

**CRITIQUE: JOEL FEINBERG'S *OFFENSE TO OTHERS*
(NOBLE BLASPHEMY II)**

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1. Introductory Thoughts

As prompted by its subtitle, this essay is a continuation of the ideas presented in my “Noble Blasphemy.” Its subject is a critical look (in both meanings of the word) at Joel Feinberg’s central ideas in his book *Offense to Others*, the second volume of the four volume study *The Moral Limits of the Criminal Law*.¹ This essay is an extension of the earlier essay in that it is a continuation of that exploration of blasphemy as both a social and legal event and as a theoretic entrance into a systemic study of language, society, and the law. As originally conceived, Feinberg’s work was meant to be a central part of that essay, primarily for Feinberg’s discussion of profound offense. But as I progressed in the writing of “Noble Blasphemy,” it became clear that Feinberg’s work as a whole demanded direct attention, for it became clear that his claim to being a *liberal* approach to the subject was undermined in that his theses function in the same manner as blasphemy law: that is, Feinberg was also merely arbitrarily drawing a line between what was socially acceptable and unacceptable, and justifying that line with appeals to “higher” authority (for Feinberg, universal moral sensibilities). As such, while Feinberg was claiming the ground of liberal legal

¹Joel Feinberg, *Offense to Others* (1985).

theory, he was in fact performing a *conservative* defense of cultural mores (the very purpose of blasphemy law).

In the early stages of that first essay, much more information began to be pulled in than I expected. I realized a lot of groundwork had to be done before I could approach Feinberg in the manner I desired. As such, rather than working out of Feinberg, the first essay became the establishing of the fundament from which my desired approach to Feinberg could be worked.

Because of this genesis, this essay is unavoidably flawed. It derives greatly upon the ideas of “Noble Blasphemy”; but, because of its being focused upon a single work not enough of those ideas are brought in explicitly to these pages. Ideas are brought in insufficiently and too choppily. So while this accomplishes its aim of being a critique of Feinberg’s work, it is perhaps, as a single essay, too solely that critique.

In final consideration of this essay, I cannot not admit to its many flaws. But I can at least say that I have done – if ungracefully – what I set out to do: sketched out the shape and shadow of a critique of Feinberg’s thesis, one that showed how Feinberg’s ideas operate against its professed intent.

2. Outlining Feinberg’s Basic Ideas

2.1 Feinberg’s Liberalism

The starting point of Feinberg’s four volume exploration of offense is John Stuart Mill (centrally, and arguably, *On Liberty*). Mill’s presence may be primarily one behind the scenes of *Offense to Others*, but he is there nonetheless, even if for a single invocation, and in that invocation operating as a counterpoint.²

The question Feinberg is addressing in the greater work (of the four volumes of *The Moral Limits of Criminal Law*) is, “What sorts of conduct may the state rightly make criminal?”³ The first volume concerned harm, which nearly every philosopher (legal and

²It is undeniable that Mill is one of Feinberg’s fathers. In the index to *Offense to Others*, Mill gets 13 references, including the reference cited here. When he does appear, it is accepted authority, even if Feinberg is writing somewhat against him in supporting the possible criminalization of offense.

³Feinberg at ix.

otherwise) would accept as justifiably criminal conduct.

However: “Controversy arises,” Feinberg says, “when we consider whether it is the *only* valid liberty-limiting principle, as John Stuart Mill declared.”⁴

Feinberg embraces that controversy and proposes such an extension of criminalization of action beyond Mill’s limits, offering an offense principle to stand next to the harm principle as the gateway to that end. Feinberg doubly embraces the controversy in claiming that his proposed criminalization of offense is a *liberal* legal philosophy, even though it goes against Mill, who is often declared the father of political liberalism.⁵

Even at this point, the thinking reader will have arguments against the claimed liberality of Feinberg’s project: after all, how could it be called a *liberal* action if Feinberg is sharply limiting freedom as defined by the father of political liberalism? In a reply as quickly formulated, perhaps Feinberg may not feel he is so sharply limiting in that his systemic clarifications that the offense principle and the apparatus that goes with it should, by his account, be used only sparingly, and deal out minor sentences at worst. Even that, however, brings question, in that it seems Feinberg is oblivious to basic arguments of stigma, of the use of small acts to operate broad repressions, and that the slippery slope is best avoided by *not creating pathways that lead to descent* – a fairly obvious principle of liberalism that seems to escape Feinberg’s thought.

Indeed: in beginning my reading of *Offense to Others* I was frequently prompted to ask a fundamental and yet unanswered question: *what, initially, propelled Feinberg into finding justification for criminalization of offense?* The project itself, in its very nature and intent, reeks of a conservative correction of liberal principles. In fact, if proposed to Mill, could not the first response be, simply, the counter-question: *Why must we have such criminalization? I have not noticed a need for it.* (And, ultimately, is there a *need* for such a thing that does not lie in one of two places: governmentally backed restrictions of rights (cut it any way and it always reads “oppression”), or the individual desire for a means to *end* behavior that *personally* found offensive? (It is not terribly difficult not to convince oneself that such latter motivations underly Feinberg’s

⁴*Id.*

⁵Feinberg also declares him such (if I remember correctly, I can not presently find the relevant essay in my stacks.)

arguments, even if the text has been academically cleaned of evidence of such. And since, as such, such a conclusion has no smoking gun to back it up, the fact that a text that claims to be liberal could produce such a intuitive reading calls to question just how liberal the claimed liberality actually is.)

I have wholly drifted into speculation and intimation, and must pull up before I go further.

2.2 The Intent of this Essay

Nonetheless for my wandering, my intent here has been made apparent. I wish to approach Feinberg through a similar question as his own: *is that which Feinberg is proposing – not only in the result but in the modality, the nature, the system of the resulting theory (and argument toward) – liberal?* Or is it woves in sheep's clothing, so wholly disguised that even Feinberg himself is missing the teeth? My tone here is neither facetious nor sarcastic: it is in fact to the very point, and to the second theme of this essay, that which refers back to the first essay and my own greater project, blasphemy. Specifically, the hypothesis that the reason that the conservative nature of Feinberg's proposal is concealed is because that particular conservative modality will of its own nature *conceal itself*. Feinberg has permitted his liberal argument to be governed by nomic demands, by that ideological superstructure fully discussed in the "Noble Blasphemy." And, since his argument is governed by rules and structures of the nomos, since his argument is crafted out of the *modality* of the nomic, it by definition will function to reduplicate the nomos, which means *to maintain status quo and the modality of status quo* – which is conservatism. Granted, Feinberg's ideas are leftist within the always conservative system of the contemporary cultural nomos,⁶ but they do, nonetheless, function as part of the nomos. As such, they are in no way liberatory. (Indeed, in the language of the first essay, Feinberg's ideas are, ultimately a fundamentalism, if only mildly so.)

⁶Feinberg's liberalism seems not inadequately described as Burkean, as that form of conservatism that does not desire utter stasis (or, more extremely, the return to previous times), but which views social development as being best when it is *slow*, avoiding all radical breaks or disruptive shifts.

3. Feinberg's Basic Ideas

In order to explore the system of Feinberg's theses, I need to lay out his basic ideas and present the gist of Feinberg's argument for the criminalization of offense. (Note that I will be rather quick about this presentation.)

3.1 The Offense Principle

The crux of Feinberg's proposition is the assertion of an "offense principle" which can stand along side the "harm principle" as the means to a liberal demarcation of that area of individual action that a state has *a right* to limit. The justification of the two principles are essentially the same but for the action involved:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) hurt or offense 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.⁷

It is Feinberg's contention that *liberalism* would (ergo *should*) accept penal limitations on individual action as stated in both the harm principle and offense principle, and nothing further. *Extreme liberalism*, for Feinberg, would accept penal limitation of action only as falls under the harm principle (leaving offense to others outside the penal code).

It is because I critique Feinberg through the system of his thought, through the function of the language of his thought, that my own argument is saved from being categorized and bracketed as extreme liberalism. While I, like Mill, see harm as the only legitimate sphere of criminalization, the nature of that criminalization breaks sharply from Mill's thought. The issue here, however, is solely Feinberg's ideas as he presents them, and revealing that even in his own system of thought, his liberalism is far there from.

3.2 A Definition of Offense

Offense must obviously be distinguished from injury or harm. However, Feinberg recognizes, the term must be narrowed down so as to eliminate much of the broader concepts of the word. This,

⁷The wording combines Feinberg's wording on pgs. ix and xiii.

for him, can be readily done through distinguishing the response of “being offended” from the response of “taking offense.” The latter response, which is the narrower meaning of offense with which Feinberg is concerned, involves a sort of universal subjectivity. Taking offense is not merely some wholly objective response to actual or imagined stimulus (say, a feeling of disgust at viewing something gory). Taking offense is rather a subjective response to *wrongful* stimulus. This clarification saves offense from pure subjectivity: it is not enough for offense to have occurred that the victim feels offended. In fact, it is not even *necessary* to offense that the victim feels offended; what *is* necessary is solely that there was a *wrongful act*.⁸

There is also a second element can be identified in offense which serves to differentiate offense in the strict sense from that in the broad sense: that is, the consequential feeling of *resentment*. Offense in the “strict” sense of the term necessitates resentment. Though, for Feinberg, that distinction – the actual *feeling* of resentment – is not necessary to legal action based upon offense principle. There need, again, only be a *wrongful act*.⁹

3.3 Application of a Balancing Test

Even with the above narrowing, the gamut of offense to others spans from the trivial to the profound. Criminalizing any and every annoyance would, of course, be socially debilitating. So, somehow, a mechanism must be found to discern that specific kind of offense that merits criminal legal response. The answer, for Feinberg, lies in nuisance. Both nuisance and offense involve “annoying distractions” which are “unwelcome demands on one’s attention.”¹⁰ In fact, Feinberg ultimately equates the two: offenses are, “in short,

⁸Of course, without the experience of offense there is no ‘damage’ marking the criminal act. Feinberg understands *wrongful* as being a violation of the victim’s rights (at 2); though, within Feinberg’s text it is difficult to avoid a circular reading, where those ‘rights’ are created by the assumption of validity of the offense principle and the criminalization of offense. (That is, ‘rights’ here seems rather more political in their origin than natural or elsewhere.)

⁹Feinberg at 1-2.

¹⁰*Id.* at 9.

themselves nuisances in the perfectly ordinary sense.”¹¹ So qualified, Feinberg calls for the application to offense of a balancing test much on the lines of that balancing test already in existence with nuisance law. While three factors will inevitably play in any socio-legal balance– the seriousness of the offense, the reasonableness of the conduct, and the interests of the community¹²– Feinberg collapses the three into two, and rests his argument upon the following balance of factors:

The Seriousness of the Offense

1. The magnitude of the offense (in intensity, duration, extent)
2. The standard of reasonable avoidability
3. The Volenti maxim (states voluntarily incurred, or risks voluntarily accepted, are not to count as offenses)
4. The discounting of abnormal susceptibilities (the eggshell-head issues)¹³

The Reasonableness of the Offending Conduct

1. Personal importance
2. Social value
3. Free expression
4. Alternative opportunities
5. Acting in malice and spite
6. Nature of the locality¹⁴

Outside equating offense with nuisance, Feinberg finds justification for the use of a balancing test in the observation that that type of deliberative processes are “at the very heart of judicial deliberations in tort cases.”¹⁵ Balancing tests do, actually, seem to be to a great (if not dominating) degree unavoidable in all deliberations not ratcheted to black-letter, fact analysis, which is the exception that proves the rule. In black-letter conclusions, balancing deliberations are suppressed so as to give discerning potency and legal-truth-defining validity to the black-letter rule. Either the rule directs the court to the correct legal conclusion, or it does not. Black letter deliberation is one concerned with applying brute facts to a

¹¹*Id.*

¹²*Id.* at 7-9.

¹³*Id.* at 33.

¹⁴*Id.* at 44.

¹⁵*Id.* at 6.

generally ungiving (or at the least resistant) legal algebra. Balance tests, however, from the start undermine the definitiveness of such algebras by separating fact from conclusion and inserting between the two fuzzy interpretation, which results in a conclusion that is a result of intuitive (rather than purely rational) analysis. (Even when the evidence is overwhelmingly to one side of the balance, there is still always the possibility of reversal if the matrix of evidence but would be changed by addition/subtraction or by reconception of some single fact dominating enough to warrant the change.)

What concerns me here, however, is not so much the justification of a balancing test but the orientation, the nature of the balancing test as presented by Feinberg; in fact, as presented by the *Restatement of the Law of Torts* which I quote here in part, as amended by Feinberg:

[. . .] the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm and risk [or inconvenience or offense] to one *is greater than he ought to be required to bear under the circumstances*, at least without compensation.¹⁶

The focus is upon the offended person, but the language of *requirement* plants that person firmly within the greater, controlling field of public interest.

What, then, would be the concern of public interest?

It is an obvious truth that each individual in a community must put up with a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of give and take, live and let live¹⁷

The requirement placed upon the individual in society is (in the minimum) toleration of those nuisances and offending acts of other people that *should be* tolerated; acts that should be tolerated because organized society demands that certain degree of “give and take.” But inherent in “should be” is that ambiguous (if not apocryphal)

¹⁶*Restatement of the Law of Torts*, § 822, cmt. j (American Law Institute, 1939) (italics added, insertion added by Feinberg), as quoted in Feinberg at 7.

¹⁷*Id.*, quoted in Feinberg at 6. The truncated sentence begins the previous quotation: “. . . live and let live, and therefore the law of torts”

line that establishes just what is offense that is “greater than ought to be required.” That line cannot be drawn and redrawn by courts on a purely individual by individual basis. After all, the inability to know what that next-met person will be offended by would suppress any possibility of social life-in-public, and would make legal oversight of offense/nuisance an impossibility.

For Feinberg, that line of what ought to be tolerated and what ought to be required – and the balancing test that will get us to that result – is not established judicially but *socially*. That line of offensiveness – as well as that principle of give and take, live and let live – lies within the cultural nomos, and functions as an extension of the cultural nomos. What needs to be given and taken, what it *means to live* and thus, when followed, that which others must *let live*, is part of the social conscious, not some purely philosophical exercise.

As such, the factors that go into the making of any balancing test would also find their origin *within the social nomos*, for, as the nomos acts unconsciously within the collective, it informs *all* social constructs, including the “balancing tests” that would be used to measure those constructs. “Public interest,” then, is not a derivative of the two (or three) points in balance. Rather, public interest will always contextualize and define both the test and its implementation. As such, factors of an offense to others balancing test will always be less factors for free consideration and more factors which function to manifest, perform, and reaffirm the dominant cultural nomos and to perform the reinforcement of the nomos. It must not be forgotten that language – language as a social (rather than individual) event – both is a construct of the nomos and serves the nomos. As such, in that the nomos can only dominate the discourse of such a balancing test, the nomos will always define the test itself. Ergo, in the end, it is a *closed system*.

That argument was rather hastily forwarded, and in its haste handwaved its way through many of the details, the primary being that a balancing – a weighing that is not controlled by the societal construction of the scales – can be performed outside the nomos (that is, aesthetically). The question at hand, though, is whether the criminalization of offense which Feinberg proposes is, in the terms of the first essay, societal or individual (aesthetic).

3.4 Categories of Offense

To explore what actions make up offenses, what Feinberg calls the “modes and meaning of ‘offense,’”¹⁸ Feinberg offers a thought experiment involving various acts of offense, out of which he derives six categories. It is worth presenting his exploration here for three reasons: (1) for contentual purposes, to give a material anchoring to both the range of events that lie under the idea of offense, and for the particularities of Feinberg’s six categories; (2) for rhetorical purposes, to duplicate the context of Feinberg’s own exploration of offense; (3) for ideational purposes, toward the ends of this essay.

Feinberg sets up a core situation through which the reader is asked to “experience” a series of thirty-one different events of varying types and degrees of intensity. The situation is that of being a person on a normal city bus, with what would be considered a normal degree of crowding: as I take it, not enough that one might feel claustrophobic, but enough that simply changing seats is not really an option. Key to the situation is that the imagined rider is constrained: constrained to their seat in the bus, and constrained also to the bus in that to get off would mean added expense, bother, and an unwelcome delay in time.

Feinberg’s intent is in part to make it difficult for the ‘victim’ of the listed offenses to avoid the offense, and in part (I am sure) to create a situation of ‘capture’ without it being a situation of ‘holding against their will.’ For myself, the situation is too compressed for both the success of the thought experiment and the discussion that stems from it. A city bus is a very closed situation not only because of the closed-in-ness of the vehicle, and the inevitable degree of dirt and wear and tear, but also because of the design intent to maximize the amount of passengers in the space allowed.¹⁹ It is infrequent that city buses are designed for comfort, and when such a bus is in use there is actually a quite apparent difference in the emotional attitude of its riders: the extra space permitted each rider

¹⁸Feinberg at 14.

¹⁹Consider the curious event after passenger aircraft land, where the moment the seatbelt lights turn off the majority of the plane jumps up and enters the aisle, even though they are all quite cognizant they they will be standing there for fifteen to thirty minutes. My own theory is the positive energy of activity toward leaving is greater even than the discomfort of standing in a line that is more cramped than the abandoned seats.

is often taken advantage of with open, exaggerated, often humorous displays.

My problem with the situation is that the 'capture' inherent to any bus ride – never mind one wherein an offense is occurring – is overlooked, and as such the inability to simply look aside is overplayed within the argument: so much so that one questions whether it is the offensive act itself or the bus that functions more profoundly in the spurring of an offensive reaction. But more on that later.

The thirty-one events are presented through six categories.²⁰ Rather than present each event, I will focus instead on the categories (which is for the most part sufficient). Keep in mind that the issue at hand is not merely actors performing the events, but a victim being forced, by capture on the bus, into witnessing the events.

(1) *Affronts to the Senses* [4]²¹: purely material experience – sound (both in volume and in being 'noise'), sight, smell – with no symbolic or contentual element. Importantly, Feinberg does recognize that such affronts easily blur into cultural or class structures.²² For example, one can readily see how something visually unappealing can touch on class (e.g., the concept of "tackiness," a common pejorative used against low-socioeconomic, decorative styles).

(2) *Affronts to Lower Order Sensibilities* [5]: disgust and revulsion. Events ranging from a person merely acting in physically offensive manner to coprophagy. These are distinguished from affronts to senses first in that the physical response is more intense and not focused upon a certain sense. Secondly, they are distinguished in that the contentual element is necessary to the event: they are "always mediated by recognition or belief," and as such are more about *sensibility* than about sense. The observing individual is not repulsed simply by the fact the actor is eating insects. Rather, there is some meaning, some *content* that insects carry for the individual that other foodstuffs lack. The food itself cannot be separated from

²⁰*Id.* at 10-13. The categories and basic descriptions come from these pages.

²¹Bracketed numbers signify how many of the thirty-one events fall into the category. Since some categories are more easily encapsulated by example than others, however, and the numbers themselves should not be taken as overly significant.

²²*Id.* at 14-15.

the event: the content is connected to the whole of the event, to the individual “eating insects.”²³

(3) *Affronts to Higher Order Sensibilities* [3]: shock to moral, religious, or patriotic sensibilities. Though Feinberg breaks it down into three elements, the essential element in all is the moral, is the affront being a challenge to moral *principles* that govern conduct.²⁴

(4) *Shame, Embarrassment, and Anxiety* [11]: the connecting element is sex(uality), with the events ranging from public nudity, to open (and not small) displays of affection, to public sex of any and all forms, including bestiality. This category is the weakest in its justification, and the most difficult for Feinberg to define as per why it is offensive. This is due primarily to two difficulties, one which Feinberg recognizes, one which he doesn't. I return to this in section 4, below.

(5) *Annoyance, Boredom, and Frustration* [3]: the three examples are a boring radio show, a boring conversation, and being accosted into continual, boring conversation. This is for me the weakest category, and its relation to offense is tenuous at best – so much so that it opens the door for *any* discomfort caused by others to fall into the realm of offense. It seems a category that demands inclusion because of the relation to the idea of nuisance rather than to the idea of offense. As well, it is difficult to conceive of a situation within this category that could ever amount to criminal action.

(6) *Fear, Resentment, Humiliation, and Anger* [5]: these are responses to insulting affronts, and are best described through the examples: using toy weapons to disturb others through an injury-threatening attitude; wearing Nazi regalia in a manner showing sympathy for the group; a person who just came from a targeted anti-religious demonstration (say, anti-Catholic); the same but with regalia/accouterments of sacrilegious content; the same but the demonstration anti-women. The first situation is differs from the others until you assume a situation where the very idea of the others being willing to put forward a controversial and anti-positional position is threatening to the individual in the same way brandishing an unknown-to-be-plastic weapon might. The uniting factor here for Feinberg is that all provoke anger in response, coupled with fear and “a feeling of humiliation and impugned

²³*Id.* at 16.

²⁴*Id.*

'honor.'"²⁵ The anger aspect is difficult for me to equate with feeling offended; rather it seems to me anger is a second order response.

Feinberg strings the six categories together along three commonalities. Firstly, they are "at the very least unpleasant," though, the nature of the displeasure is not the same in all situations. Secondly, excepting some of the events of affronts to the senses, the unpleasantness lies in psychological tensions between "conflicting elements" in the complex set of responses that the events arouse. (As in the pull-push of nudity, and the anger-lack of control conflict with insult.) Thirdly, and this Feinberg points out as central to his argument,

they are nuisances, making it difficult to enjoy one's work or leisure in a locality which one cannot reasonably be expected to leave in the circumstances. In the extreme cases, the offending conduct commandeers one's attention from the outside, forcing one to relinquish control of one's state, and drop what one was doing in order to cope, when it is greatly inconvenient to do so.²⁶

To say, I have difficulties with Feinberg's association of offense with nuisance. I question whether the identity of the two runs any deeper than surface commonalities, and whether the idea of nuisance was forced upon offense for practical reasons centered on Feinberg's argumentation, such as justifying the use of a balancing test.

There is a distinction in that nuisance traditionally demands *physical* intrusion, and while nuisance law has over time become a catch bag for types of criminalization that does not fit well elsewhere (for example, obscenity laws). The farther the nuisance is from the physical the more that 'catch-all' aspect is evident, and the less the core idea of nuisance functions as successful justification for the criminalizing legislation. (Obsenity laws were not enacted as a necessary function of nuisance theory, they were enacted for social reasons, and put under nuisance because that category fit, linguistically, better than any other.) The core of my questioning of the identity lies in the necessary psychological aspect of offense, and with that the necessary connection to ideology. (Even affronts to the

²⁵*Id.* at 21.

²⁶*Id.* at 21-22.

senses cannot avoid the socio-economic.) Though, granted, it may be said that the psychological is an element in the events that underlie some acts of nuisance. (Consider, *Griffin v. Northridge*, which involved open malice expressed and acted upon by one neighbor upon another, with a palpable taint of the psychological; yet, it was the property aspect that anchored the action and judgment in nuisance.²⁷)

4.0 Feinberg's Liberality(?)

While my extended project is blasphemy, and while Feinberg enters the issue of blasphemy through his discussion of profound offense, it is easier here, for the moment, to get into Feinberg's argument through his exploration of offense through sexuality. As such, I returning to the two difficulties marring his arguments mentioned above.

4.1 Shame and Embarrassment

The first difficulty – the one which Feinberg does recognize – to his finding offense through shame is that shame is more naturally attached to the actors rather than to the viewers. Admittedly, there is a vicarious element to shame: one can feel ashamed *for* a person that they have some connection with and thus empathy for.²⁸ But that idea also faces difficulties in the situation of offense in that the actors that are committing the offense are quite apparently unaffected by any shame.

²⁷*Griffin v. Northridge*, 153 P.2d 800 (Cal. Ct.App. 1944) (“While we take pride in the towering structures that adorn a city, its parks, its paved boulevards and its utilities, these marks of grandeur and facilities are as naught if homes are rendered untenable by those who on adjacent propertioes delight in their display of malice and hatred for a fellow man.” At ???.) The unstated underlying element in *Griffin* is race.

²⁸Feinberg at 18. Feinberg quotes Michael Bayles on the matter: “One can be ashamed of the conduct of one’s friends, for one may take vicarious responsibility for their conduct or consider oneself responsible for who one’s friends are. . . .” (Michael D. Bayles, “Comments,” *Issues in Law and Morality* (ed. Norman Care and Thomas Trelogan, 1973) at 125 n.4.)

Feinberg tries to proffer a handful of possible psychological reactions that would give a basis to shame on the part of the viewer, any of which could color any particular situation. There is the aforementioned vicarious shame. There is a kind of reversed shame, where the victim recognizes their own participation as witness to the event, and thus their own participation in the shame that the actors should be feeling. Similarly, there is a response of vulnerability for being a witness, that others are witnessing the victim witness the event. There is the psychological disruption of a positive reaction to the observation, a momentary loss of control (if quickly regained). There is the possible sensation of being threatened by the event. And, finally, there is that general confusion and disarray of feeling, especially in the situation being one that is attracting of one's attention even if at the same time repulsing as well.²⁹

There are two commonalities within the above. First, as Feinberg states elsewhere in discussing how a repulsive reaction could be “the *appropriate* response to the unrestrained depiction of sexuality,” there is the commonality of “a certain type of moral sensibility.” There is the commonality of a “reducing” of the “psychic distance” between the viewer and the viewed.³⁰ (To note, Feinberg immediately separates from this distancing the basic event of being overwhelmed by an experience, which for him has no relation to offense at all.³¹) In context it seems it is the former that is more important to Feinberg, because of the suggestion of inherent morality, which is central to Feinberg's approach. Yet, the latter is as interesting, and we'll progress through that path.

Unfortunately, Feinberg's discussion of psychic distancing is mostly unproductive. His argument as presented is little more than an assertion of a “criterion of distance” coupled with the essentially empty (and occasionally over-emphatic) assertion that any violation of that distance is completely and naturally obscene.³² Feinberg offers as example the breast of the Brobdingnagian wetnurse in *Gulliver's Travels*, which Gulliver finds revolting, and which Feinberg himself calls “normally emetic.”³³ I believe Feinberg forgot what it

²⁹*Id.* at 19.

³⁰*Id.* at 138-39.

³¹*Id.* at 140.

³²*Id.* at 140-1.

³³*Id.* at 141.

was he was reading, as A. E. Dyson points out in analysis of *Gulliver's Travels*.

We must begin by reminding ourselves that Swift is a satirist: and that satire . . . measures human conduct not against a norm but against an ideal. The intention is reformatory. The satirist holds up for his readers to see a distorted image, and the reader is to be shocked into a realization that the image is his own. Exaggeration of the most extreme kind is central to the shock tactics. The reader must see himself as a monster, in order to learn how far he is from being a saint.³⁴

Feinberg quotes George P. Elliott on the issue: “One wishes to draw back when one is actually or imaginatively too close to the mouth of a man enjoying his dinner; in exactly the same way one wishes to remove oneself from the presence of man and woman enjoying sexual intercourse.”³⁵ But *does* one, in the sense of a “universal”? And, more importantly, if they do, *why*? Where Elliott and Feinberg both fall is in the circularity of their argument: the reaction caused by the nearness of the event is that of offense from obscenity because the failure of critical distance makes it obscene; then in turn the obscenity is proven by the reaction evoked at the trespass upon required distance. More simply: it is obscene because it is too close; it is too close because it is felt to be obscene. Importantly, is a solipsism that permits application of the first commonality in all shame, moral sensibility, as cause without having to derive the desired effect from that cause.

Earlier, Feinberg offers the situation of “vivid, close-up, highly magnified, color photographs of male and female sex organs in a

³⁴A.E. Dyson, “Swift: The Metamorphosis of Irony,” *Essays and Studies* (1958) (quoted in Jonathan Swift, *Gulliver's Travels* (Norton Critical Edition, ed. Robert A. Greenberg, 2d ed. 1970) (1961) at 351 (emphasis removed). Within the tale, Gulliver's concluding comment on the flaws of the gigantic breast is thus: “This made me reflect upon the fair Skins of our *English Ladies*, who appear so beautiful to us, only because they are of our own Size, and their Defects not to be seen but through a magnifying Glass, where we find by Experiment that the smoothest and whitest Skins look rough and coarse, and ill colored.” Swift at 71.

³⁵George P. Elliott, “Against Pornography,” *Perspectives on Pornography* (ed. Douglas A. Hughes 1970) at 75-76, as quoted in Feinberg at 140.

state of full engorgement and excitation.”³⁶ There can only be four responses, according to Feinberg. The first is the above “spontaneous shrinking away”: they are “too much!”, and “[t]oo much of even a good thing is coarse and sickening.” The second is critical distancing, as of a physician in study. The third is “to find the pictures strangely moving despite their surface repulsion, and to feel the first internal rumblings of a ‘genital commotion.’” Finally, there is “revel[ling] in the coarseness of the pictures.”³⁷

What betrays Feinberg’s argument, however, is that *assumption* that the pictures *must be obscene and offensive* to nearly everyone.³⁸ As he writes: “The more interesting point . . . is that the overwhelming majority of people do *not* enjoy being spatially or psychologically close to the physiological organs and processes deemed ‘private’ in our culture.”³⁹ But, even if so, why? Is it because they inherently would avoid it, or because society compels them to avoid it? This is where the deeper assumption of *moral principles* comes into play. It casts the whole of the situation within a certain viewpoint that is above all *the natural viewpoint*. Thus, for Feinberg, obscenity functions for the third individual above as “a *barrier to prurience* which must be overcome.” Likewise, notice his description of the fourth individual as a person who can “*wallow* in the images” *even though* they “see [the images] as *yukky*.”⁴⁰

³⁶Feinberg at 113.

³⁷*Id.* at 113-14.

³⁸ The unavoidable implication is that such pictures are – or should be – *naturally* offensive to everyone, the only relative issue being the “distance” where it becomes unavoidably so.

³⁹*Id.* at 141. Feinberg continues: “To revel in these objects is about as common a pastime, I should think, as reveling in the slinky, smelly things that most of us find immediately repellant to the senses and thus in an analogous way obscene.” Considering, among many other things, the explosion of porn on internet, I believe his numbers are not as overwhelming as he might wish.

⁴⁰*Id.* at 114 (emphasis mine). “*Yukky*” is Feinberg’s word for the genesis of the obscene: specifically, “the ‘Yuk reaction’ implanted in children by their parents in the crawling stage of infancy” when trying to stop them from eating everything they pick up off the ground. That specific instance, Feinberg says, is learned behavior. But that does not prevent him from going out on a limb to try to give justification to a natural and universal ‘yukkiness’ of certain

Positive enjoyment of the pictures – without the enjoyment being somehow and always aberrant from norms – is for Feinberg essentially an impossibility in the face of moral principles, and the necessary “appreciat[ion] . . . that some yuk reactions are antecedent to, or independent of, religious taboos and metaphysical-theological doctrines.”⁴¹ In that assertion we come round to that second difficulty in Feinberg’s argument out of shame, that difficulty that Feinberg does not see: I am speaking not of the idea of a governing moral sensibility, but of how moral sensibility *functions* within Feinberg’s language, within offense as Feinberg presents it. That functioning is, ultimately as an extension of the cultural nomos.

Michel Foucault argues as much in the first volume of his *History of Sexuality*: where he argues it is in fact the religious and cultural taboos and doctrines wherein lie the ‘yuk reactions’; such lie in the social psyches, not the individual psyche.⁴² Nietzsche, who stands as counter to Feinberg, writes of shame: “Men are not ashamed to think something dirty, but they are ashamed when they imagine that others might believe him capable of these dirty thoughts.”⁴³ On the surface it seems Nietzsche is duplicating Feinberg; but, such appearances are (intentionally, on Nietzsche’s part) deceiving. It is only in recognizing Nietzsche’s ironic attitude that one sees through the aphorism: it is speaking the *negative* situation, not the positive. Shame here is not characteristic of the greater man responding to a negative event, but of the *lesser* man responding to a neutral event. Elsewhere he writes, speaking of the “temptor-god,” Dionysus:

Indeed, if it were permitted to follow human custom in according to him many solemn pomp-and-virtue names, I

human behavior. At 112-13. (“But repugnance is a virtually universal response to some things, even among small children, and it is possible that it has an instinctive basis. Desmond Morris has suggested, for example, that aversive [*sic*] to snakes, beetles, and small crawly things might be instinctive.”)

⁴¹Foucault would have something to say about the idea, and does in *History of Sexuality I*, where he pretty much argues the exact opposite.

⁴²This is obviously too brief, but I can’t find my copy on my shelves. Nonetheless, I did want to make the mention.

⁴³Friedrich Nietzsche, *Human All Too Human: A Book for Free Spirits*, (trans. Maron Faber, with Stephen Lehmann, 1984), § 84.

should have to give abundant praise to his explorer and discoverer courage, his daring honesty, truthfulness, and love of wisdom. But such a god has no use whatever for such venerable junk and pomp. “Keep that,” he would say, “for yourself and your likes and whoever else has need of it! I – have no reason for covering my nakedness.”

One guesses: this type of deity and philosopher is perhaps lacking in shame?⁴⁴

Nietzsche does not view shame as a natural, innate response to events, but as learned behavior, more specifically as *social* behavior. It is not dirty thoughts that are the difficulty for Nietzsche: in fact the question of their value to the higher individual is irrelevant to the aphorism. Rather, the problem lies in the *experience* of shame, for the shame functions within the social mentality to reinforce the social morality of the nomos, to keep behavior within acceptable norms – to the detriment of the individual. Shame as such is the learned response that *prevents* the individual from thinking the dirty thoughts, thus potentially preventing a person's individual nature from developing. That nature, in its inherent and endless creativity, is anathema to the nomos and inherently blasphemous to the religious. (Which is why the inherently individual spiritual of Christian mystics tend to be held at the periphery of the religion.) That not in the sense of a counter nomos in competition for the social conscience, but in the sense of that act that is constantly disruptive of the nomos, and *threatening* to its very existence. (Here I refer you back to “Noble Blasphemy” and the two types of blasphemy.)

Consider again Feinberg's characterization of the psychological reactions that undergirds shame: the reverse shame placed upon the viewer; a vicarious shame that the actors should be feeling; a vulnerability as a witness being witnessed; the experience of being threatened. Notice how, when viewed as functions of the nomos, they all act to control the witness, preventing participatory “dirty thoughts,” keeping the actors – who are in violation of the nomos and in their performance revealing the constructed nature of the nomos – isolated, excising them from the cultural unity of the nomos. Shame – all the offended feelings listed by Feinberg – are the nomic response that simultaneously excludes the other and

⁴⁴Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future* (trans. Walter Kaufmann 1966), § 295.

includes the same. The shame experienced by the witness maintains the solidarity of the group against the individual: the nomos is reaffirmed in group's negative reaction to the violation of the nomos. As well, each individual witness receives negative reinforcement which serves to isolate them from the ideational potential of the act: that is, to maintain that critical distancing from the act. That distancing functions within the nomos to lessen the negative psychological affects created by the threat to the security of the nomos. If the individual can maintain sterile, clinical distance (be it medically clinical or aesthetically clinical), the visuals – picture or performance – will be less *engaging* on their own terms. As such, it is less of a threat that the individual might find themselves excluded, outcast, declared variant from the nomos.

4.2 Discourse

I can not help here but think of Roland Barthes's *Criticism and Truth*, a seminal little book written in defense of the *Nouvelle critique* in France against attacks by traditional, French critics.⁴⁵ Barthes was exploring criticism and literary texts, but the principles carry over to our argument in that both Barthes and I are talking about modes of discourse, which is to say the relationship between the individual and the cultural nomos. As Barthes states, “to write is *already* to organize the world.”⁴⁶ Though, it is not enough to read line as saying the meaning of the writing is then the meaning of the world. Barthes is speaking also and primarily of the *modality* of language. In the terms of the nomos, there is language that is a function of the nomos, and language that is threat to the nomos; the former is practiced *within* and in accordance to the world that is defined by the nomos, the latter *recognizes* the presence and function of the nomos, and so instead of engaging the world as defined by language (as controlled by the social conscience), the *Nouvelle critique*

⁴⁵ Admittedly, the discussion here is too quick, too brief, and too dependent upon having read *Criticism and Truth*. The end is to show how Feinberg's own analysis is one already captured by nomic thought. It fails to recognize the actions of its own language, fails to recognize that the conclusions he “deduces” were already inherent to the world defined by his writing: the nature of his arguments are that which can only come to the desired conclusions.

⁴⁶Roland Barthes, *Criticism and Truth* (trans. Katherine Pilcher Keuneman 1987) (1966) at 51.

engages *language itself*. That is to say, to write the world means also to write the modality of the world: a definition, cultural, bounded world of the nature of the nomos, or the world as engaged and explored by the individual psyche on no terms other than that of the moment of engagement. Barthes states:

The writer cannot be defined in terms of his role or his value but only by a certain *awareness of discourse*. A writer is someone for whom language constitutes a problem, who is aware of the depth of language, not its instrumentality or its beauty.⁴⁷

Barthes takes traditional criticism to task under five headings. Each and all in essence describe the functioning of the nomos. Three – Objectivity, Good Taste, and Clarity – all are subheadings under the arching idea of Critical Verisimilitude. The fifth – A-symbolia – is also over-arching, though where Critical Verisimilitude is primarily concerned with the content of the nomos, A-symbolia is more concerned with the *modality* of nomos. Keep in mind, the crux here is the relationship between the critic and the text that is being criticized. Within our context, that text is the offensive act; and Feinberg stands as the critic. Our purpose here is to recognize the modality of Feinberg's so-called liberal proposals. That begins in Critical Verisimilitude.

Normally the term verisimilitude is used in discussing a creative text's accuracy (so to speak) with Nature.⁴⁸ Verisimilitude as Barthes uses it is not different outside it functioning in a level of reading one level up from the primary text: that is, it is discussing the 'accuracy' of the *critic's* language with nature. Of course, traditional critics are not writing stories which would have verisimilitudinal properties in relation to Nature, they are writing about *texts*. Nonetheless, for traditional critics there is yet a natural sensibility, as it were, about texts: there is still *language* as it functions naturally; there is a correct and incorrect way to write about texts as established in the natural rules of literature, rules which for traditional critics are *inherent to the*

⁴⁷*Id.* at 64. Note that "beauty" here is to be understood as traditional notions of beauty, such as that defined by the French Salon. "[T]o write is not to enter in to an easy relationship with an *average* of all possible readers, it is to enter into a difficult relationship with our own language." At 51.

⁴⁸This is a very loose definition, oriented to serve the point at hand.

texts and to nature itself. Thus the term *critical* verisimilitude: not copying nature, but critiquing *according to* nature, a critique that already exists in the language of the world.

Though, Barthes recognizes that the language of traditional critics is not in engagement with nature at all. In fact, since the critique does not break from the language of the nomos, it is controlled by the nomos.⁴⁹ The critique can only ever reaffirm the cultural truths of the nomos; it is a verisimilitude “deposited in the mind of men [critics, philosophers] by tradition, Wise Men, the majority, current opinion, etc.”⁵⁰ The traditional critics function – as does everything functioning within the nomos – to reinforce the nomos and the definition of the world *established by* the nomos. The function of their criticism is to interpret texts such that the reading of those texts also functions to reinforce and defend the nomos. ‘Reality’ (that is, the cosmos in its being, not in its meaning) and reference thereto within language is in the end irrelevant; what matters is what the nomos says is reality, the reiteration of the definitions, mores, laws, and structures that make up culture and its nomoi:

Verisimilitude does not necessarily correspond to what was once the case (that is a matter for history) nor to what must be (that is a matter for science) but simply to what the public thinks is possible, which can be quite different from historical reality or scientific possibility.⁵¹

Because the nomos defines reality, it has no true call to reality: it is, in the end, that “which goes without saying.”⁵² It is the accepted truths of reality. Within the nomos, within language as it functions for the maintenance of the nomos, “words no longer have any referential value . . . : their function is to communicate . . . not to suggest.”⁵³ Even though traditional criticism is “very fond of ‘evident truths,’” “[t]hese truths are . . . essentially normative.”⁵⁴ As was described in “Noble Blasphemy,” the realm of nomos is a closed system. Within the infinite sphere of that which *can* be said, the

⁴⁹With the idea of nomos we have moved out of Barthes’s vocabulary; but the ideas are consistent.

⁵⁰Barthes at 34.

⁵¹*Id.*

⁵²*Id.* at 35.

⁵³*Id.* at 40.

⁵⁴*Id.* at 35.

nomos carves out a small area of that which is *permitted* to be said, and declares the rest to be blasphemous – linguistically, to be *without meaning*. For meaning is also a function of the nomos, and that which does not conform to the world-meaning as established within the nomos is thus obviously *outside* meaning. As Barthes presents it:

As the normative system is very narrow, a mere nothing can go outside it: rules appear, perceptible at those limits of verisimilitude which one cannot transgress without coming up against a sort of critical *anti-nature* and falling into what is then called 'teratology'.⁵⁵

Moving back from Barthes to Feinberg, the parallels should not be difficult to find or follow. Of the rules of critical verisimilitude that Barthes presents, the most applicable for us here is that of Good Taste.⁵⁶

Good taste is his term for that "group of interdictions which belong to both ethics and aesthetics and in which classical criticism invests all those values which it cannot claim to be knowledge."⁵⁷ Barthes's language echoes Feinberg's, if in opposition. Barthes writes: "good taste is in fact a taboo against using certain kinds of language."⁵⁸ The echo-in-reverse in Feinberg is that discussed above, Feinberg's insistence that there are repulsive responses natural to individuals, not conditioned out of "religious taboos" and "metaphysical-theological doctrine." What Barthes recognized is that that statement, while internally making an appeal to *natural* moral sentiment, is in fact itself a *normative* statement functioning as part of the nomos. Language that appeals to natural moral sentiment ironically has no connection to any such natural states of being because the nomos serves society not Nature. What the language does do is create an *image* of a connection to a Nature that exists in understood ways, a Nature which very naturally can be accepted within a moral framework looking for means to reinforce the boundaries between the sacred and the profane.⁵⁹ There is,

⁵⁵*Id.* at 36.

⁵⁶Applicable in the sense of convenience toward forwarding this discussion.

⁵⁷Barthes at 42.

⁵⁸*Id.* at 43

⁵⁹This is, in essence, the target of de Sade's writings: his libertines are people who recognize the constructive nature of the

however, no such connection between language as a function of the nomos and the Cosmos in its Being. Understanding such, we can see how moral boundaries, how lines crafted out of moral sensibilities, are in the end arbitrary lines established not according to Nature but according to the needs of the nomos and the society which the nomos protects: the lines are set at a distance broad enough that the nomos can function to keep society unified, and tight enough that the nomos itself doesn't disassemble and fracture.

Within this lies the difficulty in seeing Feinberg's balancing test as a *liberal* mode acting toward the criminalizing of offense: the balancing test functions, ultimately, and can only function, according to the will and needs of the nomos – and the will and needs of the nomos is always towards stasis, towards conservative reinforcement of the nomos. Even though there may be within the balancing test an appeal to natural moral sensitivities that are observable in and felt by the large majority of people, that appeal is both made by and satisfied by the world-establishing nomos. And in that the majority of the people define their reality through the nomos, it is not surprising that 'moral sensitivities' will then be so observable – that is, with the appearance of naturalness, despite its nomic origins. In the end, moral sensitivities can and will function within the nomos with intent to *maintain* a social *status quo*, not to permit the development of individuality within society (individuality being anathema to nomos).

Feinberg, in giving a call for caution in application of his ideas, gives the example of interracial couples hand-holding in public places in the Deep South. Feinberg warns:

bigoted prejudices of a very wide spread kind . . . can lead onlookers to be disgusted and shocked, even 'morally' repelled, by perfectly innocent activities, and we should be loath to permit their groundless repugnance to outweigh the innocence of the offending conduct.⁶⁰

But Feinberg seems oblivious to the fact that it would be difficult at best to have called such conduct "innocent" a hundred years ago,

nomos and, through the nomos, of the masses' understanding of Nature and the world. Their actions are performances of Nature as it actually does exist, and as such performances which reveal the constructive nature of reality within the nomos.

⁶⁰Feinberg at 26.

and many (if not the great majority) of the people who would have witnessed it would in fact have been *morally* repelled. In every characteristic Feinberg offers, the action it would have been an *offense*, and as such criminally suspect. Feinberg doesn't recognize that he is impugning contemporary values upon a historical judgment call. The *nomos* has changed such that what was natural once before can no longer be considered such now: Feinberg's statement above would have bordered on the absurd a couple of centuries ago. With the false comparison – false because of the lack of a basis of comparison⁶¹ – it is easy for Feinberg to identify areas of innocence which “should be permitted.” But could he so do so in today's society? Is it so easy to see as innocent contemporary actions which violate the *nomos*? As well, isn't there a glaring absurdity in Feinberg characterizing as innocent something he is going to lengths to justify as worthy of criminal prosecution? How *can* the masses see as innocent that which the *nomos* – and through the *nomos* the *world* – is *defining* as not innocent?

Feinberg posits, “perhaps our abundant anxieties and our susceptibilities to shock will all fade away in the future”⁶² In the end, that “perhaps” does not wipe away the inherent oppressiveness of criminalization in the present, and does little to justify his schema as a *liberal* schema, especially when such a mechanism will always be working to reinforce status quo.⁶³ The test cases that would prove the liberality of Feinberg's thesis are not those issues that are in the front of everyone's minds; rather, the test cases are those moral issues that are as yet unrecognized, yet *should be*.

4.3 The “Individual Balance”

Within Feinberg's scheme, the *nomos* is not functioning solely with the proposed legal balance. It functions also – as should be anticipated – within the individuals in question themselves. (Here I am tying back the psychological commonality to the various types

⁶¹ They are both constructs of the *nomos*, and have no justification for being outside that the *nomos* required reality to be as such at that time. There is no basis of comparison except for their utility to the *nomos* of their respective times.

⁶² Feinberg at 17.

⁶³ That is, of course, unless the person operating the balance is, like a Zarathustra, intentionally fighting off the influence of the *nomos*.

of offense.) While it cannot be denied that an individual *experiences* profound offense (i.e., offense to the higher sensibilities), what is deniable is that that experience was in some way natural and not learned. Consider Feinberg's five characteristics of profound offense.

- (1) It has a tone "best approximated by saying that they are deep, profound, shattering, serious, even more likely to cause harm by their obsessiveness to those who experience them."⁶⁴
- (2) One can be offended at the idea of event occurring, even if the individual does not actually witness the event, even if the event occurred in private.
- (3) The offense is not merely to the senses or lower order sensibilities; "something offends *us*."⁶⁵
- (4) Because of its relationship to higher order sensibilities, profound offense "offends because it is believed wrong, not the other way around.
- (5) Profound offense is always at least partly *impersonal* (usually entirely impersonal).

These five characteristics can easily be read to be describing not offense but the functioning of the nomos in the individual's psyche. Keep in mind, the purpose of the nomos, to the individual, is to *define the world* so as to protect the individual's psyche from the unknown, and to protect society from internal dissolution and conflict. To speak it from another angle, it is to maintain the unity and thus safety of the herd by reinforcing the identity of the one as part of the herd. (Humans are both individual and social animals; such language is not inherently negative.) As such, it is not surprising that offense is perceived as threatening to the individual (see the causes of shame, above). Nor should it be surprising that profound offense, which is offense to the very world-belief would be impersonal: it is the whole of society that shares in the threat and its consequences. So also with that the offense is to "*us*": it is the individual's very being that is feeling the brunt of the attack. Thus also the increased sense of harm, and lack of necessity to witness the event.

Yet, that profound offense offends because it is *believed* wrong is more true than Feinberg realizes: the experience is *entirely* based

⁶⁴*Id.* at 58. The list crosses 58-59.

⁶⁵*Id.* at 59.

in belief, because the experience is a threatening of the very bases of a person's belief in their own existence: that is, the world-definition established by and provided by the nomos. But the effect of the verisimilitude must be kept in mind. When a person is profoundly offended by sacrilegious defamations, it is not, ultimately, the belief in their own religion that creates the offense, as the religious belief would need to *first* be a functioning of the nomos for there to be any feeling of offense. As such, the 'belief' being offended is not the conscious belief in a religion, but the unconscious 'belief' of the nomos. As such, the key element in sacrilege – the sacred – is not established in reality, or in the individual, but in the social conscious.

Even from the point of the experience of offense, the whole of the matter is functioning as part of the nomos. Indeed, in every way, Feinberg's argument is an argument *for* the defense of cultural unity against the individual, an argument from out of the nomic for the affirmation and performance of the nomic. As such, at every front its liberality comes into question.

5.0 Liberality in the Face of Nomos

5.1 Feinberg's Conservatism

Even with the many ways Feinberg tries to meliorate his system (only a few of which I touch on here), it is difficult to perceive it as a liberal response to the question of offense. A liberal response, however, is not then *by necessity* one that ignores offense completely, as does Feinberg's extreme liberalism, spoken of in the beginning of this essay. Because the nomos is the defining function of the lives of most people, it is a fool's game to simply ignore offenses – especially profound offenses. This is one of the lessons of Rushdie: profoundly offended people need to be heard. But does that justify or even *call* for criminalization? I think not. Indeed, as I more than intimated earlier, Feinberg's call for criminalization is suspect: it is a *huge* jump to go from recognizing that people can be 'hurt' through offense to seeking to justify *criminalization* of the matter.

As such, it is also overly simple to recast the "liberal" approach as merely a different balance or other test that permits criminalization but somehow protects all individuals who "should" be protected. Of course, that "should" is an impossibility, for the nomos is inherently conservative in its actions: it serves society, not

the individual. It is the purpose and end of the nomos to protect society *against* reformation. Within that end, within cultural mores, the only persons who “should” be protected are those persons that already are.

In the above we are not speaking about every individual, we are speaking of the masses, that social body of individuals who live within and according to narratives, to cultural nomoi, whether it be the dominant nomos of a culture or a minority nomos. There are other individuals, and there are other relationships between the individual and the cosmos. An approach in the manner of Feinberg is one captured by – in the manner of Barthes a verisimilitudinal replication of – the nomos, and is as such concerned only with those people who act to the continuance of the nomos. A truly *liberal* approach to offense – and to any socio-legal structure – would be one that recognizes the functioning of the nomos in society; it would be, as Barthes would argue, an approach that concerns itself not with the world as unconsciously defined by the nomos, not with language as it functions within and in reinforcement of the nomos, but with *language itself*, as defined by the *nomos* and as in agon with the nomos, with the nomos and its functioning, and with people not solely from within the nomos but while recognizing the *limits* and the *limiting* of the nomos. In legal terms, one that questions how the language of law, the systems of law, function to define answers before the questions are even asked.

Recognizing the nomos, one recognizes then *two* notions of liberality: one that functions within the nomos; one that functions in recognition of the nomos. The first is but a liberal conservatism, a Burkean conservatism as discussed above: conservative in that the nomos is inherently conservative in action, inherently suppressing radical change and maintaining status quo, liberal in yet attempting a forward-looking attitude, though one that will not disrupt the stability of the slow processes of the nomos. To some degree Feinberg senses the suppressing nature of the nomos, but recognizes it in a manner that is in accordance with his greater system. He writes: “Cultural change . . . causes a problem for the defender of an offense principle The principle as mediated by the extent of offense standard seems to permit punishment of offenders in the transitional stage that is unfair and morally unsettling.”⁶⁶ Continuing:

⁶⁶Feinberg at 47.

The vast majority . . . have little to fear from laws derived from the restricted offense principles. Reformers and trendsetters, in the other hand, those in each generation who are responsible for the movement and direction of the prevailing sensibility, may not be so fortunate.⁶⁷

The characterization of reform is one viewed through the inherent conservatism of the nomos: reform is praised, but the status quo – and the means of its maintenance – is yet defended, and criminally. It is difficult at best to read such and still see any true liberality in the thought. Feinberg's glorification of reformers does little to help the rhetoric:

These unfortunate chaps are in a way like the last soldiers to be killed in a way. They are treated no worse than their predecessors were in an earlier period, who were punished in the same way for the same thing, but coming near the end of an earlier stage of cultural history their punishment is somehow more poignant. To a later tolerant age, they will appear to be martyrs punished for exercising their rightful liberties a trifle prematurely.

Somehow, Feinberg must feel that the concept of liberty can be dominated by cultural norms and still be passed of as a liberal approach. Liberality, it seems to me, would be colored by a discourse that assumes a starting point of liberality at its greatest possible extent, limiting it only where it is absolutely necessary because of the demands of social existence. (Rather than the conservative approach, which would emphasize the needs of society, and permit liberty only where it does not become a nuisance to those needs.)

In the end, Feinberg's idea of liberality is one that is itself governed by and functions to the service of the nomos, and for that problem Feinberg can't see how his own rhetoric, which is wholly governed by verisimilitude's function of good taste, also serves the nomos. For example:

Thus, I could be in the uncomfortable position of making a case for the punishment of anti-war demonstrators in 1965 for parading a Viet-Cong flag (shocking!) while denouncing the punishment of other protestors in 1970 for doing the same thing (yawn). . . . My discomfort in this position is at least mitigated by the thought that martyrs to the cause of

⁶⁷*Id.* at 48.

cultural change, in my view, should never be subject to more than very minor penalties or coercive pressure. So the “tragedy” of their punishment is not at all that lamentable.⁶⁸ How can Feinberg not see that his rhetoric is standard rhetoric of oppression? His solution, his notion of liberty of thought and action, is ultimately one governed by don’t ask-don’t tell.

Very often offensive conduct is quite objectionable in itself and could be performed quite legally in the privacy of the actor’s own abode or some other private place, in which case he can have no complaint if the law prevents him from doing it right under the noses of unwilling observers.⁶⁹

The point is made, so I’ll move on.

5.2 The Liberal Approach⁷⁰

The second liberality is that approach to language and to being that is itself an engagement *with* language and being. It recognizes the presence and function of the cosmos, and performs in such a way as to *maintain* that recognition. To engage the cosmos is also to engage the various nomoi that function within societies around the world. To engage language means to engage language both in its free state and in its constricted state.

As spoken of in the first essay, the issue is ultimately discourse. Within the nomos discourse serves the nomos, thus Barthes’s critique of traditional criticism. But there is also discourse that can operate both *outside* the nomos without actually demanding the full disruption of the nomos, which is an impossibility so long as man remains, biologically, a social creature. Functionally, the difference between the two languages can be seen through the limiting nature of the nomos: language in service of the nomos maintains the limits of the blasphemous; language in engagement with the cosmos does not; rather it acts to continuously move *beyond* the limits of the nomos. The opposition is one of closing versus opening. The solution is likewise.

Criminalization functions in concert with the nomos: it functions to close off discourse, to push voices which conflict with language in

⁶⁸*Id.* at 48.

⁶⁹*Id.* at 40.

⁷⁰Admittedly, this is far too brief, but as it moves away from critiquing Feinberg and back into exploration of blasphemy, the brevity is called for. See my “Final Note,” below.

service of the nomos out, where they can no longer be part of discourse. (Not “acceptable” discourse in the normal sense of the word, as language in conflict with the nomos is cast as meaningless, and thus not part of the discourse at all.) It is worth bringing in again the situation of the Feinberg’s bus-ride. Always in play in offense is the possibility of looking away: it functions as one of the factors of Feinberg’s balancing test. But consider “looking away” in the context of lenses as just discussed above. Through the conservative lens, which begins always in defense of society, looking away is a necessary act as the nomos must defend always isolation of the individual in agon with society. Through the conservative lens, looking away is *closing off of discourse* done in a societally acceptable manner.

If we measure permissibility by that which is opposed to liberalism, then permissibility of action is measured by how that action closes of other people’s participation in discourse. Simply stated, there is no wrong in espousing a viewpoint so long as the manner of espousal is itself *participation in group discourse*. Once the manner of espousal functions more to close off discourse rather than maintain it – that is, if a person is offended and feels the need to “look away” – conservatism says it need not be tolerated.

Through the liberal lens however, the examination starts in the *right to free thought and action*: invitation into discourse, rather than the closing of discourse, is the foremost consideration. Liberalism – and liberty – is based in the freedom to engage the cosmos on one’s own terms, rather than on the terms of society and the nomos. But liberalism is not universal freedom of action: open discourse is its highest good, and must be defended at all times. As such, actions which close off discourse are the actions which should be discouraged, though recognizing that I am speaking of actions which close off discourse for others: everyone always has the right to close *themselves* off from discourse. As such, the Rushdie incident is brought into a different perspective. Yes, *Satanic Verses* must be defended as invitation to discourse. But so also, then, should the response of the persons offended: also an invitation to discourse. What stays outside the system is criminalization, which is always a means to the closure of discourse.

6.0 Final Note

There is much missing in this essay. The analysis of Feinberg is very – perhaps overly – focused, and I've left out a handful of side issues. But those issues ultimately would serve to anchor this exploration within the greater context of blasphemy as established in the first essay. As such, they're not as important for the moment.

As well, it points out the greater lack, the actual contextualization of Feinberg within the greater argument, especially as concerns the issue of discourse and fundamentalisms. But to successfully engage that requires integration of the two essays and a bit more cogitation and exploration of ideas. For example, I bring Nietzsche in rather abruptly here, though he should be far more evident throughout the essay. As well, de Sade, who was an obvious inclusion in the essay from the beginning, has barely made an entrance here.

Though, as an example of how a work that believes itself a liberal proposal but in fact is the opposite – in the greatest truth is *blind* to that it is the opposite – this essay perhaps does serve a purpose. It is not enough to merely compare the liberal against the conservative in an algebra of “which is more to what side?” The very texts itself must be explored as to their actions within the nomic, and their relations to the individual, which should always have priority over the cultural. The reverse is never not tyranny.