

RETHINKING THE OFFENSE PRINCIPLE

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This paper explores the Offence Principle. It discusses whether two constraints, additional to the criteria stated in conventional analysis, ought to be met before the Offense Principle can be satisfied: (i) that offensive conduct must be a wrong, and (ii) that the conduct must also lead to harm. The nature of the Harm Principle, and its relationship to the Offense Principle, are also considered. The paper suggests that, even if all cases in which offense should be criminalized also involve harm, nonetheless there may be good reasons to retain a separate Offense Principle.

One way of analyzing the moral limits on criminalization is to separate the issues into two groups. First are problems surrounding the nature and scope of the Harm Principle.¹ Assuming that the state sometimes has a legitimate interest in using the criminal law to regulate conduct that brings about harm to others, under what conditions is the prospect of harm sufficient to justify that use? There are many controversial questions here, but our concern in this paper is not with them. Rather, it lies within the second set of issues: Are there any varieties of conduct that may legitimately be criminalized where the justification for doing so does not refer to harm? To this question Joel Feinberg has answered “yes.” There are instances of conduct, he says, that may rightly be made criminal even though they do not cause harm to others. Indeed, they may be criminalized even though they do not cause harm at all. Feinberg accepts, advocates, and elucidates an *Offense Principle*.²

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1. In Feinberg’s phrasing, “It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.” Feinberg, *HARM TO OTHERS* (1984) 26 (hereafter cited as *HARM*).

2. Feinberg, *OFFENSE TO OTHERS* (1985) 1 (hereafter cited as *OFFENSE*).

posed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end. . . .

If I am seated in a bus when the amorous couple across the aisle carry their affections to the point of sexual intercourse, typically I am not harmed by their conduct, at least not in the sense of harm that is thought to invoke the Harm Principle. Nonetheless, I may be entitled to take offense, and the state might be right to criminalize the conduct on the grounds that it is offensive.

In this paper, we reconsider the Offense Principle and suggest that Feinberg's account of that principle is incomplete. In particular, we discuss whether two additional constraints ought to be met before the Offense Principle can be satisfied. First, in Section I, we argue that offensive conduct must be a wrong; it is not sufficient that the conduct causes affront, even serious affront, in others. Secondly, in Sections II and III, we consider the possibility that the only types of offensive conduct that liberals should wish to criminalize also involve some form of harm.

This second argument supplies an opportunity, in Section II, also to explore the Harm Principle. We suggest that the distinction between directly harmful and offensive actions does not correspond to the distinction between the Harm and Offense Principles, because the scope of the Harm Principle is broader than is generally recognized. In that same spirit of exploration, in Section III we reconsider the relationship between the Offense Principle and the Harm Principle. Even though, on our view, the overlap between the two principles is extensive, nonetheless there may be good reason to assess the criminalization of offensive conduct within a distinct Offense Principle and not merely as a special case of the Harm Principle.

I. OFFENSE AS WRONGDOING

Feinberg's Account of Offense as Affront to Sensibility

Feinberg's account depends primarily on consequences. For Feinberg, offense consists essentially in an affront to people's sensibilities, that is, in an unpleasant and disliked psychological experience.³ Causing any such affront, in his view, constitutes grounds for invoking the criminal law, provided that enough people are sufficiently affronted and that certain other conditions are met (more on which below). In particular, the audience's reasons for feeling affronted are irrelevant, and there is no requirement that offense be reasonably taken:⁴

Provided that very real and intense offense is taken predictably by virtually everyone, and the offending conduct has hardly any countervailing personal

3. Feinberg excludes certain physical discomforts (aches, nausea, etc.) and emotional states such as anxiety. *See, e.g.*, HARM, 46.

4. OFFENSE, 36.

or social value of its own, prohibition seems reasonable even when the protected sensibilities are not.

The main reason for disregarding the audience's reasons is, according to Feinberg, that it is difficult to explain why one is disgusted by something and, when explanations are given, they tend to be couched in terms of infringement of conventional mores that are not, in his view, proper reasons for state intervention.

At first glance, the case for intervention may appear merely consequentialist, in that it is driven by considerations of outcomes and numbers. A committed utilitarian, for example, could readily accept the position that offense amounts to creating an unpleasant stimulus. The conduct could thus be prohibited if the familiar utilitarian formula is satisfied—that is, if the extensiveness and intensity of such unpleasant stimuli outweigh in aggregate the satisfactions generated by the conduct. This would mean that a wide variety of affronts to sensibility could be proscribed if the taboos against the conduct were broadly held.

But Feinberg does not adopt a simple aggregative approach. Instead, he offers a more sophisticated balancing test that is designed to criminalize offense more sparingly. For present purposes, the test can be summarized briefly. First, a responsible legislator should consider the impact of the conduct on its audience by examining the magnitude of the affront to see how pervasively and intensely it is felt. As part of that examination, a standard of “reasonable avoidability” is imposed: The easier it is for members of the public to avoid settings where the conduct occurs, the less serious the offense is. Pornography may cause affront to many when viewed, but the seriousness of that affront is diminished if one must traipse specifically to an adult cinema to see it.

Secondly, the importance of the offending conduct is examined from the actor's perspective. The more central the conduct is to an actor's way of life, the greater is the claim not to have the conduct prohibited. As part of this examination, a standard of “alternative opportunities”—the obverse of “reasonable avoidability”—is applied: Restrictions on the conduct become more acceptable if there are satisfactory alternative times and places at which the actor could perform the conduct with less offense (say, by showing pornography only at home or in adult cinemas and not more generally).⁵

The broader social impact of the conduct is also considered. The more independent general usefulness the supposedly offending conduct has, the less the claim to prohibition. For this purpose, free expression of opinion is, following Mill, deemed to have its own social value, “in virtue of the great social utility of free expression and discussion generally.”⁶

While still involving the weighing of benefits and costs, Feinberg's test is therefore not straightforwardly aggregative. Conduct that widely offends may, for example, still be permissible when committed in settings readily

5. The full list of (six) weighting ingredients is set out by Feinberg in OFFENSE, 44.

6. *Id.*

avoidable by others. Overall, moreover, his test is capable of being tilted against prohibition by requiring that the balance must be strongly in favor of criminalization;⁷ conduct must widely cause great affront in order to overcome this bias.

The Contingent Nature of Feinberg's Account

How would Feinberg's test work in practice? In most Western countries a decade or so ago, it would have provided seemingly sensible results. In a (then) more tolerant political climate, behavior would have to have been quite outrageous before it could prompt widespread and serious offense. More recently, however, there seems to be a trend toward less public tolerance and more legal repression of purportedly offensive behavior.⁸ "Incivilities" are said to have serious consequences—to cause neighborhood decay and breed crime and to destroy the quality of urban life for ordinary citizens.

The application of Feinberg's Offense Principle is sensitive to diminishing tolerance, since the case for criminalization would be strengthened if greater affront were taken to an instance of behavior. In principle, therefore, the theory could uphold prohibitions of broad scope. Activities such as begging, for example, could legitimately be proscribed if they come to cause sufficiently widespread irritation. This possibility exists notwithstanding the mediating factors that are included in his analysis. Consider his "alternative opportunities" factor. Beggars, it may be argued, lack a range of alternative opportunities, because of the paucity of other sources of income and of places to live other than on the streets. But alternative opportunity is, on Feinberg's formula, only one factor to be weighed against the degree and intensity of the offense. In principle, if sufficient numbers of persons are sufficiently affronted by begging, the criminal law could be invoked, notwithstanding the lack of adequate alternatives.⁹

Of course, difficult cases will be unavoidable under any account of the Offense Principle, since both it and the Harm Principle are designed to mediate practical conflicts between interests such as freedom, self-express-

7. Cf. HARM, 9: there is a "general presumption in favor of liberty."

8. An early sign of this trend was Mayor Rudolph Giuliani's widely reported campaign in New York City against begging and other "quality of life" offenses. More recent signs include the drastic legal measures adopted in 1998 in England against "noisy neighbors", which are discussed in Ashworth et al., *Neighbouring on the Oppressive: The Government's "Anti-Social Behaviour Order" Proposals*, 16 CRIM. JUST. 7 (1998).

9. One response to this difficulty might be to elevate the status of the alternative opportunities proviso—to transform it from a weighting ingredient in the offense-prohibition calculus into a preemptive side constraint. Hence criminalization on the basis of the offensiveness of certain conduct would be ruled out when the actor has no practical alternative about when and where to perform the conduct. Unfortunately, that answer will not work. The lack of alternatives should not operate as an independent side constraint because its importance can be assessed only in combination with other factors. Consider our begging example. Let us concede that the beggar has no alternative means of finding subsistence. In that case, there is a powerful reason to permit begging. But that reason depends on the goal that begging serves, i.e., subsisting, which is rightly of great personal importance. Conversely, suppose that there is only one way in which I can ϕ , an activity that causes widespread and serious offense, and that ϕ ing is relatively unimportant to me. Here the lack of alternatives should not preempt the possibility of criminalizing my ϕ ing.

sion, and the well-being of different members of society. In part, it is a strength of Feinberg's analysis that it is contingent upon such factors as the strength of the offense taken and the practical alternatives available to both actor and audience. Nonetheless, it seems to us that his analysis of offense omits something fundamental. Moreover, the omitted factor operates as a conceptual requirement of offense and not merely as something to be weighed in the balancing decision to criminalize.

The Missing Element: Wrongdoing

The deficiency in Feinberg's analysis, in our view, lies in his equation of offense with affront to sensibility. If offense is defined in terms of displeasing activities (independent of the reasons why they are displeasing), its potential scope is vast. Anything you choose to do might irritate or exasperate me. A great deal depends, therefore, on how much weight is given to the various mediating principles Feinberg proposes.

As Feinberg acknowledges,¹⁰ this is not how offensiveness is thought of in ordinary moral discourse. The mere fact that V dislikes what D is doing does not by itself make D's conduct offensive. Ordinarily, when someone objects to behavior as offensive, he or she can be expected to give reasons for objecting that are ulterior to the fact that he or she dislikes it.¹¹

By way of illustration, consider the following (extralegal) example. Suppose that D meets V one day when D is wearing a garish Day-Glo orange tie. V objects. Were harmful conduct at issue, V might say: "That's *my* tie, and you've taken it without permission." But if the issue is offense, the mere fact that V's sensibilities are affronted does not imply any similar transgression. It is insufficient for V to say, "Day-Glo ties get on my nerves," for the tie-wearer has no general obligation to spare the viewer's aesthetic sensibilities. The objector would normally be expected to supply a further normative reason why the conduct should be considered objectionable.

It is true, as Feinberg points out, that the objector may not be able to say why he finds luminescent orange ties irritating or other conduct disgusting. What irritates or disgusts has its roots in social conventions, and V probably dislikes D's tie because he has accepted certain traditional notions of proper dress. But breach of such a convention does not necessarily show that there is anything wrong with the behavior—and charging someone with being offensive involves charging him with a kind of misconduct. Were V to say, "It's simply not done to wear Day-Glo orange," that would merely suggest that D is being unconventional but not that he has acted in an improper manner.

What is needed, therefore, is the provision of reasons why D's conduct is offensive: reasons going beyond the fact that it affronts V's sensibilities.

10. OFFENSE, 1-2.

11. Cf. Dworkin, *Liberty and Moralism*, in *TAKING RIGHTS SERIOUSLY* 240 (1977) at 249ff. Admittedly, in ordinary language, V may loosely describe something that is disgusting (say, a foul stench) as "offensive". But even in ordinary language this usage is peripheral; hence, without more, V may not describe herself as "offended".

Those reasons may be various. The objector may cite a personal relationship with the actor that demands special regard for the former's sensibilities in the circumstances ("It's my birthday party, and you know how I hate Day-Glo orange"). Or the reason may concern the insulting character of the conduct ("But this is 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 together on this confounded submarine for the next three months, and many of us detest Day-Glo orange"). But if the actor is a stranger to the objector, and no such special reasons can be cited, the mere fact that the conduct causes displeasure or exasperation is insufficient.

While one must be careful when drawing parallels between extralegal examples and criminal policy, similar reasoning holds when one is considering the legal proscription of purportedly offensive conduct. It is not affronting the sensibilities of other persons (even many of them) that should justify possible state intervention, but affront *plus* valid reasons for objecting to the conduct.¹² Where state intervention is involved, the range of eligible reasons could well differ from those in everyday life: For example, our birthday-party example of a special personal relationship would not provide reasons for state action. But reasons there still should be.

Feinberg explicitly disavows the need to supply such reasons. To the extent that the Offense Principle requires a wrong, he sidelines this requirement with the opening remark that "There will always be a wrong whenever an offended state [i.e., a disliked mental state] is produced in another without justification and excuse."¹³ The requirement is then disregarded in the rest of the book.¹⁴ In gist, "we don't like it" suffices. By withdrawing the normative element from V's objection, the justification of prohibition rests, ultimately, merely on conventional sensibilities. As Feinberg intends, this avoids rendering the Offense Principle into one version of legal moralism—but only at the risk of permitting a type of aesthetic majoritarianism. Perhaps it is true that whenever D's ϕ ing causes displeasure to V or affront to V's sensibilities, there is in every case a *prima facie* reason for D not to ϕ . But, even if this be conceded, assuming D is a private citizen, her reasons not to ϕ are not quite the point. What matters is whether the state has a *prima facie* reason to prohibit D from ϕ ing. On the latter question, our objection, in short, is that Feinberg's portals to the Offense Principle are too wide. Affront to sensibility, by itself, should never suffice to invoke the Offense Principle and therefore qualify for the sort of weighing exercise that both Harm and Offense Principles must then conduct.

Another strand of argument supports this analysis: one concerning the censuring role of the criminal law. We are speaking, here, of *punishing* offensive conduct. Punishment entails censure—it treats the offender as

12. An earlier exploration of this point is found in von Hirsch, *The Offense Principle in Criminal Law*, 11 KING'S C. L. J. 78 (2000).

13. OFFENSE, 2.

14. See, *in particular*, the difficulties outlined in Offense at 27ff.

having done wrong.¹⁵ This being the case, the criminalization of conduct should require a plausible claim of wrongdoing. With conduct that supposedly is offensive, one must thus ask why the actor has done anything to deserve censure. If the gravamen of offense is merely that the conduct displeases many people, then it is not clear that wrongdoing has occurred at all. Better reasons need to be provided why and in what respects there is something reprehensible about the behavior that properly may attract a censuring response.

What Wrongs Might Invoke the Offense Principle?

Our argument points up a need for future inquiry into what sorts of wrongs might satisfy this element of the Offense Principle. That task lies beyond the scope of the present paper. However, in order to illustrate the work required, it is worth canvassing briefly two standard *exempla* of offense: insult and exhibitionism.

One reason why conduct might be offensive is its insulting or demeaning character. Indeed, insults are a paradigm way of causing offense. It is social convention that gives various words, gestures, or acts an insulting meaning. But expressions of contempt are wrongful for reasons that go beyond mere convention. People have a *prima facie* claim, grounded in human dignity, against intentionally demeaning treatment.¹⁶ It does not suffice to violate that claim that another person might happen to feel insulted (anything might do that). Rather, the conduct must *be* insulting—for example, because it is intended and understood to be grossly derogatory.

Another reason is exhibitionism: Suppose that D is sitting peaceably in the park but cannot concentrate on his newspaper because E and F are copulating noisily on the grass nearby. D may rightly complain.¹⁷ One way of thinking about the wrongfulness of exhibitionism is as a type of reverse-privacy violation. Ordinarily, privacy involves the exclusion of others from one's personal domain. But there is also an interest in not being involuntarily *included* in the personal domains of others—particularly in being spared certain private (especially, intimate) activities of others. Intuitively, this point is readily made: There is something plainly obnoxious about a couple's having sexual intercourse in public or even about their arguing in a crowded train compartment over the details of their deteriorating romance. Others in such settings seem to have a legitimate claim not to have such matters forced upon them. This may be singularly on point in locations such as parks, which we value, *inter alia*, as places to interact with other persons who are not intimates, and where, consequently, such offensive

15. Cf. von Hirsch, *CENSURE AND SANCTIONS* (1993) ch. 2.

16. Sometimes, as we see in Section II, there may also be a claim predicated on harm. We are concerned here with the core case.

17. Offensive exhibitionism can also occur in private spaces. If my host, uninvited, exposes himself at a dinner party, I am entitled to take offense even though he has done so in the privacy of his own home.

activities are likely to cause much greater discomfort than they would in more private contexts.

Like insult, the contours of exhibitionism depend on social conventions that vary with time and place. Save in a few countries, it is no longer indecent for a woman to display her bare legs in public. The display of genitalia is still considered indecent but is acceptable in some Continental European countries, provided it occurs in specified public bathing areas. What makes infringement of such conventions offensive, however, is something beyond the mere existence of the convention: a conception of reverse-privacy that guards one from being confronted with certain intimate disclosures concerning others.

A unifying feature of these types of wrong is that each involves a failure to treat others with due consideration and respect. Indeed, it is this failure, rather than resulting affront, that is an indispensable facet of offense: V may laugh off an insult without being distressed by it in any way, yet the insult may still be offensive. Of course, the depth and breadth of affront caused by D's conduct is rightly, as Feinberg asserts, a consideration within the Offense Principle—but while affront is a necessary condition of that principle, it is neither a necessary nor sufficient condition of offense.

Difficulties in Identifying Offensive Wrongs

Let us stipulate, for the sake of argument, that insult and exhibitionism wrong their victims. Even then, the extent to which their prohibition is desirable will be debatable.¹⁸ Various mediating constraints must first be considered,¹⁹ and it may be that few, if any, insults would qualify for criminalization once those constraints are addressed. In a frictional, pluralistic, society, we expect persons to have a certain thickness of skin. Conflict must be tolerated; indeed, it may quite often be desirable, if differing, valuable, but contradictory ways of life are to be upheld where it is a feature of those ways of life that certain other valuable ways of life must be opposed.²⁰ Nonetheless, in principle at least, insult might be a portal to the Offense Principle. This is especially likely in respect of victims who belong to more vulnerable groups within society, for whom insults may have greater resonance than for the majority of citizens.²¹

Similarly, what constitutes an unduly self-revelatory conversation in a

18. As it happens, existing treatments of insult vary within Western Europe. Germany and Sweden both have general criminal prohibitions of insult (although the proceeding must ordinarily be initiated by private prosecution); England's provision on the subject is somewhat less sweeping. Compare the German Penal Code, s. 185, and Swedish Penal Code, ch. 5, s. 3, with the Public Order Act 1986 (UK), ss. 4A and 5.

19. See below; see also Section III. For example, wrongs of these sorts raise problems of definition, since not every intentionally demeaning act is a wrongful insult. It may be difficult for the law accurately to specify the criteria of insult in a workable form.

20. For example, commitment to a particular religion may entail opposition to other religious ways of life.

21. Cf., e.g., *Collin v. Smith*, 578 F 2d 1197 (1978); *R v. Keegstra*, 61 CCC 3d 1 (1990). We revisit insult in Section II.

train or restaurant is no doubt too variable a matter to be the subject of criminal legislation. Despite this, some clearer varieties of “public indecency” might properly be proscribed as exhibitionism, including indecent exposure, public urination or defecation, sexual congress in public, or the like.²²

Conclusions about the significance of particular conventions, and the rightness of criminalizing specific forms of behavior, will scarcely be beyond debate. One might argue that we would be better off if few or no obligations of mutual reticence were recognized, or that any such obligations are overridden by the need for mutual tolerance of diverging lifestyles. This shows that the way forward is contentious, since the ethical norms underpinning a particular claim of offensiveness may themselves be disputable. But it does not lead us back to Feinberg’s claim that the normative basis for taking offense should not matter.

Respect and Social Convention

Both of the varieties of offensiveness just noted depend, in one way or another, on social convention. In modern England, bare legs are acceptable; genitalia are not. A further difficulty, therefore, is the challenge that our analysis is simply a vehicle for enacting conventional moral norms through the criminal law. We think not, although the reasons for our view can only be sketched here. In the account we have presented, the importance of convention is intermediate rather than directly constitutive of the wrong in offensive actions. This intermediate role is, indeed, typical. Much, if not all, of our interaction with others is shaped by conventions. Often the very meaning of actions (e.g. waving good-bye by moving one’s arm) is straightforwardly a matter of shared conventions. On other occasions, the relationship is more complex. Ordinarily, one wears dark colors to a funeral, because this indicates that one approaches the occasion with due gravity and respect; failure to do so may be offensive, because it signals to others that the occasion is not respected in this way. In turn, it also communicates a lack of respect for the other participants to whom the occasion is important.

Suppose a convention exists that one does not expose oneself, uninvited, to strangers. While breach of that social convention may convey a lack of respect for others, it is not the breach itself that makes one’s behavior offensive, because the convention is primarily of instrumental rather than intrinsic value. It helps to delineate the boundaries between personal and public, something that necessarily involves limits on what kinds of access people may have to the lives of others. Lying behind it are the interests of *people*, especially in our having some degree of control over the terms of our interaction with others. D’s respect for V implies respect for the terms

22. In German law, for example, this conduct would be punishable under Penal Code ss. 183 (exhibitionist behavior) and 183a (exhibitionism leading to public outrage). *See also* the Swedish Penal Code, ch. 16, s. 16.

under which they (usually, by convention) interact. This holds independently of the particular terms of the convention. When D exposes himself, uninvited, to V, he both violates the applicable social convention and, further, wrongs V by failing to respect the terms under which she interacts with others. Conversely, where the applicable convention is not violated, the identical behavior toward V may disclose no lack of respect. Thus nudity on a public bus is different from nudity on a public nudist beach, even though, for some persons, it may produce the same level of affront in either case, and even if D knows this.

The interplay between offense and convention is no surprise, since the wrongfulness of offense is closely connected to the expressive vice of incivility. Offense communicates basic moral attitudes of disrespect, intolerance, and inconsiderateness; this communication operates by reference to socially conventional rules for the expression of respect, tolerance, and the like. Hence offense is tied to social conventions in a way that many moral values (including tolerance and respect, *per se*) are not.²³

There are deep waters here, which cannot be resolved within the scope of this paper. Prior to a relevant social convention, the difference between exposing legs and exposing genitalia may not be obvious. Yet even if the content of a convention be arbitrary, that convention may create reasons for action once it comes into existence, in virtue of the underlying purposes it serves. On this view, exhibitionism is a wrong not because of the inherent content of the exhibit, but because D's act treats V disrespectfully by violating a convention about reticence and restraint in self-disclosure that helps to maintain mutual respect.²⁴ Rules often create reasons in this way: It may be a random matter whether, in a given society, one drives on the left-hand or the right-hand side of a road—but the rule, once adopted, crystallizes reasons for driving on one side or the other. Similarly, violation of a seemingly arbitrary convention may be wrong in virtue of the underlying purpose that convention serves.

A further caveat is appropriate. Our remarks here concern the relationship between valuable conventions and wrongs.²⁵ They presuppose that the relevant social convention, underpinning the finding of an offensive wrong, is valuable. It may be that a particular convention is itself objectionable because of the behavior it requires or prohibits, notwithstanding that the convention might have instrumental value. Where this is so, the finding of wrongdoing will fall away if, all things considered, there are no (unde-

23. For valuable discussion of the differences between expressive and other virtues (and vices), see Calhoun, *The Virtue of Civility*, 29 PHIL. & PUB. AFF. 251 (2000); see also Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 ETHICS 795 (1999). As Calhoun observes, communicating moral attitudes is not the same thing as having those attitudes; it matters, for example, not just that V is respected but also that he *feels* respected.

24. Cf. Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3 (1998).

25. Indeed, they concern only one aspect of that relationship. It may be, for example, that conventions give shape to offensive wrongs in different ways, depending on the nature (coordinating, aesthetic, etc.) of the relevant convention.

feated) reasons for objecting to D's conduct. One example of this might be a convention that contravenes the human rights of some members of the community. Suppose, for example, that there still were a convention in Alabama that persons of different races should not have any physical contact in public. If an interracial couple hold hands in the park, they breach that convention, but it does not follow that their behavior is offensive—even though it may cause widespread affront amongst others in the park.

Mediating Principles

Doubtless, insult and exhibitionism do not exhaust the grounds for considering conduct offensive in the context of the criminal law. Reflection on other types of obnoxious conduct may suggest different reasons. But such reasons should be made explicit and be subjected to critical scrutiny before conduct is deemed offensive. It is not enough that the conduct be widely disapproved of or that it infringes traditional taboos.

The conclusion that conduct is offensive (for the kind of reasons just proposed) is not *sufficient* to establish that the conduct should be criminalized. Amongst other things, the consequences also count: Affront must be serious and widespread, as Feinberg insists. Indeed, arguably the conduct must also involve harm—we shall investigate this requirement below. Moreover, there remain mediating considerations that need to be taken into account.

Some of these mediating concerns take the form of restraining principles, such as freedom of speech. In political discourse, for example, it may be necessary to tolerate insulting utterances for the sake of having free public debate. Other mediating concerns constitute pragmatic criminal-policy and social-policy considerations. Consider insult. Having a general criminal prohibition against insult may make more sense in a highly-ordered society with well-established patterns of deference and civility than in a more loosely organized, rough-and-tumble society. Given that most West European countries have been evolving in the latter direction, it may be preferable to eliminate or narrow the scope of such general prohibitions where they now exist in law. However, this still leaves open the possibility that certain grave forms of insult—such as demeaning references to minority groups—should be presumptive candidates for criminalization.²⁶ We return to these considerations in Sections II and III.

If such mediating factors are still involved in decisions to criminalize, how have we gone beyond Feinberg's analysis—which we criticized earlier for relying too much on various weighing factors? The answer is that, on our account, these factors will operate differently and with narrower scope. In Feinberg's theory, conduct is *prima facie* offensive merely if it is experi-

26. Cf. the German Penal Code, s. 130(1) and the Swedish Penal Code, ch. 5, s. 5, which contain such prohibitions; *see also*, in the UK, the Public Order Act 1986, s. 19.

enced as being unpleasant. Much of his analysis then depends on how intensely and how widely it is thus disliked. On our analysis, such behavior is not even presumptively offensive: Reasons must be given why the behavior is insulting, exhibitionist, and so on.

Further, some of the factors that Feinberg treats as weighing factors would be given different status in our analysis. On his view, the “reasonable avoidability” of the conduct weighs against criminalization. Hence it ordinarily militates against criminalizing purportedly offensive behavior conducted in private. But it is no absolute bar to criminalizing such conduct; if sufficient numbers were upset by “the very thought” of the behavior occurring behind closed doors, Feinberg admits, it could be prohibited.²⁷ On our analysis, the presence of an audience would be no mere weighing factor but a necessary part of the reasons that make conduct offensive in the first place. Exhibitionist conduct, for example, involves compelling others to view certain intimate behavior. It cannot occur unwitnessed.

II. THE OVERLAP BETWEEN OFFENSE AND HARM

Even if the Offense Principle is modified as we suggest in Section I, there remain structural differences between the Harm and Offense Principles. It is only within the latter principle, for instance, that considerations of reasonable avoidability play a role. These differences suggest that while the principles may overlap in their application to particular actions, they are at their core separate and paradigmatically apply to different types of actions.

Intuitively, it seems clear that there is a difference between offensive and harmful behavior. But even if harm and offense are distinct, it does not follow that liberals need to subscribe independently to the Offense Principle. In Section II, we discuss ways in which some offensive actions may invoke both the Harm and the Offense Principles. Arguably, these are the only offensive actions for which criminalization is justified, a proposition that raises questions about the need for a separate Offense Principle. We shall address those questions in Section III.

Distinguishing Harm from Offense

What distinctions are there between harmful and offensive actions, such that criminalization of the former is thought to lie within the scope of the Harm Principle and criminalization of the latter is not? The main difference lies in their generic consequences. Harm involves a setback to a person’s interests, where a person’s interests comprise the things that make his or her life go well.²⁸ When we are harmed, our lives are changed for the

27. OFFENSE, 64–67.

28. In Feinberg’s account, “One’s interests . . . consist of all those things in which one has a stake. . . . These interests, or perhaps more accurately, the things these interests are *in*, are

worse. In particular, harm involves the impairment of a person's opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen goals. In this sense, harm is prospective rather than backward-looking; it involves a diminution of one's opportunities to enjoy or pursue a good life. Characteristically, harm is brought about through the impairment of V's personal or proprietary resources. However, as Feinberg observes, what makes such impairment harmful is not the impairment per se but its implication for V's well-being:²⁹

A broken arm is an impaired arm, one which has (temporarily) lost its capacity to serve a person's needs effectively, and in virtue of that impairment, its possessor's welfare interest is harmed.

Similarly, of interference with another's proprietary resources, Raz observes that: "any harm to a person by denying him the use of the value of his property is a harm to him precisely because it diminishes his opportunities."³⁰ Here Raz acknowledges that the justification for recognizing property rights requires, ultimately, an account that gives priority to persons. D's proprietary rights are not ends in themselves: Before the state may legitimately intervene, there must be harm to D (or others).

By contrast, at least paradigmatically, offensive behavior does not reduce a person's opportunities or frustrate his goals. Rather, it causes the victim distress without adversely affecting the sorts of interests that are the concern of the Harm Principle. Offense, we have seen, is marked by the fact that it involves a (wrongful) causing of affront to another person. In this sense, offense is experiential rather than forward-looking: The affront suffered by V need not, though it may, survive the cessation of the offensive conduct. Hence offended states are not in themselves a harm,³¹ since they do not necessarily imply any prospective loss of opportunity on the part of the victim: "They come to us, are suffered for a time, and then go, leaving us as whole and undamaged as we were before."³² They do not,

distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish. What promotes them is to his advantage or *in his interest*; what thwarts them is to his detriment or *against his interest*." Harms, 34. See, too, his *Harm to Others: a Rejoinder*, CRIM. JUST. ETHICS 16, 26 (1986), where Feinberg recapitulates: "I argued that to harm a person was to set back his interest and violate his right. To have an interest, in turn, is to have a stake in some outcome, just as if one had 'invested' some of one's own good in it, thus assuming the risk of personal harm or setback."

29. HARM, 53. Cf. Kleinig's claim that, in the case of an abduction that has no lasting effects upon its victim, there can be interference with a welfare interest but no harm: Kleinig, *Crime and the Concept of Harm*, 15 AM. PHIL. Q. 27, 32 (1978); FEINBERG, HARM, 52-53.

30. Raz, *Autonomy, Toleration, and the Harm Principle*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 313 (Gavison ed., 1987) at 327. Cf. PeFry, *Corrective v. Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237 (Horder ed., 4th series, 2000) at 256: "The main reason that personal injury constitutes harm is that it interferes with personal autonomy. It interferes, that is to say, with the set of opportunities and options from which one is able to choose what to do in one's life."

31. Cf. OFFENSE, 3.

32. HARM, 45.

in other words, set back our interests.³³ Ordinarily, the causing of offense is not a matter that interferes with the victim's capacity to enjoy or pursue a good life. There are, of course, exceptions to this proposition, but they fall to be dealt with below as exceptions and not as characteristic of offensive behavior.

The Need for a Wrong?

We argued in Section I that offense requires a wrong. However, while the specific character of that wrong may be distinctive (a point to which we return in Section III), offense cannot be differentiated from harm merely in virtue of being wrongful, because the Harm Principle also requires a wrong.³⁴ Indeed, this requirement is one reason why we associate harms with damage to personal or proprietary resources. Suppose, for example, that D steals an old shirt from V. The shirt is worthless and of no use to V; indeed, V normally throws his old clothing out and has forgotten about the existence of the shirt.³⁵ Its theft affects him not at all. Further, the shirt ends up in the hands of T, who is destitute and in great need of clothing. T's interest in the clothes is far greater than V's. Yet V is wronged by D, and V wrongs no one if, later, he discovers the theft and rather selfishly reclaims his shirt from T. V's act of reclamation falls outside the scope of the Harm Principle because, although T's situation is worsened when he is deprived of possession of the clothes, he has lost nothing to which he had a right.³⁶ This example illustrates the point that where D's action sets back V's well-being, D has a *prima facie* reason not to perform that action, but the state does not yet have a reason coercively to prevent D from performing that action. The interests of different members of a society frequently

33. This is so even though, according to Feinberg, people have an "interest" in being treated with due consideration and respect, an interest that is violated (rather than set back) when a person is offended by the conduct of another: "All offenses (like all hurts) are harms, inasmuch as all men have an interest in not being offended or hurt. . . . [O]ffensiveness as such is strictly speaking a kind of harm, but harm of such a trivial kind that it cannot by itself ever counterbalance the direct and immediate harm caused by coercion." (Feinberg, *SOCIAL PHILOSOPHY* (1973) 28.) But "interest," in this passage, has a different meaning from that upon which the Harm Principle depends. Consequently, the passage tends to conflate harm with wrong—on which *see infra*, text at note 40.

34. *Cf. Raz, supra* note 30, at 328: "Since 'causing harm' by its very meaning demands that the action is *prima facie* wrong it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded."

35. *Cf. Gardner's and Shute's example*, which they describe as "the pure case of burglary": "Suppose an estate agent who has a key to my house lets himself in while I am on holiday and takes a pile of my old clothes from the attic, passing them on to a charity shop. I had long since forgotten that the clothes were there, and I had no further use, anyway, for loon pants and kipper ties. The burglary goes forever undiscovered." *The Wrongness of Rape*, in *OXFORD ESSAYS IN JURISPRUDENCE* 193 (Horder ed., 4th series, 2000) at 201. The authors' description is, we think, a little misleading; it is better characterized as a pure case of (burglariou) theft. *See infra*, note 37 and text *thereat*.

36. At least, T has no right maintainable against me to the clothes. He may still suffer a theft at the hands of someone else.

conflict; the requirement for a wrong supplies one means by which those interests are mediated.

The Experiential Nature of the Wrong

Offensive behavior, then, involves conduct that constitutes a wrong but that does not intrinsically set back the victim's interests and well-being. On this view, the intrinsic character of offense differs from harm in that it need involve no damage apart from the affronted mental state that is caused to the victim.

Tentatively, we can say something further about that consequence of affront. Underlying both offensive and harmful actions is the agent's distinctive contribution: her physical conduct. Diregarding telekinesis, it seems reasonable to assert that physical conduct is an indispensable means of bringing about both offense and harm. Typically, the agent's conduct brings about harm and offense *through* differentiable routes. Harms (property damage, physical damage, etc.) are normally brought about by an agent in a straightforward causal manner. By contrast, offense normally involves causation of a certain sort of mental state through some form of sensory communication from the wrongdoer to the victim, and in particular through conduct that manifests a lack of consideration or respect for the victim. This underpins the essentially *experiential* character of offense: why, unlike harm, offense cannot occur unless V is aware of D's behavior, and why "bare knowledge" offense seems, in this respect, to resemble moralism. Of course, harms too can be caused by communicative means; think of Holmes's example of gratuitously shouting "fire" in a crowded theater. Therefore this characteristic cannot suffice to distinguish harm from offense. But it seems at least to be a facet of offensive actions. We return to this point in Section III.

The Breadth of the Harm Principle

We have argued that there is no conceptual link between offensive actions and harm. Nonetheless, it is possible for offensive actions to fall within the scope of the Harm Principle. This is because the Harm Principle is capable of applying to actions that lead only indirectly to harm and not just to actions that are intrinsically harmful. In order to elucidate this claim, it is necessary to spend some time exploring the scope of the Harm Principle.

Paradigm cases for prohibition under the Harm Principle arise when D's action directly attacks the conditions of V's well-being. Consider, for example, the wrong of burglary. A typical burglary occurs when D breaks into V's home in order to steal. Of course, breaking into V's home is a significant physical step by which D commits herself to carrying out the theft, and it might warrant criminalization as an attempt to commit a crime (theft) that

itself standardly involves harm. But burglary is more serious than either trespass or mere theft.³⁷ The trespassory entry by D not only exposes V to risk of the further crime; it also, in so doing, violates V's private life. Interaction with and exposure to other members of society is integral to public life; conversely, our sense of identity and well-being as individuals depends upon our being able to reserve private space from which other persons can be excluded. It is through controlling our private environment that we are able to have "breathing space" from the challenges presented by interaction with other people. Burglary compromises that space. It is hardly surprising that house burglary, in particular, causes victims great distress even if they were absent at the material time. The victim of such a burglary cannot be sure of the peaceable enjoyment even of her own home. For most people, when the integrity of their private space cannot be taken for granted, one of the foundations of their well-being is destroyed.³⁸

No one seriously suggests, however, that actions may be criminalized under the Harm Principle only when they cause harm in so fecund a manner. And it is a mistake, we think, to try to shoehorn every case into a model that requires a direct attack on D's well-being. Consider Feinberg's discussion of a bare trespass:³⁹

A trespasser invades the landowner's interest in "the exclusive enjoyment and possession of his land." Technically that interest is violated when the trespasser takes one quiet and unobserved step on the other's land; in the somewhat special sense of harm that we have been developing, such a violation sets back an interest, and to that extent therefore harms the interest's owner, even though it does not harm any other interest, and may even be beneficial on balance.

The problem with this analysis is that it tends to collapse the distinction between harms and wrongs,⁴⁰ since individuals can always be said to have an interest in not being wronged. The very reason why bare trespass is a difficult case is that the wrongdoer's action violates the landowner's right but causes no harm.⁴¹ To hold otherwise would be to make a merely formal move, modifying our conception of harm within the Harm Principle in order to include bare right-violations and thereby disguising without dissolving the problem posed by harmless wrongdoing.

Even so, it does not follow that *per-se*-harmless wrongs of this sort always

37. Thus Gardner and Shute err when they describe their example of burglary-plus-theft (*supra* note 35) as "the pure case" of burglary. Strictly speaking, the pure case occurs when D enters as a trespasser in order to steal but leaves without taking anything.

38. Cf. Simester and Sullivan, *CRIMINAL LAW: THEORY AND DOCTRINE* (2000) 507.

39. *HARM*, 107.

40. A similar error is made by Duff: see *INTENTION, AGENCY AND CRIMINAL LIABILITY* (1990) §5.3; see also *Subjectivism, Objectivism and Criminal Attempts*, in *HARM AND CULPABILITY* 19 (Simester and Smith eds., 1996) at 37 n. 68.

41. Hence Gardner and Shute rightly describe their burglary example (*supra* note 35, at 202) as "the case of the wrong and nothing but the wrong."

involve action that should be tolerated rather than criminalized under the Harm Principle. There are a number of ways in which such harmless actions may come within the scope of the Harm Principle. Most obviously, this will occur where such wrongs *standardly* cause or create a risk of harm, even if not in every instance. The justification for criminalizing these cases is, in part, practical. Inevitably, the criminal law is a blunt instrument, capable of acting in terms of standard cases and incapable of reflecting the myriad variations upon those standard cases that real life delivers.

To a large extent, this constraint is a matter of resources and of their efficient use—it is simply uneconomic to frame and administer laws that take into account the idiosyncrasies of every person's situation. Hence criminal law tends to prohibit actions on the basis of their typical risks and consequences, leaving further refinement, if any, to the realm of exceptions. A good example of this is the speed limit. In England, it is an offense to exceed 70 miles per hour on the highway even if, on some occasions, doing so poses no significant risk of harm to others (perhaps the road is empty and the driver is Michael Schumacher). Specifying a precise limit is a convenient and enforceable means by which to regulate dangerous driving, and the limit itself is determined by reference to acceptable levels of risk in standard cases.

Wrongs That Lead Indirectly to Harm

Legitimate criminalization of apparently harmless wrongs under the Harm Principle cannot always be derived from the standard case. There is a variety of ways in which the Harm Principle may come into play notwithstanding that the wrong does not directly cause harm even in standard situations.

First, the action may be harmful by diminishing well-being not immediately, in the ways described above, but *remotely*. My selling you a handgun, for example, does not in itself harm you but rather puts you in a position where subsequently you may harm another person. This possibility is an implicit feature of inchoate offenses, such as incitement to murder, and of what are sometimes called “substantive inchoate” offenses, such as the offense of “going equipped”: It is a crime in many countries to be on the street at night in possession of an instrument of burglary, such as a jemmy (or “crowbar”), without lawful excuse. The justification for this offense is not that I have the jemmy, but rather that I might use it.

It is necessary to sound a cautionary note about this form of justification. While it may sometimes be appropriate, very often there are difficulties about basing criminalization on remote harms, especially those predicated on the eventual criminal choices of third persons. To invoke the Harm Principle, we have noted, an action must not only be conducive to harm—it must also be a wrong. This constraint is particularly apposite to the criminal law. Punishment, as we have mentioned, embodies by its nature an element of blame or censure; it is unclear that D may properly be condemned for her nonharmful action just because that action happens to be linked,

through chains of complex social interaction, to the subsequent injurious behavior of some separate and autonomous person, E. It seems unjust to impose penal censure on D, at least where D has little or no ability to control the harmful choices of E and where D has not sought to assist or encourage those choices.⁴²

A second type of ground for criminalizing apparently harmless wrongs under the Harm Principle depends on the crystallizing role of rights. Stealing my old clothes not only sets back the interest, if any, that I have in the clothes; it also undermines the *regime* by which my property right in the clothes is recognized. That is to say, more than one type of interest is at stake when my clothes are stolen. Apart from my immediate interest in the clothes, both I and others have an interest in the existence of a system for allocating and reallocating property rights in general.⁴³ Thus, even where a theft does not set back V's personal interests, it sets back the interest we all have in the effective existence of a property law regime. The regime itself serves our well-being by providing a reliable means by which we can seek to improve our own lives through the voluntary acquisition, use, and exchange of resources. Having such a regime augments our autonomy; as Coleman observes, this would be true even if the particular form of that regime were not distributively ideal and it failed to secure an optimal set of proprietary entitlements for citizens.⁴⁴

The third ground shares the indirect character of the first two. Harm can also occur when people are affected by the *prospect*, rather than the actuality, of a wrongful action. One reason why the state sometimes intervenes to prevent public nuisance, for example, is not that the relevant action is harmful, but rather that avoiding it causes great inconvenience.⁴⁵ In such cases, the Harm Principle is invoked not by the nuisance itself but by the precautions required to forestall it. For, as Gardner and Shute observe:⁴⁶

It is no objection under the harm principle that a harmless action was criminalized, nor even that an action with no tendency to cause harm was criminalized.

42. For fuller development of this argument, see von Hirsch, *Extending the Harm Principle: Remote Harms and Fair Imputation*, in HARM AND CULPABILITY 259 (Simester and Smith eds., 1996).

43. Indeed, without that systemic interest, there would be a circularity about the application of the Harm Principle to violations of property rights. This is because, in most modern societies, property rights are not prelegal. Rather, their recognition (and redistribution) is itself a matter of legal rules, and moreover of rules that have varied considerably across different periods of social and common-law development. It follows that, if interference with property rights were per se a harm, it would be a harm the existence of which were determined by the state—and its legitimate criminalization would, in effect, involve us in a self-justifying appeal to the Harm Principle.

44. See Coleman, RISKS AND WRONGS (1992) 350-354. Much the same can be said for breach of contract, which is a wrong in virtue of being a breach of D's promise, a voluntary (and reciprocated) obligation assumed to V. The harm, however, lies not only in a loss of expectation to P under the contract (a loss that does not always set P's interests back), but also in the consequent undermining of the practice of exchanging enforceable reciprocal promises. Even if this practice is imperfect, its reliability promotes our well-being.

45. Cf. *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch 329 (obstructing the highway).

46. *Supra* note 35, at 216.

It is enough to meet the demands of the harm principle that, if the action were not criminalized, *that* would be harmful.

What matters, in other words, is not the question, “Is this act harmful?” but rather, “What if this act were always permitted?”⁴⁷ For example, the fact that I might be burgled may lead me to avoid taking lengthy holidays, take out insurance, install an alarm in my house, and so forth. These are costs that I would not otherwise need or choose to incur, in addition to the intangible harms of uncertainty and insecurity with which the prospect of being vulnerable in one’s home damages one’s life. On the assumption that criminalization is at least partially effective in reducing the incidence of burglary, it therefore helps to reduce harm.

It should be remembered, however, that where criminalization of an action depends for its legitimacy on what we will for convenience call “precautionary harm”, the requirement that the action be wrongful becomes especially important. It is not enough to invoke the Harm Principle that V does not like D’s behavior (say, D’s walking her dog on V’s street) and that V consequently does not leave his home in the mornings and feels obliged to erect fences on his property in order to insulate himself from D’s behavior. V’s response has a claim, as harm, on the state’s attention only if it is a justifiable reaction to D’s wrongful conduct. Thus the wrongfulness of D’s conduct must be independent of V’s response.

This requirement for wrongfulness continues to prevent the Harm Principle from becoming a purely instrumental principle. Nonetheless, the requirement for harm *is* instrumental—the link to harm does not have to be intrinsic. Thus it is a misreading of the Harm Principle and a misguided attempt to distinguish it from the Offense Principle to tie its application to intrinsically harmful actions. The Harm Principle is about wrongful actions that lead to harm; the distinction between the Harm Principle and the Offense Principle does not track the distinction between directly harmful and offensive actions.

Criminalization of Offense under the Harm Principle

We have observed that the Offense Principle contemplates the criminalization of wrongful actions that lack harmful consequences. At the same time, however, we have argued that the Harm Principle can be invoked in favor of criminalizing some action without the need to show that the action is

47. This claim is consistent with Feinberg’s own formulation of the principle (HARM, 26): “It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.” Feinberg’s formula requires that criminalization of an action will prevent harm, not that the action itself be harmful.

directly harmful per se. There is a variety of ways in which wrongdoing may lead to harm.

It follows that the Harm Principle is sometimes capable of applying to offense. Indeed, in our view, offensive conduct can involve harm in each of the divers ways that we identified above. This is not to say that all offensive conduct falls within the ambit of the Harm Principle. But many of the more serious forms of offense do so. (It is a further question, considered in Section III, how strong the argument is in favor of criminalizing the remaining cases of offense.)

First, and most obviously, conduct that is prima facie offensive can lead to physical or psychological harm analogous to that suffered in a physical attack; as when victims of racism, for example, suffer consequent mental breakdowns or hypertensive illnesses.⁴⁸ Similarly, insult may become defamation if it affects a person's social or professional standing. These are straightforward examples. However, the application of this reasoning is sometimes exaggerated. For example, a generalized thesis of offense as psychological harm has been advanced by the American criminal-law scholar, Louis B. Schwartz.⁴⁹ Offensive behavior, he argued, may do no physical harm but nevertheless visits *psychic* harm on the members of its unwilling audience. When ordinary persons see someone exposing himself on a public bus, the dismay, distress, and shock they feel constitutes psychological harm. This injurious character permits appeal to the Harm Principle—so that offensive conduct may be prohibited on the same basis as physically harmful conduct.

Should offense thus be assimilated generally to harm? We doubt it. Psychological harm is something that does exist, and on occasion it may be caused by offensive conduct,⁵⁰ but it consists of more than the state of being affronted. Diminution of one's cognitive or evaluative powers, and so on, is not the standard effect of offensive conduct. The normal person may be irritated or disgusted when seeing someone disrobing on the bus, but he or she is unlikely to suffer such impairments.

Secondly, apart from psychological harm, offensive conduct may attack well-being in more complex ways. Often this consequence is claimed for racial insults: that such insults are liable to lessen the self-confidence or self-esteem of the persons who are the targets of such insults and may damage their sense of identity and membership of society. There is a limited analogy that may be drawn here with rape, a wrong that everyone agrees falls within the Harm Principle. Rape victims may suffer great trauma, lose their sense of self-worth, lose their confidence in their social or physical environment, or be in other ways profoundly affected by their experience.⁵¹

48. Cf. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137–139 (1982).

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

50. Something long recognized in the law of tort: *Wilkinson v. Downton*, [1897] 2 QB 57.

51. See, e.g., Temkin, *RAPE AND THE LEGAL PROCESS* (1987) 1–6.

To diminish a person's actual or prospective quality of life in this sort of way is to harm that person. If similar consequences arise from offensive wrongs such as racist insults, those wrongs are rightly also characterized as harmful.

Thirdly, another version of the offense-as-harm thesis relies on connecting offense to remote harms by claiming that offensive conduct has a tendency to cause harmful results in the long term. This version recognizes that harm involves a setback of interest and that offensive conduct is not ordinarily harmful per se. But incivilities left unchecked, it is contended, lead ultimately to a higher incidence of actually harmful (and criminal) behavior. A paradigm instance of this argument is the "broken window" thesis of the American criminologists James Q. Wilson and George Kelling, who argue that permitting incivilities in a neighborhood (graffiti, unruly behavior by young people, and so forth) will cause the locality's decay, the departure of its more respectable residents, and thus an environment that fosters higher rates of theft and violence.⁵²

As it happens, empirical support for the Wilson-Kelling thesis has been sparse.⁵³ For present purposes, however, the thesis raises a more important and noncontingent issue about justifying the criminalization of offense on the basis of claimed "remote" harms. Those who engage in offensive behavior do no harm themselves but merely help generate social conditions in which *other persons* might choose to do harm. As was noted earlier,⁵⁴ ordinarily such remote behavior, when done by others acting autonomously, does not supply a reason why the original act is wrong and therefore does not supply a ground for criminalization. Offensive behavior, however, is independently wrong; hence, in principle, prospective remote harms need only satisfy the Harm Principle's consequential aspect.

So understood, harmful offense might even be regarded as a paradigm case for the criminalization of remote harms. The strength of this analysis, however, is also its weakness: that the wrongfulness of the conduct is unrelated to its harmfulness. As we shall see in Section III, this disjunction in part underpins our argument that normally the criminalization of harmful offense is best justified under a separate Offense Principle and not simply on the basis of harm.

Not all cases of remote harm suffer from the difficulty identified in the Wilson-Kelling argument. For example, a different argument sometimes made in favor of criminalizing racist insult is that it can have the effect of inducing credulous third parties to value the victim(s) less, thereby undermining the victim's membership of the community and his or her environment and opportunities more generally. Lawrence observes that racist speech delivers a message not only to the victim but also to society at large that the relevant mi-

52. Wilson and Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (March 1982).

53. See Taylor, *Crime, Grime and Responses to Crime*, in CRIME PREVENTION AT A CROSSROADS (Lab ed., 1997).

54. *Supra*, text at note 42.

nority is unworthy of full participation in the affairs of that society.⁵⁵ By working upon the larger audience, Lawrence argues, such speech can actually diminish the victim's participation in society by depriving his or her voice of persuasive power *in the ears of others*.⁵⁶ This is a variety of remote harm; harm, moreover, that is intimately related to the wrongness of the offense. Here, therefore, the Harm Principle is brought within range.

Finally, and most importantly, we have argued that harm can also occur when people are affected by the *prospect*, rather than the actuality, of wrongful action. Unlike the general difficulty with remote harms, such harms are direct consequences of the initial wrong. Paradigmatically, it is *this* type of harm that the criminalization of offensive action forestalls. Recall the example with which we began this paper. If we are seated in a bus when the amorous couple across the aisle carry their affections to the point of sexual intercourse, typically—we said—I am not harmed by their conduct. But if I find such conduct offensive and I know that taking a bus is likely to involve experiences of this sort, I might no longer want to take the bus. As such, I lose an important option the availability of which, for many people, matters to their well-being.

III. A SEPARATE OFFENSE PRINCIPLE?

So far, we have argued that the Offense Principle requires a wrong and not merely that D's conduct causes affront. We have also argued that offensive conduct is capable of causing harm in a variety of ways. Our discussion in this final section concerns two questions. First, might harm, as well as wrong, be a prerequisite of the Offense Principle? Or, in the terms with which we began this paper, are there likely to be cases of offensive conduct that may legitimately be criminalized where the justification for doing so does not refer also to harm? Secondly, if harm is so often involved in offensive conduct, why is the Offense Principle—rightly, in our view—acknowledged independently of the Harm Principle? Why, in other words, should not the criminalization of offensive conduct simply be left to be justified within the terms of the Harm Principle? In keeping with the exploratory spirit of this paper, we do not presume here to settle these questions. Rather, our remarks aim to elucidate aspects of the debates that they raise.

Criminalizing Offense without Harm?

Our first concern is with those types of offensive conduct that do not lead, either directly or indirectly, to harm. For convenience, we term such cases

55. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, DUKE L.J. 431, 439 (1990).

56. *Id.* at 470: "An obvious example of this type of devaluation would be that black political candidate whose ideas go unheard or are rejected by white voters, although voters would embrace the same ideas if they were championed by a white candidate."

mere offense. Here it seems that criminalization must be justified, if at all, by reference to the fact that the conduct manifests a lack of consideration or respect for other persons and that consequently it affronts those others: It is wrong, and it is disliked, but it does not damage other people's lives.

Mere offense differs from mere immorality. The requirement for a wrong, outlined earlier in Section I, is not a requirement just that D's behavior be wrongful. It is, further, a requirement that D's behavior wrongs *someone*—characteristically, that the behavior violates V's right to be treated with due consideration and respect. This difference between offense and immorality creates normative space for arguments in favor of criminalizing mere offense, where those arguments do not just rely on the immorality of the conduct but respond to the fact that D has attacked V's right to be treated as an equal qua self-determined, morally responsible human being. Such arguments give priority to the interests of people and not simply to morality.⁵⁷ Hence they contain and do not eschew the central advantage that the Harm and Offense Principles have over legal moralism.

But are such arguments ever likely to be sufficient in the absence of harm? Two considerations militate against that conclusion. First, criminalization is an intrusive and condemnatory form of coercion. Accepting the general case for criminalizing mere offense will inevitably lead to restrictions on individuals' autonomy, especially because the criminal law is so coarse-grained. For practical reasons, its prohibitions are framed in general terms, ruling out both valuable and valueless instances of a proscribed activity. The strongest cases for depriving people of opportunities in this way arise where D's activity is likely to diminish the opportunities for others to live good lives. In these cases, a condition of D's well-being (her autonomy) is weighed against a condition of V's well-being: Like is compared with like. But in these very cases, D's conduct is by definition harmful. Where, by contrast, the conduct is merely offensive, it is not clear that the grounds for intervention are sufficiently weighty to defeat the strong *prima facie* reasons that always exist not to criminalize. For this reason, and because of the distinctive considerations associated with criminalizing (even harmful) offensive conduct that are outlined in the

57. By way of illustration, one such argument might run along the following lines. First, D's wrongdoing generates a conflict between V's right to be treated with respect and D's liberty to behave offensively. Further, that conflict is not an abstract one: typically, D's attack has real, unpleasant, effects in virtue of the affront it causes to V. At the same time, since D's offensive behavior is *ex hypothesi* a wrong, there is no reason for the state to support D's liberty to behave in that manner, save insofar as is necessary to protect the conditions of D's well-being. Hence, to the extent that the state has good reason to intervene, it may be thought that V's rights should be preferred. Secondly, arguably the state *does* have good reason to intervene. Where the conflict is sufficiently serious (e.g., because D's behavior causes widespread offense across a society), one might argue that the state is an appropriate referee, bearing in mind the state's role in setting the terms of interaction between individuals in society. It is not important here to decide whether this line of reasoning is convincing. The point of stating it is to illustrate the possibility of such arguments for criminalizing mere offense.

next section, it is arguable that mere offense is by itself insufficient for criminalization.

This conclusion is buttressed by an observation. Intuitively, the kinds of offensive conduct for which criminalization seems most plausible are those that also involve harm. Consider insult: The strongest case for its prohibition concerns racial insult. Yet the latter conduct not only conveys contempt but also has the potential adversely to affect V's access to community life—which is a matter of harm. Similarly, consider exhibitionism: Indecent exposure in public spaces such as streets or parks not only shows a lack of consideration and respect but may also restrict others' access to and enjoyment of these public facilities—again, a matter of harm. From a liberal perspective, it is difficult to think of an attractive case for criminalizing offense where, either directly or indirectly, no form of harm is involved.

Do We Need a Separate Offense Principle?

If the kinds of offensive behavior that liberals should wish to criminalize so often—and plausibly always—also involve harm, what remaining role is there for the Offense Principle? Why not decide whether to criminalize offensive conduct, like other wrongs, simply by reference to the Harm Principle? Our conclusion on this question is tentative. But even if one assumes the strongest case, that is, that there are insufficient grounds to criminalize mere offense, we think there remain good reasons why the criminalization of offensive conduct should be determined under a separate Offense Principle.

The Dependence of Criminalization upon Offensiveness

The first step in our reasoning involves a subsidiary question. Since we are concerned with cases of harmful offense, why not disregard the offensive character of the conduct altogether and decide whether to criminalize it (within the terms of Harm Principle) simply on the basis of its harmfulness? This is really a question about the Harm Principle, but we must dispose of it before proceeding. In our view, the question misunderstands the nature of the Harm Principle. It neglects the requirement for a wrong. In Section II, we observed that the harmful consequences of offense can be remote and contingent. The exclusionary social effects of racial insult, for example, may depend on the decisions and reactions of other independent actors—perhaps D's racial insult restricts V's opportunities because it induces third parties to think worse of V, so that they become less willing to offer him employment or to interact with him socially. As we noted earlier,⁵⁸ criminalizing actions by reason of such remote harms is ordinarily problematic because D exercises little or no control over the choices of the eventual

58. *Supra*, text at notes 42 and 54.

harm-doers. Those choices do not make D's conduct wrong. In racial-insult cases, however, there is more than an eventual harm mediated through others' choices; there is also a wrong by D himself. It is via *this* act of treating V with gross disrespect that D becomes eligible for penal censure. Hence it may be legitimate to criminalize racial insult yet, at the same time, illegitimate to criminalize other varieties of conduct that also reinforce adverse racial stereotypes but that involve no immediate wrong by the actor.

However, notwithstanding that each principle requires a wrong, in other respects the criminalization of harmful offense involves different considerations from those that are involved in the criminalization of other harmful wrongs. If the structure of the offense-criminalization decision differs from the structure of the Harm Principle, it follows that the Offense Principle has independent status. We believe this to be the case, for two reasons.

First, it seems to us that the shapes of the Harm and Offense Principles differ, reflecting difference in the balance of work done by harm and wrong. In the Harm Principle, harm, its gravity and likelihood, is the driving force behind the decision to criminalize. Conversely, in the Offense Principle it is the conduct's offensiveness that provides the initial impetus toward criminalization—which is why one might take seriously the possibility of criminalizing mere offense while simultaneously rejecting the possibility of criminalizing mere harmless wrongs.⁵⁹ What is noxious about insult, for example, is primarily its offensive character rather than any consequences it may generate: that it treats those targeted with gross disrespect. As such, the significance of harm within the Offense Principle seems to lie in counteracting the mediating factors that otherwise militate against criminalization, such as the restraining principles regarding free expression and public-policy concerns requiring a degree of resilience in a diverse, rough-and-tumble society (more on which below). These restraining principles militate against prohibiting mere insult. With racial slurs, however, elements of harm enter the picture—this particular species of insult may adversely affect the ability of minority groups fully to participate in the community's social, political, and economic life. Within the Offense Principle, those prospective harms work to defeat the mediating factors; the policy concern with resilience has less force, for example, when the conduct damages people's social and economic opportunities.

59. The claim here is a strong one: (1) that the wrong supplies a positive reason—even if, as we saw when discussing mere offense, not a sufficient reason—in favor of criminalization. (By contrast, although the Harm Principle requires a wrong, that wrong operates typically as a *sine qua non* of the decision to criminalize, without generating additional reasons for doing so.) Note, however, that this analysis is severable from our weaker claim; (2) that the Offense Principle better tracks the shape of the criminalization decision, its processes, and principles, than would a Harm Principle within which offense were subsumed. A person who rejects (1) may still accept (2) and conclude that there is reason to retain a separate Offense Principle. In that case, however, the Offense Principle would not create new cases for criminalization beyond those recognized under the Harm Principle. Rather, it would be a limiting principle, dealing specifically with offensive harms and narrowing the range of such cases that otherwise would qualify for criminalization under the Harm Principle.

The Distinctive Considerations Associated with Offensive Conduct

The second difference is one of particular content. While both the Harm and Offense Principles require wrongdoing, the wrong required by the Harm Principle has no special marque and tends to vary according to the harm involved. By contrast, the wrong of offense is independently a communicative wrong, one that does not arise in virtue of any further consequence. In Section II, we noted that offensive conduct is characteristically a form of expressive action, something that expresses to V, the person experiencing the conduct, a lack of respect and consideration. This feature is distinctive of the Offense Principle. In turn, because of the expressive nature of the wrong being assessed for criminalization, the internal structure of the Offense Principle differs from that of the Harm Principle. Hence the principles exist separately.

Why is this expressive character so important? Even though D's offensive conduct may not be valuable when viewed in isolation, nonetheless it can be valuable as a constituent expression of D's chosen way of life—a way of life that on the whole may be valuable, even if this element in isolation is not. The overamorous couple on a public bus may offend, but their activity may for them be an important expression of their personal relationship—and that relationship may in turn be loving and worthwhile. We may say to the couple that they should conduct their relationship differently, at least in public, without meaning to attack that relationship. But if the offensive conduct is for that couple⁶⁰ an integral element of their relationship, then in attacking that element we necessarily attack the whole. And when we criminalize that element, we suppress that particular, valuable way of life.

Prohibition of such activity may yet be justified. It is a commonplace that criminalization removes options. Its doing so is a price we must sometimes pay, for example if undue harm is to be prevented. But where the conduct is an act of communicative expression, there is special reason to be cautious. For most of us, our lives involve and are in part defined by the interaction and relationships we have with other members of our society. A successful life normally requires that there be conciliation between the individual's way of life and the society in which she lives, something that depends in turn on the individual's being permitted to express her own values and chosen life in a tolerant environment. It is only through such interaction that her participation in and membership of the society are affirmed in the eyes of both the individual herself and her audience.⁶¹ Thus the prohibition of communicative acts, including offensive ones, tends not only to censure and preclude the particular act that is proscribed and the way of life to

60. As Raz observes, "We cannot deny them sovereignty over defining for themselves what their way of life is, and what is integral to it." *Free Expression and Personal Identification* in *ETHICS IN THE PUBLIC DOMAIN* 146 (revised ed., 1995) at 162.

61. *Cf. Raz, id.* at 153ff.

which that act gives expression, but also to undermine D's participation in the society itself.

The consideration outlined here is buttressed by other lines of argument in favor of a right to free expression, such as arguments that link the right to our collective interests in having a democratic government that observes the rule of law.⁶² Collectively, they skew the *Offense Principle*, in particular, against criminalizing even harmful offense. Moreover, the inherently communicative wrong of offensive conduct warrants other, structural differences between an Offense Principle and the Harm Principle. In particular, the avoidability of the offense and the alternatives available to the actor play a key role under the Offense Principle in mediating the attempt to reconcile interaction between different ways of life. It is no answer to the argument for criminalizing assaults on 15th Street that anyone can walk safely down 14th or 16th Streets; that 15th Street is avoidable. By contrast, indecent exposure or portrayals thereof may be permitted at designated beaches and in licensed cinemas. D is thereby left free to express himself. But V does not have to pay attention.

To some extent, the argument made here also militates *against* D, since D's offensive action may itself be inimical to V's way of life. In such cases, however, the attack is ordinarily private; it may undermine V's way of life but it lacks the authoritative voice of the state and does not undermine his membership of the community.⁶³ By contrast, criminalization condemns D's expressive conduct on behalf of the community. Here, too, the possibility of avoidance is important in ensuring that D's attack on V is not representative of the environment as a whole. One of the objections to racial insults directed against minorities, for example, is that frequently such insults are not isolated but widespread; conversely, racial slurs against someone of the majority race in a community are unlikely to be so pervasive. Where insult is widespread and unavoidable, the force of each insult is, in part, that it is no longer private; the victim comes into conflict not only with a particular wrongdoer but with the community of which he is a member.

In sum, there is a conceptual link between offense and expression. It follows that there is a conceptual link between the justification of the Offense Principle and freedom-of-expression arguments. The need to accommodate diverse and sometimes inconsistent styles of life, which may depend for their success on being socially accepted, militates in favor of a "thick skin" approach to the regulation of expressive acts, even where those acts are offensive to others. Friction is a characteristic of social interaction, at least in a pluralistic society. Such societies require of their members a certain robustness of sensibility, so that incivility is sometimes tolerated for the sake of social discourse. But this, it seems to us, is no bad thing.

62. We do not explore these arguments here, mainly because the existing literature is so extensive.

63. There may be exceptions to this, e.g., where D has representative standing or where the law is such that only views such as D's may be expressed. It is unnecessary to pursue them here.