Harm, Offense, and Morality
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1. Introduction

Joel Feinberg’s magnificent four volume work, The Moral Limits of the Criminal Law, 1 represents a sustained and comprehensive argument regarding what conduct is appropriately regulated through criminal prohibitions and sanctions. Feinberg’s conclusions are essentially those of the Millian2 liberal: Conduct that causes harm or offense to others may be criminalized, but conduct that is harmful only to the actor or that is a harmless immorality may not be. Feinberg’s governing principle, however, is not Mill’s maximization of utility but is instead respect for individual autonomy. For Feinberg, respect for autonomy delimits the legitimate boundaries of concern with others’ conduct insofar as the concern is expressed through criminal prohibitions.

Feinberg’s argument proceeds in four stages, each corresponding to a volume in the series. The first two stages display and defend the two reasons that Feinberg admits are good reasons for criminalization: prevention of harm to others3 and prevention of offense to others.4 The last two stages deal with Feinberg’s negative case, the two reasons he finds inadequate to justify criminal prohibitions: prevention of harm to self5 and prevention of harmless immoralities.6 Feinberg’s strategy is to interpret the concept of harm narrowly. This is necessary to prevent a liberal theory of justifiable criminalization from collapsing into its antithesis, Legal Moralism. If frustration of any preference were to count as harm, then the majority’s preference that others not engage in (otherwise) harmless immoralities—which preference would be frustrated without criminal prohibitions—would always count under the harm principle as a reason for realizing that preference through the criminal law.7

Feinberg devotes most of the pages in Harm to Others to refining the concept

3. What Feinberg calls the Harm Principle he formulates as follows:
   It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values. Harmless Wrongdoing, supra note 1 at xix.
4. What Feinberg calls the Offense Principle he formulates as follows:
   It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted. Ibid. at xix.
5. Feinberg rejects Legal Paternalism, which he formulates as follows:
   It is always a good reason in support of a prohibition that it is necessary to prevent harm...to the actor himself. Ibid. at xix.
6. Feinberg rejects Legal Moralism, which he formulates as follows:
   ...it is always a good reason in support of criminalization that it prevents non-grievance evils or harmless immoralities. Ibid. at 324 [emphasis removed].
of harm, and he devotes most of the pages in *Harmless Wrongdoing* to rebutting various claims that harmless immoralities are really harmful. His arguments are always rich, nuanced, balanced, and well illustrated through examples. He always treats the opposing arguments fairly, frequently improving them relative to their proponents’ renditions. Ultimately he tests his arguments by appeal to the reader’s intuitions about the proper resolution of various cases, but this is no more discrediting than it is avoidable.8

Feinberg’s narrow concept of harm covers only serious setbacks of interests, which interests perforce exclude interests in others’ welfare and morality. But having narrowed the concept of harm to avoid the Scylla of incorporating liberalism’s antithesis, Feinberg must avoid the Charybdis of a too narrow scope for the criminal law. The “extreme liberal” is one who would limit the criminal to prevention of harm to others, with harm defined as Feinberg defines it. But Feinberg finds extreme liberalism counter-intuitive. Rather than broaden the notion of harm to accommodate intuitions about the proper scope of the criminal law, a strategy that risks counting too many things as harms, Feinberg instead supplements the Harm Principle with the Offense Principle. Together, the Harm Principle and the Offense Principle define the “moderate liberalism” that Feinberg wishes to defend.

I believe that Feinberg’s rejection of Extreme Liberalism is warranted, at least if pretheoretical intuitions are to be our gauge. But if this is so, then the success of Feinberg’s defense of Moderate Liberalism will turn on the tenability of the distinction between the Offense Principle and Legal Moralism. If the boundary between those principles cannot be maintained, the Moderate Liberal must retreat to Extreme Liberalism, give up liberalism altogether in favor of Legal Moralism, or redefine the liberal project so that it is not always inconsistent with Legal Moralism.9 In what follows I shall argue that the Offense Principle indeed cannot be separated from Legal Moralism in any way that would justify criminalization of offensive conduct but not harmless immoral conduct; Feinberg’s Moderate Liberalism must therefore be rejected.

II. Liberalism as a Two-Level Moral Theory

Feinberg’s Moderate Liberalism is best thought of in terms of a two-level moral theory. At one level there are various types of immoral conduct. There is conduct that is immoral because it shows disrespect for other persons’ autonomy and the projects essential to their self-fulfillment. There is conduct that is immoral because it shows disrespect for others’ legitimate desires to be free from serious irritation and disgust. These types of conduct do not exhaust the category of immoral conduct, however, which includes, for example, the merely hurtful, the sordid, and the shameful. Promise breaking, betrayals of confidence, consensual gladiatorial

8. See *Harm to Others*, supra note 1 at 18-19.
contests, certain forms of exploitation, and so forth may well be immoral even though they do not qualify as harmings or as offenses.

Liberalism, whether extreme or moderate, operates on a second moral level as well, one at which the various types of first level immoral conduct are distinguished for purposes of criminalization. At this level, it is immoral to criminalize harmless immoralities. Put differently, liberalism as a moral theory enforces only part of first level morality. The Harm Principle and the Offense Principle express the morality of respecting autonomy, both in what they permit to be criminalized and the moral limits of criminalization that they establish. Liberalism is a (second level) moral theory about distinctions within (first level) morality. It is not itself a complete moral theory.  

A. Harm

Feinberg’s elaboration of the Harm Principle includes the following elements: (1) Harm refers to a set-back of “interests,” interests being “all those things in which one has a stake” and that define one’s well-being, including, inter alia, physical health and vigor, the absence of obsessive pain, intellectual competence, emotional stability, economic sufficiency, and political liberty. (2) The Harm Principle does not apply to harms caused by set-backs to malicious, wicked, or morbid interests, if such interests actually exist. (3) The Harm Principle applies only to harms that are wrongfully produced, that is, that represent violations of the victims’ rights, that are unexcused and unjustified, and that have not been voluntarily consented to by the victim. (3) The Harm Principle does not apply to minor physical or mental “hurts,” nor does it apply to a variety of disliked mental states (such as offendedness); we have no interest in avoidance of such states.

B. Offense

Despite Feinberg’s insistence that offense, defined as experiencing a mental state of a universally disliked kind (e.g. disgust, shame), is not a harm, he nonetheless argues that production of serious and wrongful offense may be criminalized. This allows him to deflect the force of the counter-argument that serious offense is a harm as he defines harm. Harlon Dalton, for example, contends that “[n]othing in [Feinberg’s]..definition of [interest]..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,’

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11. Harm to Others, supra note 1 at 215.
12. Justice and the Human Good, supra note 9 at 34 and 60.
13. Harm to Others, supra note 1 at 205-06 and 215.
15. Ibid. at 215-16. There are several other qualifications Feinberg attaches to the Harm Principle, including those dealing with the treatment of trivial harms, aggregate harms, risks of harm, etc.
16. Offense to Others, supra note 1 at 2.
‘the absence of groundless anxieties and resentments,’ and ‘freedom from interference and coercion.’ Indeed, a good case can be made that freedom from offense is already encompassed by one or more of these interests.” 17 Nonetheless, Feinberg refuses to concede that even an intensely offended state can be harmful, 18 although continued extreme offense can sometimes cause emotional problems that are harmful. 19 But having banished offense from the purview of the Harm Principle, he brings it back within the reach of liberal criminal law through the Offense Principle.

The affirmative case for criminalizing offense, despite its not being harmful, is a rather graphic appeal to our intuitions called “a ride on the bus.” 20 In just over three pages Feinberg vividly describes thirty-one possible causes of: affronts to the senses; disgust and revulsion; shocks to moral, religious, or patriotic sensibilities; and shame, embarrassment, anxiety, annoyance, boredom, frustration, fear, resentment, humiliation, and anger. His lurid examples range from the rather tame loud boombox to the eating of vomit and feces, acts of fellatio and cunnilingus, and a variety of religious, racial, and gender insults. I suspect that hardly anyone, no matter how liberal, will fail to be convinced that some of these acts are justifiably punishable, whether under the Offense Principle or under a broader version of the Harm Principle.

C. Harm, Offense, and Rights

There is one final point in our preliminary discussion of Feinberg’s affirmative case for punishability. Feinberg restricts the justifiability of criminal punishment under both the Harm Principle and the Offense Principle to conduct that, in addition to causing harm and offense, violates the victim’s rights. 21 It is easy enough to understand the necessity for this restriction. Frequently the prohibition of conduct that is harmful or offensive will result in harm to the one prohibited. Because someone will be harmed (or offended) whether or not we prohibit the conduct, we need to rank the various interests at stake and determine which will prevail in cases of conflict. Rights represent our conclusions regarding these inevitable conflicts of interests. And it is only when we are harmed or offended and our rights are violated that criminal punishment is appropriate. 22

This restriction of the Harm and Offense Principles to rights violations plays an important role in Feinberg’s attempt to keep the Offense Principle from collapsing into Legal Moralism. For Feinberg denies that the inevitable offense caused by the thought of conduct that is immoral is the type of personal offense that could be the basis of a claim that one’s rights were violated by the conduct. 23 I shall return to this important issue presently.

18. Harm to Others, supra note 1 at 49-50.
19. Ibid. at 49; Offense to Others, supra note 1 at 3.
20. Offense to Others, supra note 1 at 10-13.
21. Harm to Others, supra note 1 at 215; Offense to Others, supra note 1 at 1-2.
22. Harm to Others, supra note 1 at 109-14.
23. Offense to Others, supra note 1 at 67-69.
D. Legal Moralism

The Harm Principle and the Offense Principle provide the moderate liberal with her two legitimate bases for criminal punishment. In his third volume, *Harm to Self*, Feinberg presents the case against Legal Paternalism, the principle that harm to the actor is always a good reason in support of a criminal prohibition. I shall have nothing directly to say about this principle. I must, however, say a few things about the principle of Legal Moralism, the subject of Feinberg’s last volume, *Harmless Wrongdoing*, before I turn to my principal focus, liberalism and offensive conduct.

Legal Moralism holds that it is always a good reason in support of criminalization that it prevents harmless immoralities. Feinberg’s most impressive work, in my opinion, is his account of the arguments for and against Legal Moralism, the former of which he treats scrupulously fairly, but the latter of which he finds decisive. A few observations about Feinberg’s case against Legal Moralism are in order here.

The harmless immoralities which Legal Moralism would warrant criminalizing are not mere violations of conventions, of norms that may vary from society to society. They are assumed by Feinberg to be violations of true moral norms, norms sanctioned by critical, as opposed to merely conventional, morality. In other words, Feinberg does not produce a liberal victory by defining true moral reasons as those protecting against harm or offense and leaving Legal Moralism applicable to a null set of immoralities. Liberalism represents a moral position regarding when the coercive measures of the criminal law may and may not be employed to enforce true morality. Under liberalism, we will often have a moral right to do what is truly morally wrong without fear of legal punishment.

Having given Legal Moralism the robustness of a principle that deals with true immoralities, Feinberg’s case against it is weakened by several concessions that he is prepared to make. First, he grants that harmless immoralities may be deterred by legal measures short of criminal prohibitions, such as through subsidies or educational programs designed to promote morally valuable ways of life. Feinberg’s liberalism is not the thoroughgoing neutralist conception of Ackerman or Dworkin. Yet the line between “do not do X or you will suffer a penalty” and “pay over resources (perhaps necessary for X) (on pain of penalty) and we will use them to promote y” is a theoretically difficult one to draw.

Second, Feinberg is willing to withhold application of the Harm Principle to

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27. *Ibid*., at 309. See also “Moralistic Liberalism and Legal Moralism”, * supra note 10 at 1418-19.
set-backs of immoral interests, such as those that are “malicious...wicked or mor-
did.” In other words, the concept of harm in the Harm Principle is a moral one, with that part of true morality that lies beyond the Harm and Offense principles serving as at least one of its sources. Therefore, mere immorality, while not a ground for criminal prohibition, can be a ground for withholding criminal protection of an interest.

Third, Feinberg wishes to admit retributivism—punishment based on moral desert—into the liberal’s justifications for criminal punishment. Feinberg believes this can be done without falling into Legal Moralism if the blameworthiness that the liberal uses to mete out punishment is derived from harm- or offense-threatening dispositions. Part of the point of criminal punishment in a liberal society is to stigmatize the offender in proportion to his blameworthiness, but only that portion of blameworthiness derived from the harm and offense sectors of morality. The liberal may not, however, make conduct punishable merely because it is blameworthy. The problem for Feinberg is to show how the dispositions to harm and offend can provide the proper bases for scaling retributive punishment without themselves becoming the legitimate objects of criminal prohibition. In other words, if we can punish A more than B for acts that threatened the same amount of harm merely because A’s motives reflected less concern with others’ rights than B’s, or because B has greater remorse than A, why may we not punish those with callous or anti-social dispositions even if they have not yet acted in a harm-threatening manner?

Indeed, when we punish A more than B, aren’t we punishing A this extra amount for his wicked character and not for his act? And if so, have we not moved beyond the Harm and Offense Principles and partially into the realm of Legal Moralism?

Feinberg makes other concessions that weaken the case against Legal Moralism. He acknowledges the force of Irving Kristol’s hypothetical example of gladiatorial contests between well-paid combatants held before consenting adults, and admits that even liberals might want to ban such an enormous (but harmless) evil.

He carves out an exception to the Harm and Offense Principles for cases like Parfit’s misconceived child, cases where persons have acted wrongly but have wronged no one. Feinberg argues that allowing criminal punishment for such cases offends only the letter but not the spirit of liberalism because what leads us to say the parents acted wrongly in Parfit’s example is the effect of their act on the welfare

32. Harm to Others, supra note 1 at 215 and 205-06.
34. Harmless Wrongdoing, supra note 1 at 154-55.
36. And what if B’s greater remorse comes not from having harmed but from having transgressed God’s laws? If we still count his remorse as grounds for mitigating his punishment, have we moved into Legal Moralism? See ibid. at 517-20.
38. Harmless Wrongdoing, supra note 1 at 130-31.
39. Ibid. at 326-27. Parfit’s example involves a couple who conceive a child they know will be defective when, by conceiving at another time, they would have conceived a normal child. See Derek Parfit, “On Doing the Best for Our Children,” in Michael Bayles, ed., Ethics and Population (Cambridge, Mass.: Schenkman, 1976) 100.
interests of persons. Feinberg does not believe that this exception for cases where the wrongmaking aspect of harmless wrongdoing is connected with welfare interests allows wholesale Legal Moralism.

Feinberg's case for a line between the Harm and Offense Principles and Legal Moralism is thus weakened by the concessions he is willing to make in the direction of the latter, both in allowing moralistic concerns to affect the interests that are covered by the Harm and Offense Principles and the amount of punishment meted out in criminalizing harmful and offensive conduct, and also in the exceptions he makes with varying degrees of reluctance for non-criminal regulation of immoralities and for prohibiting truly grave evils and evils that are so because of their effects on welfare interests. Nevertheless, the line Feinberg has drawn appears tenable in a large range of cases. I now turn to my main project, which is to question whether this is so in the case of offensive conduct.

III. The Offense Principle and Legal Moralism

A. The Offense Principle Elaborated and Qualified

The Offense Principle that Feinberg defends is one that is qualified in a number of ways. Before it may be the subject of criminal prohibition, the offense must be serious. The seriousness of the offense is a function of how severe it is (its intensity, duration, and the number of its victims), how avoidable it is and whether the risk of offense is voluntarily assumed, and whether the susceptibility to offense among those offended is normal or abnormal. (Feinberg does not, however, require that taking offense be "reasonable" except insofar as conduct that offends few people will rarely be serious enough to warrant criminalization.)

The second way the Offense Principle is qualified is that, just as with the Harm Principle, offensive conduct may not be criminalized if the interests in engaging in it outweigh the interests of those offended. Of particular concern is the actor's freedom of expression, since that is an interest of the actor quite frequently implicated in offensive conduct.

Conduct that is immoral but causes no harm will frequently cause offense. That is, those who are aware of that conduct will suffer the states of mind characteristic of offense, such as disgust, revulsion, shock, shame, resentment, and anger. Moreover, immoral conduct that offends will quite often meet all the conditions for criminalization under the Offense Principle that Feinberg lays down: the offense caused will be intense, long-lasting, widespread, relatively unavoidable, involuntary, and normal, with no weighty countervailing interests in support of the conduct. Sometimes, of course, conduct will be so central to personal autonomy or to free expression that, despite its immorality and offensiveness, it should not be criminalized under the Offense Principle. But much immoral and offensive conduct

40. Harmless Wrongdoing, supra note 1 at 326-27.
41. Offense to Others, supra note 1 at 35.
42. Ibid. at 35-36.
43. Ibid. at 37-38.
arguably will not be of this nature.

Feinberg not only willingly concedes these points but embraces them. His posture in *Offense to Others* is to defend the Offense Principle primarily from the criticism of Extreme Liberals, who endorse the Harm Principle and nothing more. And many of the examples of offensive conduct that he employs in making the case for criminalization are examples of conduct that the Legal Moralist is interested in: harmless immoralities.44

**B. Offense and Legal Moralism**

1. Minor Offenses

Because Feinberg and Legal Moralists would endorse criminalizing those harmless immoralities that offend—the former because of the offense, the latter because of the immorality—and because many (most?) harmless immoralities will offend those aware of them, what room is left for operation of Feinberg’s injunction against Legal Moralism? One area is where harmless immoralities fail to offend seriously enough to warrant their criminalization. A Legal Moralist might reach exactly the same anti-criminalization conclusion as Feinberg for these cases. This is because there will be interests of the actor that will be set back by criminalization that may well outweigh the interest in punishing immorality in cases where the immorality is so minor that it will not cause serious offense. Although it is not clear exactly how the Legal Moralist will weigh the abstract value of punishing immorality against the various more concrete interests that will be set back by criminalization, there is no reason to think she will ignore or heavily discount the latter.

2. The Bare Knowledge Problem

The area where Feinberg and the Legal Moralist clearly part company is that of offensive and immoral conduct that occurs in private. This is what Feinberg calls the “bare knowledge problem.”45 Suppose Alfred is profoundly offended as a result of merely knowing of Betty and Clara’s lesbian relationship, the intimate practices of which occur behind closed doors in their apartment. Suppose Alfred is not abnormal in his offense and that offense at lesbian practices is widespread and serious. And suppose for the sake of argument that lesbian practices are immoral, though harmless. Will the Offense Principle then legitimate for liberals the criminal prohibition of lesbian practices?

Feinberg wants to deny that it will. He draws a bright line between offensive criminal practices that Alfred perceives directly in public places and those that Alfred knows of other than through direct perception. It is here that the notion of wrongdoing plays a role under the Offense Principle as it does under the Harm Principle.46 To be punishable, conduct must not only offend; it must also wrong

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44. See *Ibid.*, at 11-13. Among his examples are public homosexual acts, public desecration of religious and patriotic symbols, and public racial, sexual, and ethnic insults.
its victims. This requires, says Feinberg, that the victims’ grievances be personal. 47 Alfred cannot claim that he is wronged by Betty and Clara’s immoral conduct, despite his being offended by the thought of it. It is worthwhile to quote Feinberg’s position in full:

If governmental invasions of liberty to protect others from bare knowledge are ever legitimate, it must surely be when the resultant offense is of the “profound” [violation of moral standards] variety. If mere offense to the senses or the lower-order sensibilities (e.g. by “disgusting” activities) could be protected even from unwitnessed conduct, then as we have seen, the offendable party would be protected from conduct to which he has no objection except that it is unpleasant to witness, and then even when he is not made to witness it! In that case what he is actually protected against is his own vivid imaginings, which should be subject to his own control unless they are, because of neurosis, irresistibly obsessive. In the case of genuinely profound offenses, however, the offended party has a powerful objection to the unwitnessed conduct quite apart from the effects on his own state of mind that come from thinking about it when it is unobserved. Indeed, these derivative unpleasant effects are the consequence of the behavior’s affront to his moral sensibilities and would not exist but for that affront. It would put the cart before the horse to say that the moral sensibilities are shocked because of the unpleasant states produced in the offended party’s mind. These states have nothing to do with his complaint. His grievance is not a personal one made in his own behalf. It is therefore odd to ground a prohibition of the offending conduct on a fancied need to protect him. When an unwitnessed person defaces flags and mutilates corpses in the privacy of his own rooms, the outsider is outraged, but he would not claim to be the victim of the offensive behavior. He thinks that the behavior is wrong whether it has a true victim or not, and that is what outrages him. As soon as he shifts his attention to his own discomfiture, the whole nature of his complaint will change, and his moral fervor will seep out like air through a punctured inner tube.

The advocate of punishment for those whose unwitnessed and unharmful activities offend in their very description can now be confronted with a dilemma. Either he bases his argument on an application of the offense principle or else on a (tacit) appeal to the illiberal principle of legal moralism. The former would be a claim to protection from their own unpleasant mental states by those who are offended by a “bare thought” or by “bare knowledge” of the occurrence of the loathsome behavior. The latter would be an application of the liberty-limiting principle that all liberals (by definition) reject: that it is a good reason for a criminal prohibition that it is necessary to prevent inherently immoral conduct whether or not that conduct causes harm or offense to anyone. If it is the liberal offense principle to which ultimate appeal is made, the argument has a fatal flaw. According to that principle as we have interpreted it ..., criminal law may be used to protect persons from wrongful offense, that is, from their own unpleasant mental states when wrongfully imposed on them by other parties in a manner that violates their rights. On the plausible assumption that desecration of sacred symbols even in private is wrong (even without a victim), there is a sense then in which it produces “wrongful offense” in the mind of any disapproving person who learns about it: The conduct is wrongful and it is a cause of a severely offended mental state. But that is not yet sufficient for it to be a “wrongful offense” in the sense intended in a truly liberal offense principle. The offense-causing action must be more than wrong; it must be a wrong to the offended party, in short a violation of his rights. But as we have seen, even the offended party himself will not claim that his own rights have been necessarily violated by any unobserved conduct that he thinks of as morally odious. If he does make that further personal claim he becomes vulnerable to Mill’s withering charges of moral egotism and bad faith. His profoundly offended condition then is not a wrong to him, and thus not a “wrongful offense” in the sense of the liberal offense principle.

47. Ibid. at 67-68.
The offended party experiences moral shock, revulsion, and indignation, not on his own behalf of course, but on behalf of his moral principles or his moral regard for precious symbols. If those moral reactions are to be the ground for legal coercion and punishment of the offending conduct, it must be by virtue of the principle of legal moralism which enforces moral conviction and gives effect to moral outrage even when there are no violated rights, and in general no persons to "protect." 48

At an earlier point in his argument, Feinberg claims that one can suffer lower-order, non-"profound", offenses, such as revolting or disgusting or boring sights and smells, only if one directly perceives them rather than merely learns of them. 49 When one does perceive them, and thereby suffers the offense, the grievance one feels is felt to be personal, a wrong to the perceiver.

The offense one suffers because of violations of moral norms—in Feinberg's terms, "profound" offense—does not depend upon my perceiving as opposed to knowing about the violations. Alfred suffers profound offense whether or not he witnesses Betty and Clara in their lesbian intimacies or merely knows of them. But where he does not witness the conduct, but merely knows of it, his grievance is not a personal one because he cannot claim the conduct is a wrong to him. And if the conduct, because unwitnessed, wrongs no one, it cannot be prohibited under the Offense Principle.

I agree entirely with Feinberg's analysis of profound offense, except for the conclusion he draws from it. There are two horses Feinberg might ride here, and neither one will get him where he wants to go. One is the distinction between perceived conduct and known conduct. The other is the distinction between conduct that offends because it violates norms and conduct that violates norms because it offends. Let us take up each of these distinctions in turn.

Feinberg rests his position on the distinction between perceived and known conduct. He wants to say that if Alfred were to be unwillingly forced to view Betty and Clara's lovemaking, then even with respect to his profound offense (the offense he suffers as a result of the violation of the moral norm), he has a personal grievance eligible for protection under the Offense Principle. If Alfred merely knows of Betty and Clara's conduct, however, then he lacks a personal grievance.

What are the grounds for Feinberg's distinction between perception and knowledge? There are two possibilities. One possibility is that there is a different quality to offenses that are perceived as opposed to offenses that are merely known about. The other possibility is that perception, but not knowledge, individuates the harm of offense in a way that makes the resulting grievances capable of characterization as wrongs to particular people.

The first possibility overlooks the fact that we are dealing here with profound offense, offense responsive to the fact that moral norms have been violated. Whether Alfred directly perceives Betty and Clara or merely knows about them, that part of his offense that is profound offense would be constant. At least Feinberg gives no argument that it would not be. Alfred's direct perception is just one way

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48. Ibid. at 67-69 [citations omitted]. Permission to use granted by Oxford University Press. See also ibid. at 94; Michael D. Bayles, Book Review (1986) 5 L. & Phil. 113 at 114-15.
49. Offense to Others, supra note 1 at 57-58.
for him to know about Betty and Clara’s profoundly offensive conduct. In all cases it is his knowledge that moral norms are being violated that causes his offense.

Consider Agnes, who believes that extra-marital sex, including heavy petting, is immoral (but harmless). She has learned that Barbara and Charles, unmarried, are having an affair, and she is profoundly offended. At a dance she observes another couple, Bill and Candy, engaging in rather heavy petting. At first she believes they are married, and she is not offended by their behavior, even though it is indiscreet. When she is informed that they are not married, she suffers profound offense. Clearly her offense in both cases is a product of her knowledge that moral norms are being violated. Perception in the second case merely provides her with evidence of the violation.

The other possible basis for Feinberg’s distinction between perceived and known immoral conduct is that perception but not knowledge somehow personalizes the offense in a way that allows us to identify specific persons who have been wronged.50 This, too, is problematic. Consider two cases of immoral conduct, one that is perceived by thousands of people, and one that occurs in private but that is learned of by a few people. There is no conceptual bar to claiming that the few have been wronged. (“If you act immorally, and others find out, you have wronged them: this is a risk you take whenever you act immorally.”) Nor is there a conceptual bar to claiming that thousands have each been personally wronged in the first case. Mere numbers are irrelevant, though if they were relevant, they would cut in favor of, not against, mere knowledge.51

50. Feinberg does make an exception to the bare knowledge limitation on offense for cases where the private conduct is offensive to a specific person, for example, the mutilation of her spouse’s corpse. Ibid, at 69 and 94.

51. See also “‘Disgust’ and Punishment” supra note 17 at 894.

Feinberg doesn’t deny that one can have rights against being subject to risks of harm in addition to rights not be harmed. See Harm to Others, supra note 1 at 191 and 216. See also Christopher Schroeder, “Rights Against Risks” (1986) 86 Colum. L. Rev. 495. But see Judith Jarvis Thomson, The Realm of Rights (Cambridge, Mass.: Harvard University Press, 1990) at 243-47. The arguments for criminalization of conduct that unreasonably risks harm equally support criminalizing conduct that unreasonably risks offense. Indeed, so long as criminal statutes that proscribe offensive conduct do not require proof that anyone was actually offended on the occasion in question, those statutes are most appropriately thought of as punishing the creation of an unreasonable risk of offense. In any event, offense due to knowledge cannot be distinguished in principle from offense due to perception when assessed in terms of risk of offending versus actually offending. Both the actor who engages in offensive conduct in public and the actor who engages in offensive conduct in private only risk offending others. Whether others are offended, whether by direct perception of the conduct or by learning of it, is beyond their control once they act. At most one can say that immoral conduct in public in general creates a higher risk of being perceived and offending than the risk immoral conduct in private creates of being learned about and offending. That is a difference in degree but not in kind.

One other possible distinction between offensive conduct that is directly perceived and offensive conduct that is merely known about can be disposed of in short order. It may be thought that offensive conduct that occurs in private and then is learned about either requires the aid of a third party who relates the evidence of the conduct to the offended party or requires the offended party himself to engage in snooping activities. In the first case, the argument continues, it is the intermeddler who wrongs the offended party, not the actor who engaged in the offensive conduct. In the second case, it is the victim himself who is to blame for his offense.

Although there surely are cases where the victim is at least partly to blame for his own offense (because he engaged in unjustifiable snooping), there will be many cases when the private conduct offends without the victim’s being blameworthy. Some of these cases will involve culpable acts of intermeddlers—gossiping snoops—but some will not. And even if the offense depends on gossiping snoops, that fact does not itself relieve the actor of responsibility for the offense caused by his conduct. Often conduct is punished because it risks harm through intervening culpable acts of others.
I conclude that Feinberg has not offered a convincing rationale for distinguishing between cases of profound offense that involve direct perception of offending conduct and cases of profound offense that involve bare knowledge of offending conduct.\footnote{Other conduct that Feinberg's principles might put beyond the reach of criminal law might include the replacing of forests with plastic trees that no one can distinguish from living trees and that do not otherwise harm the environment, or the elimination of species when their elimination causes only bare knowledge offense. See Larry Alexander, "Liberalism as Neutral Dialogue: Man and Manna in the Liberal State" (1981) 28 U.C.L.A. L. Rev. 816 at 846-47; Laurence Tribe, "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale L. J. 1315. See also "'Disgust' and Punishment", supra note 17 at 892, n. 56.}

Moreover, Feinberg in some sense trivializes his liberal freedom from moralistic criminal prohibitions by forcing those who would engage in harmless immoralities to do so behind closed doors. Because he has already discounted their interests in engaging in such conduct as sordid and wicked, if they are not attempting to communicate ideas, they will lose out in the balancing under the Offense Principle unless they retreat from the public realm. But why if we are to bar Legal Moralism through the front door should we allow it in through the backdoor in the form of protecting against profound offense, a protection that makes the immoralist a second-class citizen who cannot engage in his favorite pastimes out of doors?

3. Offense Due to Violation of Norms

If, in the case of profound offense, we reject Feinberg's distinction between perceived and merely known immoral conduct, we are left with another possible distinction that might prevent the Offense Principle from coming close to collapsing into Legal Moralism: the distinction between conduct that violates moral norms because it offends and conduct that offends because it violates moral norms. Although Feinberg doesn't ultimately rely on this distinction in making his case against criminalizing immoral conduct that occurs in private, it is useful to consider the implications of employing such a distinction. After all, the distinction appears much more closely related to the rejection of Legal Moralism than does the distinction between perceived and merely known conduct.

Feinberg adverts to this distinction, and at one point he even appears to be drawing the boundary between the Offense Principle and Legal Moralism on the basis of it.\footnote{Rejecting the distinction between perceived and merely known immoral conduct does not actually collapse the Offense Principle into Legal Moralism because the grounds for prohibiting immoral conduct under those principles differ: Under the Offense Principle, immoral conduct is prohibited because it offends; under Legal Moralism, it is prohibited because it is immoral. Nonetheless, conduct that Legal Moralism would prohibit will almost always be subject to prohibition under the Offense Principle. I owe the point of this footnote to comments by Michael Moore.} Ultimately, however, he countenances prohibition of conduct that offends because it is immoral so long as the conduct occurs in public.\footnote{See Offense to Others, supra note 1 at 57-59.}

But suppose he were to reject this and demand that conduct be offensive independently of immorality before it may be prohibited under the Offense Principle.

\footnote{Ibid. at 16-20.}
Would this get him where he wants to be? Surely not. If we eliminate from the application of the Offense Principle all conduct that offends because violative of norms (as opposed to conduct which violates norms because it offends), the Offense Principle will be eviscerated. It will apply perhaps to conduct the sight, smell, or sound of which would be offensive in all cultures—perhaps the smell of sulphuric acid or the sound of chalk screeching on a blackboard. But most of the offensive conduct that Feinberg’s bus rider encounters would not be eligible for prohibition under the Offense Principle.

Most of the conduct that offends us does so by virtue of its flouting of norms.\textsuperscript{56} This is obviously true of such things as belching in public. It is probably also true of public bulimic or coprophagic conduct, since there may very well be cultures that do not find such conduct revolting. And it is true of such conduct as public nudity or public fornication.

Feinberg appears at some points to believe otherwise. He points out that we are offended by public nudity or fornication but not by private nudity or fornication.\textsuperscript{57} Therefore, it is our perception of the conduct, not its violation of norms, that causes our offense. The norms against public nudity and fornication are the only norms they violate, and they do not explain, but are explained by, the offense caused.

This analysis of such norms is incorrect. Public nudity and fornication do not everywhere and at all times offend. They offend when they violate norms about public behavior, norms that are in no sense universal.

It is correct, of course, that nudity and fornication in private don’t violate our norms and don’t offend us. And it is, therefore, also correct that it is something about their being public that leads to our condemning public nudity and fornication. But it is incorrect to conclude that bare perception (no pun intended) rather than norm transgression is the source of our offense in such cases. There are norms about proper conduct in public that are sources of offense when violated but that do not protect against offense that pre-exists the norms themselves. Eliminate the norms and you eliminate the offense.

Consider in this connection the following example. Bill and Candy engage in public fornication before an enthusiastic crowd of twenty onlookers. No one present is offended because no one endorses the norm against public fornication. Alfred, however, who was not present but would have been offended had he been present—he subscribes to the norm against public fornication—he hears about Bill and Candy. Will he be offended by what they did, and if so, why?

I believe that Alfred may very well be offended (in the profound sense) even though no one present was. And the source of such offense will not necessarily be his imaginings of what Bill and Candy looked like at the time. Alfred may be offended just by the fact that Bill and Candy violated a norm to which Alfred subscribes, at least if we assume that the norm does not admit of an exception when the onlookers will not be offended. (The norm against public fornication might indeed not admit of such an exception; we may think that public fornication is

\textsuperscript{56} See “‘Disgust’ and Punishment”, supra note 17 at 901-05; “Liberal Conception of Law”, supra note 7 at 11-12.

\textsuperscript{57} Harmless Wrongdoing, supra note 1 at 15-16.
Feinberg must admit that many offense-giving public acts are so because they violate norms that are prior to offense. That admission, coupled with the prior argument that the perception/knowledge distinction is irrelevant in the case of offense caused by norm violations (profound offense), threatens either to collapse the Offense Principle into Legal Moralism almost completely or, alternatively, to rescue the Offense Principle by reducing its application to the small number of cases of universally revolting sights, smells, and sounds.

4. Offense and Conventional Norms Regarding Respect

To save a more robust Offense Principle and yet avoid Legal Moralism, Feinberg might resort to the following argument. It is true, he might say, that most of the cases of offense that I would allow to be punished involve norm-violation as the source of the offense. But the norms in question, as opposed to the norms with which my rejection of Legal Moralism is concerned, are understood as culturally relative conventions about proper behavior in public and thus about how to show respect (and disrespect) to those present. Every culture needs conventions of this kind because in every culture people need to know whether they are being shown disrespect (and should therefore feel offended). The content of these norms can be quite variable, since their content is relatively unimportant. That is, their content is relatively unimportant in the same way the content of the norm about which side of the road to drive on is relatively unimportant.

There surely are norms that fit this description. Their public violation causes offense to those present (at least if they subscribe to the norm). Their private violation does not cause offense because they can’t be privately violated. (They only apply to conduct in others’ presence; and those present must endorse the norms as appropriate vehicles for demonstrating respect.)

This argumentative strategy is problematic for several reasons. First, it oddly privileges purely conventional norms over norms believed to be universal. The former can be enforced through the criminal law under the Offense Principle; the latter are legally unenforceable (at least through criminal sanctions).

Second, many of the acts that a Feinberg liberal would presumably find punishable consist of publicly flouting norms that are believed to be universal moral norms, not conventional norms of the respect/offense-giving kind. Consider homosexual embracing and kissing in public. The strategy in question would apparently rule out punishment for this, even if the offense it caused (by its direct perception) were serious, widespread, and so forth, and not outweighed by free speech or other interests of the actors. For unless there were a conventional norm deeming homosexual kissing in public to be disrespectful of those present—as opposed to a moral norm condemning homosexual behavior generally—the offense felt by the witnesses would be of the profound variety and no different, or so I have argued.
from the offense they would feel if they merely learned of this conduct but did not see it.\textsuperscript{61}

Of course, there might be a conventional meta-norm that deems publicly flouting moral norms to be disrespectful of those present, and violation of this conventional meta-norm might then legitimate punishment, even if violation of the underlying moral norm would not. But this tack for legitimating punishment exposes a third and I believe quite devastating weakness in the strategy I am describing. The weakness is this. There is nothing in principle that keeps us from having norms governing how to demonstrate respect (and give offense) that deem as disrespectful all public flouting of nonconventional moral norms. Whenever, therefore, we wish to criminalize public immoral conduct, it will be unclear even to ourselves whether we are criminalizing it because it is immoral (Legal Moralism) or because it violates our norms regarding offense.\textsuperscript{62} Moreover, there is nothing in principle that prevents us from regarding private immoral conduct as disrespectful to anyone who learns about it, at least if we jettison the distinction between perceiving and merely knowing about conduct. (If no one ever learns about private immoral conduct, it won’t be punished anyway, even under Legal Moralism.) And given that private immoral conduct would cause profound offense among those who learn of it, we may in fact deem it disrespectful of those whom it offends. In that case, the line between the Offense Principle and Legal Moralism is all but obliterated. In any event, under the argumentative strategy we are considering, private immoral conduct is always hostage to the content of conventional norms regarding how respect and offense are shown.

In the end, once the perception/knowledge distinction is dropped, the fact that those offenses which Feinberg would punish are more often than not products of norm violations leads to the result that the Offense Principle covers most of the territory that Legal Moralism might otherwise occupy. Feinberg cannot want this result, but neither can he avoid it, unless he eliminates norm violations as legitimate sources of punishable offense. His choice, then, is between a denatured liberalism, one that through the Offense Principle embraces most if not all of what the Legal Moralist wants, and an anaemic Offense Principle, one that covers only universally noxious sights, sounds, and smells.

\textbf{IV. Conclusion: Offense, Legal Moralism, and the Liberal Project}

It will be instructive as a concluding comment to locate the difficulties Feinberg encounters with the Offense Principle within the larger context of the defense of liberalism against conservative and perfectionist political moralities. If one defines liberalism by such characteristics as political, communicative, and religious freedoms, tolerance of diverse lifestyles, predictable legal arrangements, and a generally broad domain for autonomous personal decisionmaking, what theoretical tacks are available for its defense?

\textsuperscript{61} See also \textit{ibid}, at 11-12.
\textsuperscript{62} See also ""Disgust' and Punishment", \textit{supra} note 17 at 906-09.
Ethical and religious skepticism are ruled out, for they undermine all moral views, liberalism as well as its opponents. But one related tack that has found favor is to posit an epistemological discontinuity between, on the one hand, the arguments that are offered to support the liberal's protection of autonomy regarding visions of the moral and religious Good and, on the other hand, the arguments that are offered to support particular such visions. Simply put, this defense of liberalism argues that liberalism rests on more secure, less contestable, grounds than do those moral and religious views the choices among which liberalism seeks to protect and about which it is to remain "neutral."

This defense of liberalism is quite problematic for three reasons. First, it makes liberalism look entirely provisional, a temporary position for us to maintain until we are surer of our moral and religious views. Second, its premise of an epistemological discontinuity is itself unsupported. And third, it must define its requisite neutrality without smuggling in views that it has deemed epistemologically second-class, a task that is notoriously difficult.

A second tack is to defend liberalism, not as neutral among visions of the Good, but as a particular vision of the Good itself, the correct one, at least for our times. On this "perfectionist" defense of liberalism, liberal liberties are instrumental for living a good and proper life, since there are in fact plural forms of the Good, but there is room for some Legal Moralism as well to exclude the truly sordid and degrading.

The third theoretical tack is to argue that it is morally true that the only interests that can be legitimately protected through coercion are those interests one would have as an isolated, desert-island, individual. Though there may be personal and interpersonal norms one should observe, and religious views one should hold, no one else has a legitimately protectable interest in having you observe such norms or hold such views. Any religious or moral view inconsistent with this position is incorrect, though by the same token, one has no legitimately protectable interest in eradicating such incorrect views.

Theoretical problem for those who defend liberalism in this manner is to define legitimately protectable interests in ways that are intuitively plausible but that do not violate the individualism constraint and smuggle in illicit social or religious norms. Various liberal theorists have tried their hand at this, employing such notions as "primary goods," "resources," "manna," and suitably purified

63. See "Moralistic Liberalism and Legal Moralism", supra note 10 at 1418.
conceptions of “welfare.”

Feinberg’s notion of “harm” is a similar individualistic concept, and I would place Feinberg’s liberalism in this third theoretical camp.

The root idea in this third conception of liberalism is that we should have resources and moral space to constitute our own desert island. Norms of personal conduct within these boundaries may be as valid as the norms of liberalism itself, and there may be morally and religiously correct ways for us to act within these boundaries. No one else, however, has a legitimate interest in coercing us to observe such norms.

What is true of norms of personal conduct is true as well of all interpersonal norms other than those that define our moral space and those to which we consent to be bound. Even if we deem all correct norms of personal behavior to be norms of correct social behavior, we have no legitimate interest in enforcing those norms against violators. On a desert island we would have many things, but we would not have the comfort of knowing that others, on their desert islands, were living according to norms and ideals that we hold. Our protectable interests stop at our island’s shore, even if our actual interests extend well beyond it.

If this defense of liberalism is correct, then all opposing moral and religious views about protectable interests—that is, all opposing political moralities—are incorrect. But moral and religious views about personal conduct can be correct on this view without leading to Legal Moralism.

What such a defense of liberalism cannot support is anything like Feinberg’s full-bodied Offense Principle. For most of the sources of offense—those other than a few universally revolting sights, sounds, and smells—consist of violations of norms, norms that differentiate the ugly and the beautiful, the rude and the polite, the noble and the sordid, the pious and the profane, and so forth. These norms do not define legitimately protectable interests, even when couched in terms of offense, since they lie beyond our desert island boundaries. Although those boundaries might extend to our perceptual limits, they do not extend to the limits of our normative concern. And since the offense that violation of these norms causes is a product of knowledge that norms are being violated, not mere perception of the conduct considered apart from its being a norm violation, criminalization of such offensive
conduct cannot be justified on the version of liberalism under consideration. The Offense Principle fits most comfortably with liberalism if liberalism is given a perfectionist justification. This is not the route Feinberg wants to take. But it may be the route both he and we should take, especially if we are travelling on Feinberg’s bus and want to see real, not plastic, trees outside.  

percentage of people who observe or learn about the violation, then the Offense Principle does not legitimize punishment of the violation. This restriction leads to one of the strongest arguments for Legal Moralism that Feinberg grapples with, the argument that permitted immoralities will undermine standards of offense to the detriment of those who remain offended: Joel Feinberg, Harmless Wrongdoing, supra note 1 at 69-70. The social as opposed to individualistic basis of Feinberg’s Offense Principle is quite apparent in his rejection of this argument for Legal Moralism, but his arguments on this point fit poorly into his generally individualistic defense of liberalism.  

71. See supra note 52.