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INJURY AND EXASPERATION: AN EXAMINATION OF HARM TO OTHERS AND OFFENSE TO OTHERS

*Andrew von Hirsch**

HARM TO OTHERS. By *Joel Feinberg*. New York: Oxford University Press. 1984. Pp. xiii, 269. \$29.95.

OFFENSE TO OTHERS. By *Joel Feinberg*. New York: Oxford University Press. 1985. Pp. xix, 328. \$29.95.

Notions most often spoken of can receive the least careful scrutiny. So it has been with harm and offense. Since John Stuart Mill, a vast literature has accumulated on whether harm to others should be the sole basis for state compulsion or whether offense to others or self-harm can also be legitimate grounds. But what, exactly, is meant by "harm" and "offense"? Those critical questions of definition remained unaddressed.

Now comes the first sustained effort to investigate harm, offense, and allied notions, by one of this country's leading philosophers of law, Joel Feinberg. His effort is ambitious indeed, taking the form of a four-volume work entitled *The Moral Limits of the Criminal Law*. The first two volumes deal with harm to others and offense to others, respectively. It is these I address herein. Two volumes have yet to appear: one on harm to self,¹ and the other on nonharmful kinds of supposed immorality.²

It is difficult to overstate the importance of Feinberg's undertaking. One simply cannot make sense of many criminal law issues without an understanding of whether and why conduct is injurious or obnoxious. Feinberg helps us begin to understand. Recently, I had occasion to write a work on sentencing policy; its most troublesome task, perhaps, was gauging the seriousness of crimes.³ Seriousness depends, in part, on the degree of harmfulness of the criminal conduct, but there was scant literature on harmfulness to turn to. Fortunately,

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1. J. FEINBERG, *HARM TO SELF* (forthcoming).
2. J. FEINBERG, *HARMLESS WRONGDOING* (forthcoming).
3. A. VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 63-76 (1985).

Feinberg's first volume appeared while I was at work — and his discussion of degrees of harm proved most helpful. Others dealing with criminal jurisprudence and related questions will likewise find themselves enlightened by Feinberg's analysis.

I

Feinberg begins *Harm to Others* with an analysis of what "harming" means. Harm is an intrusion into an interest that someone has. A person has a variety of interests, physical integrity and property being only the most familiar. An interest, according to Feinberg, is something the person has a *stake* in (pp. 33-34). A person has a stake in something when he stands to gain or lose depending on its condition. The stake has to be a relatively stable and deep-rooted concern, whose achievement the person can reasonably hope for. One has a stake in an adequate diet and a job, but merely a wish of the moment for pistachio ice cream and a longing, perhaps, to be President (pp. 41-45). This definition seems elementary enough, but it has usefulness: it permits harms to be assessed and compared by examining the type and importance of the interests that are invaded.

An interest, however, strikes me as being more than a stable, reasonably hoped-for want. The idea of a "stake," on which Feinberg relies, has stronger connotations: something that has been or is the person's own. My stake in an enterprise or horse race is the money that I put into it, and I am harmed if I lose it. My stake does not include large additional sums I might win, even if those winnings are much hoped for and the odds are favorable.

An interest thus involves the idea of expectation in a normative and not purely predictive sense. To assert I have an interest in *X* entails not only that *X* would benefit me but that *X* is something that I or persons like me have some colorable claim to. That claim is *prima facie* only: it is not yet a moral entitlement, or a legal right. Among the various interests people have, some may warrant the law's protection and others not. Deciding which interests should have protection is a major issue of legal policy. But having an interest at least raises the question: why *shouldn't* that interest be protected? Offense differs from harm, as we shall see, in that no interest — no stake — is involved. By being offended, it is not obvious that the person loses anything he might have a claim to. That makes the case for responding to offense more tenuous.

If an interest is something more than a stable want, harming is something less than culpable wrongdoing. I commit a culpable wrong against you only if I (1) harm you by setting back an interest of yours (2) which is also your right, (3) without justification, (4) under circumstances in which I personally am at fault for having done so. While Feinberg initially defines harm as a setback of interests, he later revises

his definition so as to eliminate these distinctions between harming, wronging, and being at fault. Harm, he then asserts, constitutes a wrongful and unexcused invasion of interest (pp. 105-06). Feinberg is led to this by the scope of his inquiry: his books concern the scope of the *criminal law* (pp. 19-25), and criminal liability has to do with culpable misconduct.

This revised definition is, in my judgment, unhelpful — for it biases the state's response toward the criminal law. When harm is identified as a culpable invasion of a protected interest, then the conduct either is reprehensible and warrants a criminal sanction or else is not harmful and calls for no response. Separating harm from wrongdoing and from culpability would help avoid this bias. A determination that someone has been harmed — that his interests have been set back — would be a reason for a state response, but its kind would still be open for discussion. Punishment is a particularly onerous species of intervention, both in its potential deprivations and in the stigma of blame it carries. Even when harm is done and a state response seems warranted, therefore, invoking the *criminal law* should require its own justification — that there is something presumptively reprehensible about inflicting this kind of harm, and that the harm was wrought through the actor's fault.⁴ Absent these added elements, there still may be harm to be remedied, but the remedy should be sought other than via the criminal law.

Melding harm with culpable wrongdoing also has another drawback: it tends to deflect attention from principles of culpability in the criminal law. We see this in Feinberg's own account. His topic is harm. He briefly lists the elements of culpability — intent, recklessness, negligence, absence of excuse — in his revised definition of harm (pp. 105-06). But then he has nothing more to say about these elements. Questions of culpability are, however, at least as complex and at least as demanding of analysis as questions of the injuriousness of conduct. More is involved than the familiar categories of intent, recklessness, negligence, and full excuse that Feinberg mentions. Questions of diminished culpability (which arise, for example, in situations of provocation) need to be considered also.⁵ Culpability must be addressed separately to have the visibility that it needs for adequate analysis.

II

Let me turn next to the portion of *Harm to Others* I found the most interesting: Feinberg's discussion of degrees of harm. Since his four volumes deal with the limits of the criminal law, he examines this

4. See also Kleinig, *Criminally Harming Others*, 5 CRIM. JUST. ETHICS (forthcoming).

5. See A. VON HIRSCH, *supra* note 3, at 71-74; see also von Hirsch & Jareborg, *Provocation and Culpability*, in NEW DIRECTIONS ON RESPONSIBILITY (F. Schoeman ed.) (forthcoming).

issue in order to determine whether conduct is sufficiently injurious to warrant being criminalized at all (pp. 188-90). However, his discussion can also be applied to sentencing policy, as I mentioned at the outset.⁶

Harms may invade different interests. Car theft entails a substantial property loss; armed robbery typically involves a smaller pecuniary loss but a threat to life. Most of us would rate armed robbery as more harmful, because we consider the interest in physical integrity more important than that in common items of property. Sometimes, however, property loss can seem very serious, as when one is swindled out of one's life savings. What is needed, therefore, is a theory that explains *why* a particular interest should be considered more important than another.

Feinberg offers a threefold grading criterion. The importance of any given interest, he suggests, depends on whether it constitutes a *welfare interest*, *security interest*, or *accumulative interest*.

Welfare interests rank highest. These are the concerns that persons need satisfied in order to have any significant capacity to engage in their chosen pursuits. They constitute, in Feinberg's words, the "generalized means, often indispensable ones, to the advancement of [a person's] more ulterior interests" (p. 42). When these interests are compromised, the person is foreclosed from almost any activity. Up to a certain point, both physical integrity and property constitute welfare interests. That point is defined by the tolerable minimum of these concerns that is needed in order for a person to go about his affairs. A person requires a certain minimum of physical well-being to undertake anything else. He likewise needs a certain tolerable minimum of economic support, or else he is debilitated. However, it is only a limited subcategory of property that thus qualifies: preserving a means of livelihood is a welfare interest, but owning a Maserati is not.

Ranking next, of intermediate importance, are what Feinberg terms "security interest[s] . . . cushioning [a] welfare interest" (p. 207). Beyond the bare minimum of health and economic well-being required to pursue his aims, a person requires a certain additional safety margin. Without that margin, the person may be able to function, but only barely so — and with much reason for apprehension. Freedom from common physical assaults is an example of this kind of interest: such assaults do not threaten one's existence, but do compromise one's sense of elementary security.

Below the welfare and security interests rank the "accumulative interests" (p. 207). These are the nonessential interests people have in the various good things of life. An enjoyable existence involves these various concerns, be they in goods, leisure, or whatever. Common

6. A. VON HIRSCH, *supra* note 3, at 63-76.

theft offenses, for example, typically and foreseeably deprive a person neither of his minimum livelihood nor of the margin of security above that minimum. They invade his accumulative interests.

The three categories are far from precise, but are helpful because they provide a common standard for judging invasions of different kinds of interests. A ranking of harms is not, of course, sufficient to gauge the seriousness of crimes — questions of culpability need still to be considered. A negligent invasion of a welfare interest may be no more serious than an intentional invasion of a security interest. But half, if not all, of the job of rating crimes' seriousness involves assessing the gravity of harms.

Useful as Feinberg's classifications may be, the question that keeps nagging the reader (or at least this reader) is *why* these particular classifications are appropriate. What is the rationale underlying his idea of welfare interests? Is it a notion of the person's survival or subsistence? Or is something more involved? Feinberg chooses not to address this issue. He simply describes the concept of a welfare interest, and leaves the appropriateness of his classifications to the reader's judgment. At the outset of *Harm to Others* (pp. 17-18), he says he does not wish to link his proposed conceptions of harm with any single general moral theory.

At first glance, a subsistence rationale for his classification of interests seems plausible. The welfare interests in physical security and livelihood are, indeed, necessary for the person's survival. This seems uncontroversial: would not any legal system give highest priority to those victims' interests that are essential for living? This rationale, however, does not stand up to closer scrutiny.

Mere subsistence would yield a list of welfare interests much narrower than that which Feinberg proposes.⁷ Interests in personal liberty, in particular, would be excluded. An unfree life may not be pleasant, but millions survive throughout the world in authoritarian systems. Feinberg argues at one point that deprivation of liberty makes the person lose dignity and moral responsibility (pp. 211-12). This may be morally deadening, but one does not actually die of being bossed about.

The idea of *choice* is central to Feinberg's definition of welfare interests, when that definition is examined more closely. Welfare interests are those concerns that a person needs preserved in order to choose and pursue his ulterior goals (pp. 37-38). Welfare interests have their high ranking of importance precisely because they are pre-

7. Feinberg lists as welfare interests "the interests in the continuance for a foreseeable interval of one's life and the interests in one's own physical health and vigor, . . . minimal intellectual acuity, emotional stability, . . . the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion." P. 37.

requisite to whatever mode of life the person may wish to achieve.⁸

The underlying idea, I would suggest, is thus connected with personal autonomy. Individuals should be entitled to decide for themselves which interests are most important in their lives. A theory of harm should make allowances for differences in how people value life's goods. It should not elevate one set of possible focal aims above another set, because that is for the person himself to choose. The attraction of the concept of a welfare interest lies precisely in its pluralism: welfare interests are those necessary for *whatever* more ultimate aims the person may select. Such a rationale explains why a minimum of political liberty is a welfare interest.⁹ It is not that one cannot subsist without liberty. It is, instead, that one cannot formulate, select, and pursue one's own purposes where there is excessive outside interference with one's choices, associations, and expression.

This suggested rationale comports with familiar traditions of philosophical liberalism. The central liberal assumption is that government, when exercising its powers of compulsion, should be neutral on how people should value their own pursuits — because that choice should be left to individuals themselves.¹⁰ When harm becomes the basis for the exercise of state power, therefore, the criterion for harm should not prefer one particular set of focal aims a person might select over another set.¹¹ Welfare interests are assigned their degree of importance not because they reflect particular pursuits that are deemed superior, but because they are the necessary or virtually necessary prerequisite for whatever pursuits an individual may choose.

Such a rationale does inject potential controversy into the theory of harm, for not everyone subscribes to philosophical liberalism. Would it not be preferable to have a theory of harm that is less colored by a particular moral-philosophical outlook?

I doubt it. When one ranks interests for the purpose of assessing harms, that *necessarily* is affected by one's deeper moral-philosophical assumptions. Someone who seriously wishes to reject liberal assumptions — who feels the state should treat some ways a person might live his life as superior to others — cannot accept Feinberg's account of

8. This account of welfare interests resembles Rawlsian "primary goods": prerequisites for the pursuit of whatever other aims a person has. J. RAWLS, *A THEORY OF JUSTICE* 92 (1971).

9. In speaking of political liberty, I narrow the definition of this welfare interest somewhat; Feinberg sees constraints from *any* source as violating the liberty interest. Pp. 206-14.

10. See, e.g., R. DWORKIN, *A MATTER OF PRINCIPLE* 181-204 (1985).

11. The most obvious application of this assumption of "neutrality" is to rule out or restrict what Feinberg calls "moralistic legal paternalism": coercing the actor to engage in certain conduct (or forbidding other conduct) because that conduct is considered a valued (or worthless) way of ordering one's life. P. 27. The assumption may, however, be extended to valuation of victims' interests for purposes of assessing harm: some particular interests should not be valued higher than others merely because they are part of a way of conducting one's life that the state deems preferable. The theft of a Vivaldi album should not be considered more harmful than the theft of a Prince album on grounds that people should listen to better music.

welfare interests, however "impartially" that theory is described. Such a person will be drawn to a wholly different theory for ranking harms — one that assigns the highest importance to those interests that, in his judgment, the state should treat as essential for the superior modes of living. Better to make the rationale for welfare interests as explicit as possible and accept the possibility of disagreement. An explicit rationale, as we have seen, helps shed light on what should and should not qualify as a welfare interest. Theories of harm, if they are to provide any useful guidance to decisionmakers, cannot be ideologically colorless.

III

Notwithstanding the complexities of gauging degrees of harmfulness, the harm principle itself is uncontroversial: few would wish to deny that harm to others constitutes a legitimate basis for state action. When one moves from harm to offense — from injury to exasperation — matters become more difficult. Most societies penalize a wide variety of obnoxious but apparently nonharmful behaviors. While some of these prohibitions (such as that against prostitution) might sensibly be dispensed with, others seem unavoidable: how could we possibly legalize indecent exposure or the public mutilation of corpses? What has been perplexing to philosophers is the rationale: *why* should offensive conduct be forbidden?¹²

The traditional rationale for such prohibitions consisted of straightforward appeals to the prevailing mores. Indecent and disgusting conduct infringed the community's standards for appropriate conduct: prostitution was lewd, loud public radio playing indecorous, and that was that. Such appeals raise troublesome questions, however. Why is offensive conduct anything more than a breach of the prevailing taboos? In a free society, how can the majority be entitled to impose its taboos on unwilling minorities? If the conduct injures no one, what possible right is there to forbid it?

One response to such questions has been to deny their premise: offense is not as harmless as it seems. Professor Louis B. Schwartz took this tack in a well-known essay written two decades ago.¹³ Offense, Schwartz maintained, may do no material injury, but nevertheless visits *psychic* harm on the members of its unwilling audience. Prohibition of offensive conduct is thus warranted in order to protect persons from that psychic harm. Schwartz's argument fit in well with

12. For previous discussions of offense, see Feinberg, "*Harmless Immoralities*" and *Offensive Nuisances*, in *ISSUES IN LAW AND MORALITY* 83 (N. Care & T. Trelogan eds. 1973); Bayles, *Comments: Offensive Conduct and the Law*, in *ISSUES IN LAW AND MORALITY*, *supra*, at 111; Ellis, *Offense and the Liberal Conception of Law*, 13 *PHIL. & PUB. AFFS.* 3 (1984); Vandaveer, *Coercive Restraint of Offensive Actions*, 8 *PHIL. & PUB. AFFS.* 175 (1979).

13. Schwartz, *Morals Offenses and the Model Penal Code*, 63 *COLUM. L. REV.* 669 (1963).

the utilitarianism that was then popular among legal writers. Offensive conduct may be forbidden when its aggregate costs, including the displeasure it causes, exceed its measurable social benefits.¹⁴

Feinberg is too sophisticated to accept such arguments. Offense, he rightly recognizes, cannot simply be assimilated into harm: the offended person has no definable, specific interest invaded by the conduct, comparable to that invaded when he is harmed. The simple utilitarian formula, he also recognizes, would permit far too ambitious regulation: it would mean the state could intervene whenever the aggregate irritation from the conduct exceeded its aggregate satisfaction.

So Feinberg devotes his *Offense to Others* to rescuing the offense principle from its previous defenders. He recognizes that offense is analytically distinct from harm, and he repudiates the utilitarian formula of merely summing up the satisfactions and dissatisfactions produced by the conduct. In its place, Feinberg offers a more complex balancing test (pp. 25-49).

Feinberg's test can briefly be summarized as follows. First, he considers the impact of the conduct, on audience and actor respectively. To determine impact on the audience, the magnitude of the offense is examined to see how pervasive and intensely it is felt. For that purpose a standard of "reasonable avoidability" is imposed: the easier it is for members of the audience to avoid the setting where they will be offended by the conduct, the less serious the offense is. The importance of the offending conduct to the actor is also examined. The more central the conduct is to the actor's way of life, the greater is the claim not to have the conduct restricted. A standard of "alternative opportunities" (the obverse of "reasonable avoidability") is applied here: to the extent that there are satisfactory alternative times and places in which performing the conduct would do less offense, the claim to performing the conduct at the site where it does offend is weakened.

The second step, after thus considering the audience and the actor, is to weigh the broader social impact of the conduct. The more independent general usefulness the supposedly offending conduct has, the less is the claim to prohibition. For this purpose, free expression of opinion is (following J.S. Mill) deemed to have its own social value "in virtue of the great social utility of free expression and discussion generally" (p. 44).

Feinberg's test differs from traditional utilitarianism in that it is not purely aggregative. Conduct that widely offends still might be protected because of its importance in the lives of a limited number of

14. Schwartz recommended prohibition only when the conduct is offensive to nearly everyone, not merely to a majority. His apparent reason for this restriction on the offense principle, however, was utilitarian: the need for wide tolerance of minority lifestyles for the smooth functioning of a plural society. *Id.*

persons engaged in it. Instead of weighing net satisfaction and dissatisfaction, the test is designed to tilt against prohibition of offensive conduct, and the conduct must be *very* offensive indeed to overcome this bias.

How would Feinberg's test work in practice? In most Western countries, not so badly. Public tolerance is likely to be fairly high, so behavior will need to be fairly outrageous before it prompts extensive offense. Even when conduct would be deemed offensive if publicly done, Feinberg's mediating principle of "reasonable avoidability" is likely to protect those who engage in it in private.¹⁵ While there might be rules on public sexual solicitation and on the advertising of pornography, not much private conduct is likely to be barred altogether, except perhaps such rare and bizarre things as corpse mutilation.

Yet his theory remains worrisome. In places where taboos are stronger and more uniformly held, the scope of prohibition could be considerably broader. If private homosexual behavior, or whatever else, really did affront the sensibilities of enough people to an intense enough degree, it could be barred. Reasonable avoidability is, on Feinberg's formula, only a factor to be weighed against the degree and intensity of the offense. Feinberg himself admits that if enough people were sufficiently shocked at the very idea of such behavior going on behind closed doors, it could be prohibited even if privately conducted.¹⁶ The formula gives the deviant few little guaranteed scope for pursuing unpopular preferences.

Such hypothetical situations aside, the structure of Feinberg's theory strikes me as vulnerable. His strategy is (1) to treat offense in general as a *pro tanto* reason for possible state intervention, and then (2) to introduce "mediating principles" to limit the scope of that intervention. This makes the theory very sensitive to the weight given such counterconsiderations. Much depends, for instance, on the emphasis placed on Feinberg's "principle of reasonable avoidability": it is that mediating principle, largely, that would protect privately conducted behavior. If that principle is given slightly less weight in the scale — or if the definition of "avoidability" is construed more narrowly — then Feinberg's test would allow the state to intrude much more ambi-

15. Feinberg adds another mediating principle, namely that offended states are to be given less weight where they are the result of "abnormal susceptibilities" of the offended persons. Pp. 33-34. In a society where tolerant attitudes prevail, this principle would restrict the application of the offense principle considerably. In a society that is hostile to unorthodox conduct, however, it would have little mitigating impact.

16. Pp. 64-67. Feinberg adds the requirement that the offense, to be prohibitable, must be *wrongful*. Pp. 68-69. This could bar prohibition of "mere knowledge" offenses where the actor is unaware of the affront to offstage sensibilities. But where the actor is aware that others will be offended by the bare knowledge of his acts — as he may well be if he engages in the acts in an environment of low tolerance — and proceeds with the conduct despite that awareness, the "wrongfulness" criterion could be satisfied. Feinberg's argument about wrongfulness strikes me as somewhat of an expedient for limiting the troublesome implications of his own theory.

tiously into private conduct. Yet there is, in his theory, no clearly enunciated rationale explaining why his mediating principles are given the particular weight and interpretation he would prefer. The balancing test might thus be acceptable enough in Feinberg's own hands, but prove quite threatening in other hands. That leads me to ask whether, perhaps, the weakness lies in the basic structure, in conceding that offense in general warrants possible state intervention and then trying to take most of that concession back through supplementary principles.

IV

Feinberg retains, from earlier versions of the offense principle such as Louis Schwartz's,¹⁷ the idea that affronting people's sensibilities is *in itself* reason for invoking the criminal law, if enough people are sufficiently affronted. The audience's reasons for feeling affronted are irrelevant. Feinberg is quite emphatic that there need be no requirement that offense be reasonably taken. In his words: "Provided that very real and intense offense is taken predictably by virtually everyone, and the offending conduct has hardly any countervailing personal or social value of its own, prohibition seems reasonable even when the protected sensibilities themselves are not" (p. 36). It is, he says, often difficult to explain why one is disgusted by something; and when explanations can be given, they tend to be couched in terms of affronts to conventional morality that are not, in Feinberg's view, proper reasons for state intervention (pp. 36-38). Offense is thus treated as parallel to harm. Just as any harmful conduct is a potential basis for state prohibition because of its harmfulness, so it is with offense (p. 36).

Treating offense as comparable to harm in this fashion does not withstand scrutiny. Harm is an invasion of interest. An interest, as I suggested earlier,¹⁸ is something in which one has a stake. It is this idea of a stake, a colorable claim, that supplies the reason for objecting to harmful conduct. To burn down my house harms me because it deprives me of my dwelling place. Offense is different. Not only is the state of being offended more transient than that of being injured, but it entails no similar notion of a stake, of something of mine on which you've intruded. Whatever offends is offensive. The potential scope of offense is thus much wider than that of harm. You can harm me only by setting back particular interests of mine: by transgressing upon my physical person, taking my property, injuring my good name, etc. However, anything you choose to do might exasperate me. Hence we ordinarily require that, when someone objects to exasperating con-

17. See notes 13-14 *supra* and accompanying text.

18. See note 3 *supra* and accompanying text.

duct, he give reasons for objecting that are ulterior to the mere fact of offense.

Let us consider this logic in everyday contexts. *A* shows up in *B*'s presence wearing a day-glow orange tie. *B* objects. In case of harm, the harm itself is grounds for objection because it carries its own implicit *grounds* — *A*'s intrusion in something that is *B*'s. Thus *B* might say: "That's *my* tie, and you've taken it without permission." But if the issue is offense, *B*'s being offended does not imply any similar transgression. It is scarcely sufficient for *B* to say, "Day-glow orange ties get on my nerves," for the tie-wearer has no general obligation to spare the viewer's nerves. Thus the objector would normally be expected to supply a reason for objecting, beyond the mere fact of offense. It is true, as Feinberg points out, that he may not be able to explain just why garish ties disgust him. What he needs do, however, is explain why the actor has a special obligation to avoid doing what he, the viewer, finds disgusting. Those reasons may be various. The objector may cite a special relationship with the actor that warrants regard for the former's sensibilities. ("It's our anniversary, and you know how I hate day-glow orange.") Or the reason may concern the known insulting nature of the conduct to the audience. ("You simply can't wear orange to the Hibernian Society Ball on St. Patrick's Day.") Or there might be reasons of enforced togetherness warranting special attention to others' sensibilities. ("We're stuck on this damned submarine together for the next three months, and some of us detest day-glow orange.") But if the actor is a stranger to the objector, and no such special reasons can be cited, the mere fact that the objector is offended is insufficient.

While one must be careful when drawing parallels from everyday life to public policy, similar reasoning holds. Invasions of interest are potentially objectionable *because* they are such. This is most evident with welfare interests. Why should my physical integrity and minimum economic security be protected against invasion? It is because those are my vital concerns, essential to carrying on my life. Accumulative interests are more contingent, in that the rules for permitted accumulation may vary with the society. Still, it is not hard to argue that a person, in order to pursue a worthwhile existence, needs to have some manner of accumulation protected. This logic does not carry over to offense. Since any conduct of others might offend, a person invades no one's legitimate sphere merely because his manner causes irritation. In a society in which men customarily wear short hair, the wearing of long hair may be considered repulsive, but it is far from apparent why such distaste should be the basis for prohibition.

What, then, could the basis be for regulating offensive conduct? It might be useful to follow the structure of ordinary reasoning. It is not offense in itself that gives rise to any possible claim to state interven-

tion, but offense *plus*. That "plus" is reason why the actor should spare the audience's sensibilities. The reasons may differ from those used in ordinary life, but reason there still should be. This would be different from Feinberg's balancing test for offense. Here, establishing supporting reasons — the "plus" factor — should be necessary even to a *prima facie* claim to regulation, whereas in Feinberg's balancing test, matters such as the pervasiveness and the public nature of the offense are merely particular factors, not necessarily decisive ones, in deciding upon regulation.

What kind of reasons come to mind? I can think of three possible types. The first is typified by the glue factory built near the residential district. Some offensive conduct impedes the quiet enjoyment of specific interests of specific persons. The glue factory, if the stench is strong, affects the habitability of neighbors' dwelling places. This kind of claim is restricted to those who have the affected interests and who are forced into close and prolonged exposure to the noxious conduct.¹⁹ The conduct must be sufficiently public and intrusive to force its attention on the affected persons.

The second kind of reason recalls the orange tie in the submarine. Regulation of noxious conduct may be called for in public places where people are forced together in close proximity. The idea is not protection against unpleasant stimuli, but ensuring comfortable common access to facilities designed for common use. Everyone in the lower east side of Manhattan should be able to enjoy the beauties of Stuyvesant Park, not just those who have the stomach to witness public sexual acts.²⁰ Most of Feinberg's amusing list of examples of offensive conduct (pp. 10-13) fall into this category. What may be crucial to his examples is that they occur on a bus. Much otherwise acceptable conduct might have to be curtailed on the Madison Avenue local: not only disrobing or sexual intercourse, but handball as well. Here, the basis for regulation seems different from that suggested by Feinberg's balancing test. Publicness is not just a factor in the scales, but an essential part of the reason for regulation. It may, moreover, be the degree of enforced mutual proximity, and not merely publicness, that provokes the need for a regulatory response.

Third, regulation of conduct that is not just offensive but insulting might conceivably be appropriate. The residents of Skokie did not merely happen to have a distaste for Nazi parades ("So ugly and jagged-looking, those Swastikas!"); they had *reason* to object because the conduct was an expression of contempt for them. The idea is that

19. Feinberg identifies public and private nuisance law as a "model" for his balancing test for offense, pp. 5-10, concluding that "the offense principle will have to be mediated by balancing tests similar to those already employed in the law of nuisance." P. 10.

20. It has been reported that the Park became, for a time, the scene of public homosexual acts. N.Y. Times, Oct. 12, 1985, at 29, col. 2; 31, col. 4.

people have a special claim against intentional besmirchment, as part of what is necessary to preserve their own self-respect. It would not suffice that the audience might happen to feel insulted (anything might do that) but that the conduct *be* insulting — *i.e.*, that it can reasonably be interpreted as a calculated denigration. Insult raises issues of free speech, and it may be necessary to permit a considerable range of insulting symbolic behavior in the interest of freedom of expression. (Here, the United States is more permissive than many European countries.²¹) But insult, as contrasted with mere offensiveness, gives rise at least to some *prima facie* claim.²²

The foregoing three grounds for regulation are considerably more restricted than Feinberg's balancing test. All three involve *communicated* offense — the publicness is part of the very reason for objecting to the conduct. This eliminates "bare knowledge" offense — that is, private conduct the very idea of which offends others. And the focus of the debate shifts from the mere fact and pervasiveness of offense to the strength of the particular reasons why the offensive conduct should be restrained.

I do not offer these three grounds for regulation as a finished theory. The reasons I suggest may require reformulation, and there might be additional grounds I have missed. I mention them simply to illustrate my thesis that the reasons for objecting to offensive conduct are critical to the regulation of offense.

V

We are brought, finally, to the hard question. Can obnoxious conduct ever be barred on "moralistic" grounds — on grounds that it violates the customs or mores of a particular society? Feinberg wants emphatically to rule this out: "Legal moralism," as he calls it, should never be grounds for state intervention; and he devotes his forthcoming volume, *Harmless Wrongdoing*,²³ to elaborating this thesis. Feinberg formulates the offense principle broadly in order to render legal moralism unnecessary. Prostitution, pornography, and the like can be regulated according to the offense they do to other persons' sensibilities, without need to consider their supposed intrinsic indecency or unsuitableness.

Is Feinberg right in his rejection of legal moralism? I do not have a confident answer. One could conceive of a restricted form of legal

21. Many European countries prohibit explicitly racist speech. See, for example, the West German prohibition set forth in STRAFGESETZBUCH § 130 (1982).

22. When insult is directed at groups instead of individuals, countervailing considerations supporting free speech become stronger. Commentary about groups, even if biased or defamatory, approaches the arena of political discourse, where we may not trust the state to be a neutral arbiter.

23. J. FEINBERG, *supra* note 2.

moralism, based on a general ethical theory such as that outlined by Stuart Hampshire in his recent *Morality and Conflict*.²⁴ This theory gives social convention a degree of independent justifying force, provided the results do not infringe upon stated, overriding principles of ethics and justice. However, Hampshire does not apply his theory to the particular topic at hand, that of regulating indecent or disgusting conduct.²⁵ We also have yet to see Feinberg's forthcoming book, which may well contain convincing counterarguments. I thus remain agnostic until I have seen the issue more fully argued.

What troubles me, however, is Feinberg's proposed tradeoff — of allowing a broadly defined offense principle, so that we can dispense with any need for legal moralism. An offense principle, if broadly defined, can itself be quite threatening to personal choice, since so many personal choices can offend others' sensibilities. The alternative Feinberg fears may be a lesser evil. Legal moralism may be frightening if coupled with an authoritarian theory of the state; but it is not necessarily so when combined with strong limiting principles favoring personal liberty. There could be a strong presumption against intervention, and only narrowly drawn exceptions in which established social conventions could be enforced. We could then debate those proposed exceptions and decide either to permit or rule out regulation. Little is gained, however, if we rule even a restricted legal moralism out of bounds and then accept a much more unrestricted offense theory in order to prohibit unconventional conduct.

I would turn Feinberg's strategy on its head: First, I would restrict the offense principle much more than Feinberg proposes. Affront to sensibility would by itself be *no* reason for intervention, no matter how widely felt.²⁶ Such affront would be prohibitable only when there were special, affirmative reasons warranting intervention — reasons such as those I have outlined above concerning the connection of the offense with the enjoyment of specific interests, the use of public facilities designed for common use, or the intentionally insulting nature of the conduct.²⁷ These reasons might be better formulated, but they should relate only to a few, specific subspecies of publicly communicated offensive conduct. The offense principle should not be made to do the dirty work of legal moralism; offense outside these narrow confines should not be used to justify regulating a wide variety of behavior traditionally perceived as immoral.

Second, with a restricted offense principle in place, legal moralism could then be argued on its own explicit terms. Conduct, however

24. S. HAMPSHIRE, *MORALITY AND CONFLICT* 126-69 (1983).

25. Hampshire presents his view as a general moral theory and does not address the limits of state power.

26. See Part IV *supra*.

27. *Id.*

unconventional or shocking, could not be prohibited on mere grounds of offensiveness; the case for prohibition, if any exists, would have to rest upon the affront to recognized social convention. We would have to decide whether that should ever be grounds for prohibition, and, if so, how important the particular conventions are and how much their preservation would infringe on individual choice.²⁸ As a result of such a debate, various bizarre activities could be forbidden, or else would have to be tolerated. If the issue is the abuse of corpses, we would either decide to prohibit such conduct because certain conventions relating to death are preeminently worth preserving,²⁹ or else tolerate a practice that disgusts us — either because we wish to reject legal moralism generally, or because we accept it in certain restricted situations but not in this kind of case.

I could imagine living with any of these various solutions. At least, the issue of infringing conventional mores would be dealt with directly; we would not be prohibiting indecency by masking it as offense. There would be a deserved skepticism about claims that conduct should be prohibited merely because it is tiresome to others.

28. Could such a view be consistent with the traditions of liberalism? Feinberg asserts that it could not, by definition: liberalism, he asserts, consists in the view that harm-to-others and offense-to-others exhaust the grounds of state intervention, and that paternalistic considerations (i.e., harm to self) and legal moralism should carry no weight. *HARM TO OTHERS*, pp. 14-15.

This is unpersuasive. Liberalism, surely, does not represent a particular view about harm, offense, paternalism, or legal moralism. Rather, it represents a more general view about the preeminent importance of personal liberty. See R. DWORKIN, *supra* note 10, at 181-204. It should be a matter of argument, not definition, whether a position on these more particular subjects is or is not consistent with a high value placed on individual choice. Gerald Dworkin, for example, has argued for a restricted form of paternalism, on the basis of notions of autonomy. Dworkin, *Paternalism*, 56 *MONIST* 64 (1972). His view may or may not be correct, but it seems strange to claim his is not a liberal view by definition.

The same holds for legal moralism. If personal autonomy is given a high value, this would rule out a particular form of moralism: namely, moralistic legal paternalism. See note 11 *supra*. There might, however, be a basis for upholding certain social conventions, not on the grounds of the moral good of actors themselves, but for the more modest kind of reasons relating to the maintenance of certain social conventions, *provided* the scope of such regulation is stringently restricted in order to safeguard a wide scope of personal choice for individuals. Whether any legal moralism can be squared with philosophical liberalism cannot be settled by definitional fiat. One must, instead, examine the particular form of moralism proposed: what its rationale is, how extensive or restricted its potential applications are, and how firm the limitations on intervention are (to protect actors' personal choices).

29. Conventions can be backed by deeper reasons. The convention concerning respectful treatment of corpses, for example, may be based on ideas of respecting the value of the departed person's life. It might still be overridden by personal rights arguments. For example, the convention concerning corpses should not be used to forbid unusual religious ceremonies regarding death. But where that is not the case, the state might legitimately prohibit certain dealings with corpses on grounds of the convention of respectful treatment. An example of prohibited conduct might be relatives' selling of the corpse for use for certain purposes.