OFFENSE TO OTHERS. By Joel Feinberg.[1] New York: Oxford University Press. 1985. Pp. xix, 328. $12.95.

Stanley C. Brubaker[2]

Offense to Others is the second volume of what will surely become Professor Joel Feinberg's magnum opus, a unified four volume inquiry into the moral limits of the criminal law. Each volume deals with a single kind of reason that is offered for restricting liberty: harm to others (volume one), offense to others (volume two), harm to self (volume three), and legal moralism (volume four). It is an avowedly liberal endeavor, which self-consciously attempts to vindicate at least the "motivating spirit" of John Stuart Mill's *On Liberty*, while qualifying its argument "in light of the many accumulated difficulties and criticisms."

Feinberg departs from Mill in two significant respects. First, he abandons Mill's utilitarianism for the method of "coherence." That is, he establishes the strength of a proposition by showing that its denial would entail a proposition that the reader finds unacceptable; or alternatively, he argues that what the reader believes true or right has certain implications of which the reader may be unaware. "If the argument is successful," he writes, "it shows to the person addressed that the judgment it supports coheres more smoothly than its rivals with the network of convictions he already possesses, so that if he rejects it, then he will have to abandon other judgments that he would be loath to relinquish."[3] Second, using this method, Feinberg acknowledges the need to move beyond "harm to others," the only limitation on liberty Mill accepted. Feinberg embraces, with numerous qualifications, the principle of this volume, "offense to others." In keeping, however, with the "motivating spirit" of Mill, Feinberg promises to maintain throughout these volumes that the true liberal must reject the principles of "harm to self" and "legal moralism" as limits on liberty.

After defining "offense" as "the miscellany of universally disliked states," Feinberg takes the reader on an imaginary "ride on the bus," where he is confronted with six distinct clusters of offenses in thirty-one variations. These include affronts to senses (fingernails scratching a tablet); disgust and revulsion (coprophagic diners); shock to moral and religious sensibilities (smashing of a corpse's face by mockful mourners); shame, embarrassment, and anxiety

1. Professor of Philosophy, University of Arizona.
2. Associate Professor of Political Science, Colgate University.
3. J. FEINBERG, HARM TO OTHERS 1 (1984).

(ten stories in all, with passengers engaging in an astonishing variety of sexual acts). Most readers, it can be assumed, will emerge from the bus with their "network of convictions" firmly supporting limits on liberty based on offensiveness.

Drawing from private nuisance actions in the law of torts, Feinberg develops the conceptual apparatus for determining when offensiveness justifies the limitation of liberty. He urges a balancing test. One side of the balance is the "seriousness of an offense," taking into account the magnitude of the offense, its avoidability, and whether one voluntarily exposed oneself to it. On the other side is the "reasonableness of the offending conduct," taking into account its personal importance to the actor, its social value, the nature of the locality, whether there are less offensive alternative avenues for the conduct, and whether the actor's motives include spite and malice. Feinberg then turns to what are probably the most controversial and complex areas of offense to others, "profound offense" (which we shall consider later) and "obscenity."

Most of this volume is devoted to obscenity, considering that concept in three distinct senses: as a type of offense felt towards an object, as a technical legal term for a type of pornography, and finally, as a class of impolite words. The most difficult sense to delimit, of course, is the first. Here Feinberg skillfully locates the concept in popular vernacular and identifies vulgarity and "yukkiness" as the most basic components of its offensiveness. These qualities alone, however, do not suffice to render a thing obscene, for "[t]he main feature that distinguishes obscene things from other repellant or offensive things is their *blatancy*; their massive obtrusiveness, their extreme and unvarnished bluntness, their brazenly naked exhibition."

Paradoxically, what is obscene can also be alluring—though, of course, not all that is alluring need be obscene. Pornography, which Feinberg sharply distinguishes from obscenity, always has the character of allure, that is, it is "designed entirely and plausibly to induce sexual excitement in the reader and observer." But we should call a particular work of pornography obscene only when we wish "to endorse some offense as the appropriate reaction to it." This offense can be shock at the blatant violation of a moral standard, or revulsion at the coarseness and obtrusiveness. Feinberg's balancing test doesn't justify censoring pornography as such, for that would constitute a form of legal moralism. But to the extent that the pornography is also obscene and thus offensive, it can be controlled to the extent of protecting unwilling audiences and children.

Not surprisingly, Feinberg finds the Supreme Court's handling of the legal sense of obscenity highly artificial. Since its debut in this field in 1957, when it declared such material outside of first amendment protection, the Supreme Court has called "obscenity" what is actually pornography. (Courts have dogmatically adhered to this confusion to the point that an obscene gesture cannot be constitutionally "obscene," for it does not arouse sexual desire.)[4] But worse than the semantic confusion, the Court did actually embrace the censorship rationale appropriate for pornography, the moral wrongness of the appeal to a prurient interest. That is, employing the terminology appropriate to the offense principle, the Court actually embraced the principle of legal moralism.[5] Although the Court later added offensiveness to the criteria of legal obscenity,[6] the basic rationale remained legal moralism. Thus official censorship, as in *Paris Adult Theatre*, could extend into theatres that unobtrusively advertise their films and admit only consenting adults. Moral soundness, by Feinberg's analysis, lies with Brennan, who would limit the reach of state law to the protection of children and unwilling adults, that is, the "offense" rationale.

Obscenity in the sense of impolite words is the final subject of his work. Characterized by their conspicuous violation of taboos (which may be religious, sexual, or scatological) these words, broadly speaking, do "offend." But only in restricted circumstances would the offense warrant the criminal sanction. Obscene words serve numerous purposes—providing a no-nonsense disphemism to balance euphemism, flavoring description with "spice and vinegar," expressing strong feeling, giving insult and provocation, and effecting a good joke. Feinberg joins thinkers such as Robert Graves and H.L. Mencken in admiring the capacity of these words to extend and strengthen the range of expression. He also recognizes that under certain circumstances their offense may be more than one should have to bear. For the most part, social mores, he argues, can take care of confining obscenities to their proper context, and Feinberg chooses to focus on only two areas of controversy—fighting words and indecencies on the airways.

Although he affirms the doctrine of "fighting words," he restricts it sharply to what Austin called a "performative utterance," words that do something rather than simply express something.

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4. Connecticut v. Anonymous (1977-6), 34 Conn. Supp. 575, 377 A.2d 1342 (1977).

5. Feinberg would actually characterize the Court's concern as a species of legal moralism, "moralistic legal paternalism," where the alleged immorality of an action consists in its moral harm to the actor himself, as in "harm to one's character" or "becoming a worse person" (pp. xiii, 183).

6. Manual Enterprises v. Day, 370 U.S. 478, 482 (1962).

Comparable in that way to declarations of war, "fighting words" should be restricted to words that in certain circumstances, by prevailing symbolism, initiate a state of hostility. By virtue of their invective effectiveness, obscene insults may sometimes also constitute fighting words, but they can be proscribed only because they are fighting words, not because they are obscene.

Feinberg finds even less justification for banning or even limiting obscenity on the airways. He concludes this work with a criticism of Justice Stevens's reasoning in *FCC v. Pacifica Foundation*,[7] which affirmed federal authority to channel "indecent" language over the radio (George Carlin's "Filthy Words" in this case) from the hours in which "there is a reasonable risk that children may be in the audience." For Feinberg, the offense of getting hit with an undesired obscenity, for children as well as adults, is a mere "mosquito bite," too trivial for the concern of the law, and one that the listener can guard against by simply turning the station off. As for the exposure of children to obscene words, Feinberg grants that were the words used pornographically, there might be grounds for state regulation, but he doubts that momentary exposure to obscenity can ever have a sufficiently marked effect on a child's moral character as to justify their proscription.

To my knowledge, the concept of offense has never been given as clear, penetrating, and imaginative analysis as in this book. The product of decades of reflection, the work magnificently combines the analytic rigor of contemporary philosophy with a poetic gift of imaginative illustration and phrasing. Often, as I worked my way through an argument and objected, "Okay, but what about x, y and *z*?," I turned the page to discover Feinberg considering not only x, y, and *z*, but *zz*, and with hypotheticals more threatening to his position than any I had imagined. In these four volumes, Feinberg may achieve his goal of making "the best possible case for liberalism" and the work may well deserve a place next to Mill's *On Liberty*.

Nevertheless, as Feinberg recognizes, even the best possible case for liberalism may still fail to persuade. Feinberg's own "coherence method"[8] provides grounds to doubt that liberalism is, as he wishes the reader to believe, "true doctrine." Recall that to succeed under this method, an argument must show the reader that "the judgment it supports coheres more smoothly than its rivals with the network of convictions he already possesses, so that if he rejects it, then he will have to abandon other judgments that he

7. 438 U.S. 726 (1978).

8. J. FEINBERG, *supra* note 3, at 18.

would be loath to relinquish."[9]

Many readers may find that several judgments in Feinberg's statement of liberalism do not "cohere more smoothly" than non-liberal judgments with their "network of convictions." Some of these judgments that the reader might find more startling than smooth are subsumed under Feinberg's proposition that maintaining a way of life—the tone of the community and character of its citizens, preserving as sacred what is held as sacred, encouraging the minimal moral requisites that may be necessary for its continuation—can never justify the coercive use of the law as long as the activity involves only consenting adults and is not directly thrust upon an unwilling public. Or his judgments that the polity must be utterly indifferent to the character of citizens promoted by its criminal law; that the only wrongdoing of which the criminal law can take cognizance is a violation of the rights of others; that the "reasonableness" of taking offense[10] cannot be a factor in assessing the offending action's lawfulness. Most of these troublesome judgments derive from the very heavy weight that Feinberg gives to the claim of liberty and the virtual weightlessness given the claims of politics (as preserving a way of life) and virtue (as the cultivation of human excellence)—a balance that entails the absolute exclusion from the law of what he calls "legal moralism" and "legal paternalism."

The limited scope of *Offense to Others* does not force Feinberg to establish the plausibility of this assignment of weights, for the counterweight to a "liberty to offend" is itself a form of liberty, a liberty not to be offended. It is against the forceful claims of legal moralism and legal paternalism that the inherent worth of liberty, or autonomy, has to be established and assessed, which Feinberg promises to do in volume three, *Harm to Self*. In light of this promise, it would be premature to develop the doubts expressed above except to note that with the names of "moralism" and "paternalism," Feinberg unfairly freights his opposition with deeply negative connotations. Instead I will deal briefly with his treatment of "profound offense," which he considers fully in this volume, and with punishment, which oddly is not contemplated as part of the projected four volumes of this work.

The experience of "profound offense" differs from ordinary offense in several respects. It differs by its felt tone (it is more than even a gross annoyance; it *is* profound); by the fact that mere knowledge of the offensive action is sufficient to produce the offense

9. *Id.*

10. Beyond the less judgmental factors of intensity, duration, and avoidability of the offense.

(it is unnecessary to see, hear or smell the offensive action); and by what it offends in us (not merely one's sensibilities, but the very self that possesses these sensibilities, one's very *being*). Yet the depth with which the offense strikes the "self" does not mean in any way that it is personal, for profound offense is expressed impersonally. It is not one's own personal good that one is protecting, but a standard of morality. One is offended because the action is wrong, not as with ordinary offenses, where one claims the action is wrong because one is offended.

Feinberg does not flinch in showing that there are acts towards which most of us would take profound offense—desecration of religious icons, necrophilic acts, cannibalism, bestiality, mutilation of corpses. But, his main concern is to show that his balancing test can contain the potential threat to liberty posed by the concept of profound offense. The potential might seem significant: the very word "profound" suggests a heavy weight in the scales. And since offense is taken at "bare knowledge" of the act, not necessarily the actual witnessing of the act, its reach is pervasive. Developing the danger of such a liberty limiting offense principle, H.L.A. Hart, for instance, writes, "[T]he only liberty that could coexist with [this] principle is liberty to do those things to which no one seriously objects. Such liberty is clearly nugatory."

As Feinberg explains, the real complaint in a case of profound offense is the wrongfulness of the act, not one's personal discomfort at the knowledge that it is taking place. But then, he notes, we must recognize that the nature of the complaint is not really a claim to be free from this discomfiture, or offense, but a claim of legal moralism—"that it is necessary to prevent inherently immoral conduct whether or not that conduct causes harm or [direct] offense to anyone." "By definition" such a claim is foreclosed to the liberal. And since it is the alleged wrongfulness of the action that leads to the offended state of mind, once that action is recognized as not truly "wrongful" (because no one's "rights" are violated), offense at the "bare knowledge" of the action becomes barren indeed. This realization, he notes, should prick the bloated righteousness of the profoundly offended and the "moral fervor will seep out like air through a punctured inner tube."

Therefore, except where the profound offense becomes a personal offense as well (where a widow learns that it is her late beloved husband whose face is "smashed to bits in a scientific experiment") or where the offensive conduct is obtrusively advertised (a neon sign proclaiming "Cannibalism, Bestiality, Incest.

Tickets $5.00 Meals $25. Close relatives half price"), the balance scales would not authorize suppression of the conduct.

For one who is already thoroughly committed to the framework of philosophical liberalism, this argument works. But it is unlikely to convert those with doubts about the liberal framework itself. For if one does take profound offense when another mulitates a corpse, desecrates a religious icon, or engages in incest, unless he is already dogmatically committed to liberalism, he is likely to find Feinberg's observation—that liberals "by definition" cannot act on this sentiment—a better reason for rejecting liberalism than his sentiments. Liberalism so defined will have a rough time finding a "smooth fit" with his present "network of convictions."[11]

Employing the same "coherence method," we might also question how well Feinberg's liberalism accords with the concept of punishment. It is curious that Feinberg does not intend to consider the question of punishment within this work, for there would seem to be an obvious need for the justifications for limiting liberty to square with those for punishment. And it is doubly curious that Feinberg does not see a mismatch—or incoherence—between the moral limits of the law articulated in this work and his analysis of punishment in his earlier essay, *The Expressive Function of Punishment.*[12] There Feinberg maintained that the symbolic signification of disapproval, indignation, or reprobation is what distinguishes punishment from mere penalties, licensing fees, taxes, and more significantly, from other forms of officially sanctioned "hard treatments"—severe rehabilitative therapy or medical treatment and impositions of strict liability. And quite apart and distinct from hard treatment as needed for deterrence or rehabilitation, it is this expressive reprobative function, he continued, that justifies hard treatment.[13]

Since punishment does truly interfere with the individual's autonomy—or his ability to determine "for himself whether or not he will perform an act X or undergo an experience E"—liberalism must take a hard look at what purpose it serves. Notably, however, the "expressive function" that Feinberg endorsed in this essay cannot be subsumed under either of the two principles that he now

11. One with these sentiments might still be persuaded to embrace liberalism if he could be convinced by slippery slope or ad horrendum arguments, e.g., that state authority to prohibit necrophilic acts would necessarily entail authority to limit sexual acts to "missionary style" between (live) married partners. But, as Feinberg himself notes, such arguments are unconvincing.

12. J. FEINBERG, DOING AND DESERVING 95-118 (1970).

13. *Id.* at 116. That is, the hard treatment, in our culture at least, is necessary for the expression of public disapproval.

gives as exclusive reasons for interfering with liberty, i.e., the harm and offense principles. One can protect others from harm and direct[14] offense through the hard treatment required for deterrence and rehabilitation. The additional, and sometimes symbolic, hard treatment necessary for reprobation would appear superfluous—and therefore suspect. Using Feinberg's analysis in this earlier essay with his present terminology, we should have to conclude that the purpose of the symbolic reprobation is the relief of the profound offense (albeit one of "bare knowledge") the public feels at the criminal act. By punishing the criminal and thereby vindicating its standards of right and wrong, the public is relieved of the profound offense that it would otherwise suffer. But if Feinberg's analysis in this earlier essay is correct,[15] then the coherence method forces us to make a choice between punishment as civilization has known it—with the symbolism of condemnation and with proportionality to the seriousness of the crime—and liberalism as Feinberg defines it.

Though *Offense to Others* frequently examines questions that are constitutional as well as moral, Feinberg cannot be accused of reading his moral theory into the Constitution, for he carefully distinguishes moral theory from constitutional theory. For example, in criticizing as "absurd" the Court's opinion in *Paris Adult Theatre*, Feinberg concedes, parenthetically, "but of course if is always possible that it is the Constitution that is absurd, not the five-man majority". Since the Constitution does clearly contemplate true "punishment"[16] as opposed to mere "discouragement" of crimes, we must conclude that if Feinberg is right about the nature of liberalism, then the Constitution is not a liberal document.

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14. As opposed to "bare knowledge" offense.

15. Though the point is not crucial to my present argument, I should note that while Feinberg is in the right ballpark with this essay, he is not quite on base. Just as the profound offense taken at bare knowledge of certain acts is itself relatively insignificant compared to the depth of our judgments that the act giving offense is truly wrong, here the need for public expression is itself relatively insignificant compared to the depth of judgments that the punishment is itself right, i.e., that for his crime, the criminal *deserves* hard treatment and shame.

16. *See, e.g.*, U.S. CONST. art. I, § 8, cls. 6 & 10; amends. V & VIII.