislators, and many (if not most) of the rest of us radically misgauge what others are doing and thinking, and wrongly assume that our own experiences and attitudes are other than typical.

113. Being gay and engaging in sex are, of course, quite distinct phenomena. Yet this society commonly views gays solely as (homo)sexual beings, or makes the converse mistake of insisting upon sexual abstinence as a condition of social acceptance.

statutes and cases springs from a societal consensus. After all, there are some twenty million gay people in this country,¹¹⁴ most of whom regard gay sodomy as perfectly "normal," as well as millions of straight people who (regardless of the level of their overall homophobia) do not begrudge gay men and lesbians the right to sexual intimacy.

Still, half the states make sodomy a crime, and the Supreme Court has upheld their right to do so.¹¹⁵ If, as I suspect, the philosophical underpinning of these pronouncements is twofold—that sodomy is punishable because it is disgusting and because it is immoral—then my disagreement is plain: Disgust-based prohibitions are in my view illegitimate,¹¹⁶ so too are prohibitions based solely on the fact that conduct is deemed immoral.¹¹⁷

114. See generally A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *supra* note 110; A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 110.

115. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

116. See *supra* Parts III.A and III.B.

117. I find compelling much of H.L.A. Hart's rejoinder to Lord Devlin, H. HART, *LAW, LIBERTY AND MORALITY* (1963), and anticipate happily embracing much of Feinberg's forthcoming fourth volume. For the moment, I am content simply to sketch my still-forming position, with the expectation that further reflection will provide not only details but major modifications (and perhaps recantations) as well.

Central to my opposition to legal moralism is the conviction that it cannot coexist, theoretically or practically, with genuine individual autonomy. I am inclined to agree with Lord Devlin that societies are built, in part, on a shared morality, and that the cohesion that results therefrom is, in general, a good thing. I do not agree, however, that individual departures from that shared morality are necessarily destructive. On the contrary, I would argue that unless a society allows departures from its morality, allows in effect its citizens to be immoral, individual autonomy has no real meaning. And in our society, at least, respect for the individual is at the core of the morality we share.

Of course, there may be occasions (even in this most individualistic and least collectivist society) in which individual autonomy must give way in order to preserve shared values. But several conditions must first obtain: (1) there must be a genuine and substantial risk that unchecked deviant behavior will produce a shift in shared values; (2) there must be a likelihood that the society, following an appropriate period of readjustment, would regard the "new" shared morality as inferior to the "old"; (3) the feared shift must involve core (i.e., defining) values; (4) the shift must be immune to social pressure, education, and other similar non-coercive measures; (5) the shift, once in effect, must be irreversible by non-coercive means.

The first condition reflects the fact that not all moral deviations are likely to take hold. I am not likely to get into necrophilia no matter how trendy it becomes. More to the point, it is not likely to ever become trendy, even if we allow card-carrying necrophiliacs to run free. In general, the likelihood that unchecked deviation will lead to a shift in values is directly related to the number of people who find the pertinent deviant behavior attractive. This leads to my second condition, that the shared morality, post deviation, must be inferior to the shared morality *ex ante*. If large numbers of people are poised to deviate the moment the club is lifted, (or if they deviate anyway, notwithstanding the threat of the club), it is worth considering whether the behavior at issue should remain devalued. Implicit in my position is the notion that communal values are, and should be, dynamic; that they do not exist independently from other forces (economics and ideology, for example) that are themselves dynamic; and that some value shifts strengthen rather than destroy a society.

My third condition proceeds from the assumption that not all values are equal. A society that defines itself centrally as a "gentle, loving people" would be severely damaged by behavior that led inevitably to increased overall callousness. On the other hand, that same society might be relatively unshaken by a value shift regarding, say, sex before marriage, or business practices such as greenmail.

Conditions four and five reflect my disagreement with the Devlinesque view that the state cannot afford to stay out of the morals enforcement business if it hopes to survive. In fact, I take a polar opposite view, namely, that the state has little to gain by being in the morals enforcement business. History has shown that public enforcement is impossible without private assent to the values at issue.

“Disgust” and Punishment

Suppose, instead, that I retained my position regarding the enforcement of morals, but thought it acceptable to penalize disgusting behavior. And suppose, further, that I was successful in selling this position to every legislature and to the highest court in every jurisdiction. What would happen?

I suspect that after a period of considerable confusion, virtually all of the laws that were illegitimate attempts to enforce morals would be upheld (or reenacted if necessary) as legitimate exercises of the states' right to deter and punish disgusting behavior. Because immorality and disgust are simply different facets of the same “intolerance and indignation” (to borrow Lord Devlin's phrase), to take away with one hand and restore with the other seems quite peculiar. Yet, that is precisely the result that Feinberg's approach threatens, for despite his adamant opposition to equating sin and crime, Feinberg seeks to justify the punishment of offensive behavior. To his credit, he avoids the result I fear, at least with respect to laws criminalizing private consensual sex. He does so, however, by carefully massaging his mediating principles. And there's the rub. We can scarcely be confident that a legislature that is disgusted by what it considers “unnatural and perverted” sex will nonetheless conclude that such conduct has great personal value.¹¹⁸

IV. A TENTATIVE ALTERNATIVE

A. *Subsume “Psychically Harmful Conduct” Under the Harm Principle*

Feinberg uses the term “offense” as a catch-all for an incredibly broad range of human responses: anger, annoyance, anxiety, boredom, disappointment, disgust, embarrassment, fear, frustration, humiliation, hurt, resentment, shame, and shock. These responses are properly lumped together, but the term “offense” does not capture their common element. Each of them describes a psychic pang.

Because I regard these pangs as harmful, I am comfortable referring to them as “psychic harms.” Moreover, as is probably apparent from my

At the same time (to oversimplify only slightly), where there exists private assent, public enforcement is not necessary. To be sure, governments may play a constructive role in fostering a society's shared morality. Similarly, as “omnipresent teachers” they can undermine that morality by allowing themselves to take shortcuts, by becoming lax in their self-vigilance, and by placing themselves above the people. But the pedagogy of repression is rarely an effective approach, unless the desired lesson is one of alienation.

On a more positive note, I suspect that shared values are deepened when they are reaffirmed in the face of a serious challenge. But that reaffirmation must be chosen rather than imposed. By striking down behavior that morally tempts us, the state deprives us of the growth-inducing experience of wrestling anew with why we as a society elected to put that temptation behind us in the first place.

118. Justice White, in *Bowers*, labelled this argument specious. 106 S. Ct. at 2844-46.

earlier criticism of Feinberg's insistence that offenses and harms are different in kind, I think that the primary distinction between psychic and physical harms is the difference in receptor sites. Accordingly, I see no theoretical reason to maintain separate liberty-limiting principles. If some (or all) psychic harms should be treated differently from physical harms, for reasons practical or prudential, the case for disparate treatment can be made as easily from within the context of the harm principle as from without, and can be put into practice through the judicious use of new mediating principles.

B. Mediating Principles that Produce Non-Penal Responses to Most Psychically Harmful Conduct

I agree with Feinberg that a broad liberty-limiting principle is of little use without mediating principles to structure its application to specific categories of conduct. I would embrace many of the guidelines he relies on to supplement the harm and offense principles (which I would collapse into one),¹¹⁹ modifying them, however, to incorporate the property concepts discussed in Part II.¹²⁰ Thus, I would exempt from punishment conduct engaged in by consenting adults within space the actors have a legitimate right to control;¹²¹ I would prohibit conduct pursued within space an unconsenting victim has a legitimate right to control. Conduct occurring elsewhere—on public property, on “private” property in which many people have an interest, or on property whose “ownership” is uncertain or ambiguous—would require more complex mediating principles.

Ideally, these principles would distinguish among types of communal space, suggesting to legislatures appropriate responses short of punish-

119. The harm principle's mediating maxims, summarized in HARM at 215–17, 243–45, fall into four identifiable groups: (1) Rules that simply exclude certain behaviors from the scope of the harm principle. For example, justified, excused or harmless wrongs are not covered. Nor are wrongs done to sadistic or malicious interests, *id.* at 215. (2) Rules for applying the harm principle to specified categories of individuals. For example, unusually vulnerable people are not entitled to special protection by the criminal law, except protection from “unnecessary, deliberate, and malicious efforts to exploit [their] vulnerability” and special protection that can be achieved “without serious inconvenience” to others, *id.* at 216–17. (3) Rules to guide legislatures in cases of competing, conflicting or uncertain interests. For example, if it is uncertain that conduct will cause a harm, the risk of harm (considering both magnitude and probability) should be weighed against the social value of the risk-creating activity, *id.* at 216. (4) Rules to guide legislatures in cases where harm results from cumulative conduct of many individuals, but no individual's conduct would of itself be harmful. For example, selective licensure is appropriate for setting optimal activity levels if both blanket permission and blanket prohibition are unacceptable, *id.* at 217.

120. I am, as yet, uncertain about whether these should apply to physical harms as well as psychic ones.

121. For the moment, I am content just to give a sense of what these new mediating principles would look like. At a later point, I will have to address such obvious issues as the treatment of any externalities that flow from psychically harmful conduct that originates within the actor's protected space.

“Disgust” and Punishment

ment. For example, in deciding how to treat psychically harmful conduct that occurs within the confines of a large, multi-use open space, a legislature might choose to partition the space (so that offender and offended alike can enjoy it) instead of excluding the offender. Similarly, where psychically harmful conduct occurs within an enclosed, special-purpose public space, and where the conduct is unrelated to that purpose, a legislature might select exclusion as the preferred sanction, and authorize prosecution only in the case of extreme recalcitrance.

Other new mediating principles might also be appropriate. Perhaps in fixing sanctions for psychic harm, legislatures should consider the nature of the discomfort. Were such a rule in place, the inane chatterer on Feinberg’s bus could be forced to be silent (arguably the ultimate punishment), whereas someone who reeked beyond sufferance could be escorted off. Legislatures should also take into account the universality of various affronts.

Mediating principles should include some mechanism for taking cultural bias into account. To be sure, there is a cultural component in much that Feinberg defines as harm. Many crimes against persons (suicide and abortion prior to *Roe*, for example) and against “nature” (sodomy, polygamy, and the like) are culturally laden. Thus we need a mediating principle that would assist legislatures to identify conceptions of harm that are strongly culturally contingent. These would be exempt from punishment.¹²²

C. *Tolerate Harmful Conduct When Inextricably Bound Up with Feelings of Disgust*

As I argued in Part III, disgust-based harm should normally be exempted from punishment.¹²³ The mediating principles described above would probably screen out most conduct in this category. The harm principle, even as elaborated by Feinberg, would exclude from consideration behavior deemed to be *de minimus*. Judicious application of property concepts would protect allegedly disgusting conduct engaged in within the actor’s own space, and in many circumstances would promote non-criminal responses to such conduct when it occurs in public. In addition, the proposal that legislatures take into account the degree of cultural bias in the definition (and experience) of harm might result in permissive treatment of still more behavior. Even so, without an explicit acknowledgment of the goal of insulating arguably disgusting conduct from punish-

122. Guidelines designed to mediate cultural bias should apply to physical as well as psychic harms.

123. I would, I think, allow measured, non-punitive regulation.

ment, these mediating principles will not assure that legislatures will pursue a tolerant approach.

Even a clear rule will confront the question of what, precisely, "disgust" means and how one can detect its presence. My answer is familiar and deceptively simple—you know it when you feel it. Justice Stewart is often derided for a similar conclusion, but that is because his critics mistakenly believe he was attempting to define obscenity. Instead of offering any such definition, Stewart was focusing on the *sensation* produced by obscenity. His approach made eminent sense, for it is that sensation—label it prurient interest, lust, sexual embarrassment, or whatever—that obscenity law seeks to quash. Similarly, disgust is a sensation that we experience, often with the unwilling participation of our *internal* organs. Reactions of nausea are experiences with which we are all quite familiar, and they are distinct from other psychic responses. Thus, the problem of separating disgust from other psychic harms is more apparent than real.

Often disgust is one of several types of harm experienced. It is unreasonable to conclude that whenever physical harm is also inflicted, the problematic nature of disgust as a basis for punishment should be ignored. Consider, for example, the Arkansas deputy sheriff who made the arrest in *Carter v. State*.¹²⁴ He not only experienced revulsion at the sight of two men making love; he also lost his dinner, three times. (Let's make the officer's gastric distress a nightly event, triggered by the mere memory of the arrest, so that it comfortably clears the de minimus hurdle). Even if you accept my view that his revulsion is not a legitimate justification for punishing the lovers, the question remains whether punishment can instead be justified by the officer's quite real nausea.

I think not, because his physical distress was *the direct product* of his psychic distress. The one was inextricably bound up with the other. If the officer had not experienced revulsion, or, more precisely, if his sensibilities were such that the sight of male lovers did not unnerve him, then he would not have experienced nausea. This leads me to suggest a test, handy but not universally applicable, that may prove useful for identifying the cases in which psychic and physical harm are inextricably related and therefore should be treated together. The test is in the form of a question: If the psyche of the person who gave offense somehow were transplanted into the person who took offense, would the recipient experience physical pain under the same circumstances? A formulation that makes reference solely to the offended party is possible, but the version I propose has the virtue of making us constantly aware that the perpetrator and the victim

124. 255 Ark. 225, 227, 500 S.W.2d 368, 370 (1973).

“Disgust” and Punishment

experience different psychic realities—a critical element in any argument in favor of tolerance.

D. *Unfinished Business*

This sketch reveals how much more I must do before presenting a full-blown alternative to Feinberg’s approach. On the micro-level, there remain such tasks as the development of new mediating principles, the working through of approaches to psychic states other than “disgust,” and, more fundamentally, the articulation of how property concepts will benefit the enterprise.

There are also a number of larger, enormously challenging questions that Feinberg’s book provokes. What is the connection between esthetic considerations and psychic ones of the sort covered by the offense principle? What are the connections between morality and esthetics, and between morality and disgust? What is the social function of tolerance (and intolerance) of immorality, of psychically disturbing events, of unesthetic experiences? What role should law play in promoting tolerance or intolerance, and in shaping psychic, esthetic, or moral sensibilities?

The brief chapter that became a four volume work by Joel Feinberg has sowed seeds aplenty to keep scholars harvesting for decades. I am truly delighted to be among them.