

Offensive Nuisances

1. *Disclaimers: the relative triviality of mere offense*

Passing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor (“harmless”) aches and pains, are not in themselves necessarily harmful. Consequently, no matter how the harm principle is mediated, it will not certify as legitimate those interferences with the liberty of some citizens that are made for the sole purpose of preventing such unpleasant states in others. For convenience I will use the word “offense” to cover the whole miscellany of universally disliked mental states (see Vol. I, Chap. 1, §4) and not merely that species of the wider genus that are offensive in a strict and proper sense. If the law is justified, then, in using its coercive methods to protect people from mere offense, it must be by virtue of a separate and distinct legitimizing principle, which we can label “the offense principle” and formulate as follows: *It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end* (i.e., there is probably no other means that is equally effective at no greater cost to other values). The principle asserts, in effect, that the prevention of offensive conduct is properly the state’s business.

Like the word “harm”, the word “offense” has both a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc.), and the latter referring to those states only when caused by the

wrongful (right-violating) conduct of others. Only the latter sense—wrongful offense—is intended in the offense principle as we shall understand it. In this respect there is a parallel with the harm principle. We can also use the verb “to offend” meaning “to cause another to experience a mental state of a universally disliked kind (e.g., disgust, shame). The offense principle then cites the need to prevent some people from *wrongfully offending* (offending and wronging) others as a reason for coercive legislation. Finally, the word “offense” in the strict and proper sense it bears in ordinary language is specific in a different way. Whereas “offense” in the sense of the offense principle specifies an objective condition—the unpleasant mental state must be caused by conduct that really is wrongful—“offense” in the strict sense of ordinary language specifies a subjective condition—the offending act must be taken by the offended person to wrong him whether in fact it does or not. In the strict and narrow sense, I am offended (or “take offense”) when (a) I suffer a disliked state, and (b) I attribute that state to the wrongful conduct of another, and (c) I *resent* the other for his role in causing me to be in the state. The sense of grievance against the other or resentment of him for wronging me in this way is a phenomenological component of the unpleasant experience itself, an element that actually reenforces and magnifies its unpleasantness. If I am disgusted by the sight of a hospital patient’s bloody wounds, the experience is one of that miscellany of disliked states I call “offended states of mind in the broad sense,” but I can hardly resent the poor fellow for his innocent role in causing me to suffer that state of mind, and indeed there may be nobody to resent, in which case I do not “take offense,” which is to say I am not offended in the strict and narrow sense.

The offense principle requires that the disliked state of mind (offense in the broad sense) be produced wrongfully by another party, but not that it be an offense in the strict sense of ordinary language. The victim may not know, or may not care, that another has wrongfully caused his unease, and therefore his unpleasant state of mind will not contain the element of resentment, and thus will not be offense in the strict sense. The offense principle as we shall interpret it then applies to offended states in either the broad or the strict sense—that is either with or without resentment—when these states are in fact wrongfully produced in violation of the offended party’s rights. It is necessary that there *be* a wrong, but not that the victim *feel* wronged. And there will always be a wrong whenever an offended state (in the generic sense) is produced in another without justification or excuse.

Since I shall be defending a highly restricted version of the offense principle in this chapter, I should begin with some important disclaimers. To begin with, *offense is surely a less serious thing than harm*. That comparative

value judgment seems to me self-evident, yet not simply true by definition. It is possible to deny it without contradiction if only because offense is not strictly commensurable with harm. It is a misconception to think of offenses as occupying the lower part of the same scale as harms; rather offenses are a different sort of thing altogether, with a scale all of their own. Yet most people after reflection will probably acknowledge that a person is not treated as badly, other things being equal, when he is merely offended as when he is harmed. We may (at most) be inclined to rank extreme offenses as greater wrongs to their victims than trifling harms, but perhaps that is because they may become so offensive as to be actually harmful, in a minor sort of way. (At any rate the comparison of extreme offense with minor harm is the only place controversy could reasonably arise over the relative seriousness of offenses and harms.) Continued extreme offense, as we have seen (Vol. I, Chap. 1, §4), can *cause* harm to a person who becomes emotionally upset over the offense, to the neglect of his real interests. But the offended mental state in itself is not a condition of harm. From the moral point of view, considered in its own nature (apart from possible causal linkages to harmful consequences), it is a relatively trivial thing.

It follows from this evident but unprovable truth that the law should not treat offenses as if they were as serious, by and large, as harms. It should not, for example, attempt to control offensiveness by the criminal law when other modes of regulation can do the job as efficiently and economically. For the control of uncommon and transitory forms of offensiveness, for example, reliance can be placed on individual suits for injunctions, or by court orders initiated by police to cease and desist on pain of penalty, or by licensing procedures that depend on administrative suspension of license as a sanction. These alternatives would not entirely dispense with the need for punishment (which is almost always a disproportionately greater evil to the offender than offended mental states are to his "victims"), but punishment would be reserved as a back-up threat, not inflicted for offending others so much as for defying authority by persisting in prohibited conduct (see Vol. I, Introduction, §7). It may well be that the ordinary criminal law need not concern itself at all with defining crimes of offensiveness, even though offensiveness is the sort of evil it could in principle be used legitimately to combat. It is more likely, however, that for various practical reasons, reliance on injunctions, administrative orders, and license withdrawals would be insufficient to control *all* properly prohibitable offensive conduct. In some cases, we can know very well in advance that conduct of a certain kind will offend; that is, we don't have to wait for the particular circumstances to decide the question. Moreover, in some cases there will not be time to get an injunction or administrative hearing. By the time that sort of

relief is forthcoming, the annoyance has come and gone, and the offense, such as it is, already committed.

Even if there must be defined crimes with specified penalties for purely offensive conduct, however, the penalties should be light ones: more often fines than imprisonment, but when imprisonment, it should be measured in days rather than months or years. Where crimes are divided into the categories of misdemeanor and felony, purely offensive crimes should always be misdemeanors, never felonies. Where penal codes follow the American Law Institute model¹ in dividing offenses into felonies, misdemeanors, petty misdemeanors, and "violations," harmlessly offensive conduct at its worst should be a petty misdemeanor, but typically only a violation—a status it would share with traffic and parking violations, various illegal sales, and unintentional violations of health or safety codes. When a given crime is both harmful and offensive the punishment can properly be severe, but legislators and judges should make it clear that the severity of the punishment is primarily a function of the harmfulness (or dangerousness) of the criminal act, not a reaction to its offensiveness. The state should punish a very harmful or dangerous but only routinely offensive crime much more severely than a crime that is greatly offensive but harmful or dangerous only to a minor degree.

~~These strictures would seem too obvious to mention were it not for the fact that they have been traditionally flouted by legislatures. Indeed, it hardly overstates the case to say that until very recently, at least, legislatures have tended to go haywire and treat offensiveness as *more* serious than harm!³ In 1961, Herbert Wechsler⁴ made a survey of state penal codes and reported, among other things, that the New York Penal Law provided a maximum sentence of ten years for first degree assault and twenty years for sodomy; that Pennsylvania's Penal Code specified a maximum of seven years' imprisonment for assault with intent to kill, but ten years for pandering; that California provided a maximum of two years for corporal injury to wife or child but fifteen years for "perversion." Mayhem and assault with intent to commit a serious felony got fourteen and twenty years respectively in California, but statutory rape and incest got fifty years each. (Is incest two and half times as great an evil as mayhem?) From colonial times until 1869 North Carolina, following English precedents, punished "the unmentionable crime against nature," even when perpetrated with a willing partner, by the death penalty,⁵ a punishment much more severe than that for aggravated battery or grand larceny. But Zechariah Chafee gives the best example I know of perverse judicial zeal to avenge mere offense: "The white slave traffic was first exposed by W.T. Stead in a magazine article, 'The Maiden Tribute'. The English law did absolutely nothing to the profi-~~

house.) If they are to be the concern of the criminal law at all, it should be only when they occur in open places and thereby inconvenience elements of the general public, in the manner of "public" or "common" nuisances. In neither case will the law be justified in interfering with the offending conduct on the sole ground that it ~~does~~ annoy or inconvenience someone or other, for the consequences of such massive interference with liberty would be chaotic and paralyzing. Instead, the offense principle will have to be mediated by balancing tests similar to those already employed in the law of nuisance.

3. *A ride on the bus*

There is a limit to the power of abstract reasoning to settle questions of moral legitimacy. The question raised by this chapter is whether there are any human experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons' liberties. The best way to deal with that question at the start is to engage our imaginations in the inquiry, consider hypothetically the most offensive experiences we can imagine, and then sort them into groups in an effort to isolate the kernel of the offense in each category. Accordingly, this section will consist of a number of vividly sketched imaginary tales, and the reader is asked to project himself into each story and determine as best he can what his reaction would be. In each story the reader should think of himself as a passenger on a normally crowded public bus on his way to work or to some important appointment in circumstances such that if he is forced to leave the bus prematurely, he will not only have to pay another fare to get where he is going, but he will probably be late, to his own disadvantage. If he is not exactly a captive on the bus, then, he would nevertheless be greatly inconvenienced if he had to leave the bus before it reached his destination. In each story, another passenger, or group of passengers, gets on the bus, and proceeds to cause, by their characteristics or their conduct, great offense to *you*. The stories form six clusters corresponding to the kind of offense caused.

A. *Affronts to the senses*

Story 1. A passenger who obviously hasn't bathed in more than a month sits down next to you. He reeks of a barely tolerable stench. There is hardly room to stand elsewhere on the bus and all other seats are occupied.

Story 2. A passenger wearing a shirt of violently clashing orange and crimson sits down directly in your forward line of vision. You must keep your eyes down to avoid looking at him.

Story 3. A passenger sits down next to you, pulls a slate tablet from his brief case, and proceeds to scratch his fingernails loudly across the slate, sending a chill up your spine and making your teeth clench. You politely ask him to stop, but he refuses.

Story 4. A passenger elsewhere in the bus turns on a portable radio to maximum volume. The sounds it emits are mostly screeches, whistles, and static, but occasionally some electronically amplified rock and roll music blares through.

B. *Disgust and revulsion*

Story 5. This is much like story 1 except that the malodorous passenger in the neighboring seat continually scratches, drools, coughs, farts, and belches.

Story 6. A group of passengers enters the bus and shares a seating compartment with you. They spread a table cloth over their laps and proceed to eat a picnic lunch that consists of live insects, fish heads, and pickled sex organs of lamb, veal, and pork, smothered in garlic and onions. Their table manners leave almost everything to be desired.

Story 7. Things get worse and worse. The itinerant picnickers practice gluttony in the ancient Roman manner, gorging until satiation and then vomiting on to their table cloth. Their practice, however, is a novel departure from the ancient custom in that they eat their own and one another's vomit along with the remaining food.

Story 8. A coprophagic sequel to story 7.

Story 9. At some point during the trip the passenger at one's side quite openly and nonchalantly changes her sanitary napkin and drops the old one into the aisle.

C. *Shock to moral, religious, or patriotic sensibilities*

Story 10. A group of mourners carrying a coffin enter the bus and share a seating compartment with you. Although they are all dressed in black their demeanor is by no means funereal. In fact they seem more angry than sorrowful, and refer to the deceased as "the old bastard," and "the bloody corpse." At one point they rip open the coffin with hammers and proceed to smash the corpse's face with a series of hard hammer blows.

Story 11. A strapping youth enters the bus and takes a seat directly in your line of vision. He is wearing a T-shirt with a cartoon across his chest of Christ on the cross. Underneath the picture appear the words "Hang in there, baby!"

Story 12. After taking the seat next to you a passenger produces a bundle wrapped in a large American flag. The bundle contains,

among other things, his lunch, which he proceeds to eat. Then he spits into the star-spangled corner of the flag and uses it first to clean his mouth and then to blow his nose. Then he uses the main striped part of the flag to shine his shoes.

D. *Shame, embarrassment (including vicarious embarrassment), and anxiety*

Story 13. The passenger who takes the seat directly across from you is entirely naked. On one version of the story, he or she is the same sex as you; on the other version of the story, he or she is the opposite sex.

Story 14. The passenger in the previous story proceeds to masturbate quietly in his or her seat.

Story 15. A man and woman, more or less fully clothed to start, take two seats directly in front of you, and then begin to kiss, hug, pet, and fondle one another to the accompaniment of loud sighs and groans of pleasure. They continue these activities throughout the trip.

Story 16. The couple of the previous story, shortly before the bus reaches their destination, engage in acts of mutual masturbation, with quite audible instructions to each other and other sound effects.

Story 17. A variant of the previous story which climaxes in an act of coitus, somewhat acrobatically performed as required by the crowded circumstances.

Story 18. The seat directly in front of you is occupied by a youth (of either sex) wearing a T-shirt with a lurid picture of a copulating couple across his or her chest.

Story 19. A variant of the previous story in which the couple depicted is recognizable (in virtue of conventional representations) as Jesus and Mary.

Story 20. The couple in stories 15–17 perform a variety of sadomasochistic sex acts with appropriate verbal communications (“Oh, that hurts so sweet! Hit me again! Scratch me! Publicly humiliate me!”).

Story 21. The two seats in front of you are occupied by male homosexuals. They flirt and tease at first, then kiss and hug, and finally perform mutual fellatio to climax.

Story 22. This time the homosexuals are both female and they perform cunnilingus.

Story 23. A passenger with a dog takes an aisle seat at your side. He or she keeps the dog calm at first by petting it in a familiar and normal way, but then petting gives way to hugging, and gradually goes beyond the merely affectionate to the unmistakably erotic, culminating finally with oral contact with the canine genitals.

E. *Annoyance, boredom, frustration*

Story 24. A neighboring passenger keeps a portable radio at a reasonably low volume, and the sounds it emits are by no means offensive to the senses. Nor is the content of the program offensive to the sensibilities. It is, however, a low quality “talk show” which you find intensely boring, and there is no possible way for you to disengage your attention.

Story 25. The two seats to your left are occupied by two persons who put on a boring “talk show” of their own. There is no way you can avoid hearing every animated word of their inane conversation, no way your mind can roam to its own thoughts, problems, and reveries.

Story 26. The passenger at your side is a friendly bloke, garrulous and officious. You quickly tire of his conversation and beg leave to read your newspaper, but he persists in his chatter despite repeated requests to desist. The bus is crowded and there are no other empty seats.

F. *Fear, resentment, humiliation, anger* (from empty threats, insults, mockery, flaunting, or taunting)

Story 27. A passenger seated next to you reaches into a military kit and pulls out a “hand grenade” (actually only a realistic toy), and fondles and juggles it throughout the trip to the accompaniment of menacing leers and snorts. Then he pulls out a (rubber) knife and “stabs” himself and others repeatedly to peals of maniacal laughter. He turns out to be harmless enough. His whole intent was to put others in apprehension of harm.

Story 28. A passenger sits next to you wearing a black arm band with a large white swastika on it.

Story 29. A passenger enters the bus straight from a dispersed street rally. He carries a banner with a large and abusive caricature of the Pope and an anti-Catholic slogan. (You are a loyal and pious Catholic.)

Story 30. Variants of the above. The banner displays a picture of a black according to some standard offensive stereotype (Step ‘n Fetchit, Uncle Tom, etc.) with an insulting caption, or a picture of a sneering, sniveling, hook-nosed Fagin or Shylock, with a scurrilous anti-Jewish caption, or a similar offensive denunciation or lampooning of groups called “Spicks,” “Dagos,” “Polacks”, etc.

Story 31. Still another variant. A counter-demonstrator leaves a feminist rally to enter the bus. He carries a banner with an offensive caricature of a female and the message, in large red letters: “Keep the bitches barefoot and pregnant.”

4. *The modes and meaning of "offense"*

I have tried to make a number of different points by telling these bloodcurdling tales: that there are at least six distinguishable classes of offended states that can be caused by the blamable conduct of others; that to suffer such experiences, at least in their extreme forms, is an evil; but that to the normal person (like the reader) such experiences, unpleasant as they are, do not cause or constitute harm. It is very important that the reader put himself on the bus and imagine his own reactions, for no amount of abstract argument can convince him otherwise that the represented experiences are in principle of a kind that the state can legitimately make its business to prevent.

When I imagine myself on the bus in these various stories, I find that one of the least unsettling experiences is that of the otherwise well-behaved nude passenger (story 13). Needless to say, I have never seen a nude person on a public bus, so I cannot be certain what my reaction would be. But I know that the sight of a nude body as such never did a normal person any harm, and as for the "unsettling experience" itself, one might escape it, I suppose, by turning one's eyes elsewhere, or escaping into one's private reveries. For all that, however, I suspect that I would be made at least vaguely ill at ease by the nude body (for reasons that urgently require examination—see below, pp. 17ff.), and perhaps less stable persons in such a situation would be thrown into the kind of inner turmoil to which even the reader and I would be subject in most of the other situations.

The examples of "affronts to the senses" are all cases where the gratingly unpleasant experience derives entirely from its sound, color, or odor, and not at all from any symbolic representation, or recognized object. The shirt in story 2 "offends the eye" not because it is recognized as a shirt or because it symbolically asserts or suggests any proposition about shirts or any other subject. It is the sensuous garb of the experience rather than any cognitively mediated content that directly assails the eye, and that is the very feature that distinguishes affronts to the *senses* from shock to the *sensibilities*. That most of us are more disturbed emotionally by assaults on our sensibilities than by direct affronts to our senses is a contingent fact about our psyches and our common culture that could well have been other than it is without violating any law of nature. Story 3 (fingernails scratching slate) is designed to show, moreover, that affronts to senses can be so intensely unpleasant as to be nearly unbearable, even when they do not involve the cognitive faculties (and hence the sensibilities) in the offense. On the other hand, it is likely that the offense in story 1 (a passenger's odor) is influenced to some extent by one's awareness of its source as an unwashed human being, and

the revulsion attendant upon that recognition. Precisely the same odor, if it were recognized as one's own, for example, would not be quite an equal offense, presumably, in one's own nostrils. Indeed, the unpleasantness of smells (perhaps more than that of other senses) is very difficult to separate from associated beliefs and sensibilities. The smell of freshly baked macaroni and cheese smells very little different from that of much human vomit, yet the latter but not the former, when mediated by recognition, is offensive. A carton of rotten eggs, however, would smell no worse for being recognized as such, or as some particular person's property, and it may well be a transcultural truth that no one finds sulphurous oxide or the smell of skunk in high concentration very pleasant. These examples suggest that some affronts to the olfactory sense may be less dependent on cognition than others.

Another fact suggested by the stories in group A is that offensive sounds and smells can reach much greater extremes of intensity than directly offensive shapes and colors. Quite apart from the point that visual affronts are more easily avoided (we can shut our eyes more easily than our noses and ears), the visual sense seems less vulnerable to affront than the others, a purely neurological fact that has certain obvious implications for the legislator who employs an offense principle mediated by the kind of balancing tests used in the law of nuisance. Eyesores, so called, are for the most part not as great nuisances as noisome stench and loud or grating sounds.

Disgust and revulsion, as illustrated by the stories in group B, differ from mere sensuous assaults in two important respects. In the first place, their impact on the offended person, while not *always* more intense, is less localized and more profound. Indeed, the etymology of the word "disgust" (from the Latin for "bad taste") suggests that the condition it designates is more likely to involve the digestive tract than the organs of perception. The first definition of the word in *Webster's New International Dictionary* (Third Edition, 1961) presumably captures something like its original sense: "marked aversion or repugnance toward food or toward a particular dish or kind of food . . ." In a second, more generalized definition, disgust is an extremely disagreeable emotional reaction "excited by exposure to something [anything] highly distasteful or loathsome," for example, the sight of a patient's festering wounds. Whatever the object of the disgust, the term is distinguished only in degree from its near synonyms "sicken" ("a disgust so strong that one is affected physically as by a turning of the stomach") and "nausea" ("stronger still, suggesting a loathsomeness that provokes vomiting"). To be acutely disgusted is to suffer as disagreeable a state of mind and body as is possible below the threshold of actual harm, since to be sickened or nauseated is, in most cases, to cross that threshold.

In the second place, disgust—unlike sensuous affront—is always mediated by recognition or belief. What turns the spectator's stomach when he sees the itinerant picnickers in stories 6–8 consume their unusual “food” is not the color, shape, touch, sound—not even the smell—of the objects of their appetite (although these may be independently offensive to the senses), but rather the recognition of those things as objects of a certain kind—live insects, slugs, sex organs, feces, vomit, etc. If the spectator mistakenly believed that the picnickers were eating eggplant, macaroni and cheese, and sweetbreads, he might still experience some aversion in the circumstances, but it would not amount to disgust or revulsion of the near-sickening kind. Disgust then is an offense not merely to sense but rather to *sensibility*, that susceptibility to offense from witnessing objects or events which, because of the observer's recognition of them as objects of a certain kind, are painful for him to behold.

The sensibilities offended in the stories of group B might be called “lower order sensibilities,” and as such they can be contrasted with the moral, religious, and patriotic sensibilities in group C. We are disgusted at the sight of a person eating a dripping, wriggling, live sea slug, simply because we recognize it to be such, and given the character of our gastronomic sensibility, that recognition is quite sufficient to induce disgust. It is not necessary to the process that we hold a moral principle, or even a specific moral conviction, that eating sea slugs is cruel, sinful, or wicked. It is simply disgusting in some pre-rational, nondiscursive way, and that is an end to the matter. An additional step is involved in the production of disgust by offense to higher level sensibilities. When we see a strapping young man arrogantly push aside an aged lady in his haste to occupy the only remaining seat on the bus, we recognize the items in our experience as *young man*, *aged lady*, *push*, and *seat*, and that brings to mind a moral principle prescribing the proper conduct of persons of the type perceived. Then, in virtue of the perceived gross violation of that principle, we are disgusted. Similarly, the sight of a person wantonly desecrating a crucifix offends the religious sensibility not simply because the abused object is recognized as a wooden object in the shape of a cross, but because of the conventional symbolism of such shapes, and a whole complex of religious convictions, commitments, and emotions directed to the objects symbolized.²¹

The examples of indecorous sexual conduct in group D include some extreme deviations from prevailing standards of “normalcy” (stories 20–23), but they also include examples of perfectly ordinary and acceptable ways of deriving sexual pleasure when done in private (stories 14–17) and at least one commonplace state of being in which almost everyone in the world participates daily in private (story 13). Why should examples of the latter

kinds be so upsetting? Why should conduct perfectly acceptable in itself become "indecent" when performed in public? These examples are not like the instances of disgusting eating in group B. Rather they would seem analogous to examples of "normal eating" in a public place, for example, munching peanuts or eating sandwiches, alone or with a friend, on a bus, activities which are not generally thought shameful, embarrassing, or indecent, but are at the very most, minor violations of etiquette.

Our culture, of course, is far more uptight about sexual pleasures than about "harmless" pleasures of any other kind, which is easy enough to understand given the danger in, and harmful consequences of, sexual behavior in the past—disease, personal exploitation, unwanted pregnancy, etc.—and the intricate association of sexual taboos with rules of property transfer, legitimacy, marriage, and the like. Perhaps our abundant anxieties and our susceptibilities to shock will all fade away in the future, as improved contraceptive techniques reduce dangers of disease and unwanted pregnancy, and candid treatments of sexual themes in public forums and private conversations become more common still. But that day, despite recent relaxations of attitudes, still seems far off.

The disquietude caused in captive observers by public nudity and sexual behavior is a complicated psychological phenomenon, difficult to explain not only because of wide individual differences, but also because so many psychic elements are involved, and combine in so many possible ways. To begin with, nude bodies and copulating couples, like all forms of nuisance, have the power of preempting the attention and absorbing the reluctant viewer, whatever his preferences in the matter. The presence of such things in one's field of perception commands one's notice; they are distractions that must be attended to and coped with whatever one might prefer to be doing or thinking. Moreover, the problem of coping, for many persons at least, is a bit of a difficult one, not insurmountable, but something of an unpleasant strain. Part, but only part, of the explanation of that displeasure, no doubt rests on the fact that nudity and sex acts have an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed. Indeed, most of us spend an inordinate amount of time and energy, even without provocation, in sexual fantasies and the repression of lust. The unresolved conflict between instinctual desires and cultural taboos leaves many people in a state of unstable equilibrium and a readiness to be wholly fascinated, in an ambivalent sort of way, by any suggestion of sexuality in their perceptual fields. There is a temptation to see and savour all, and to permit oneself to become sexually stimulated, as by a pornographic film, but instantly the temptations of voyeurism trigger the familiar mechanism of inhibition and punishment in the form of feelings of shame.

The primary basis of one's "offended state" then is this tension between attracting and repressing forces, against a psychic background of total fascination, a combination which can be at once exciting, upsetting, and anxiety-producing. When the precipitating experience is not mere nudity, but actual sexual activity, even of a "normal" kind, it will create a kind of inner agitation at best, and at worst that experience of exposure to oneself of one's "peculiarly sensitive, intimate, vulnerable aspects" which is called *shame*.²² When one has not been able to prepare one's defenses, "one's feeling is involuntarily exposed openly in one's face. . . . We are . . . caught unawares, made a fool of."²³ For some relatively unenlightened persons the result will be a severe psychic jolt; those of us who are better able to cope with our feelings might well resent the necessity to do so and regard it as an irritating distraction and a bore, much the same as any other nuisance.

Understandable doubt has been expressed by some writers over the contention that the public nudity or sexual behavior of others can produce something called "shameful embarrassment" in oneself. Michael Bayles has effectively entered a challenge to that way of describing matters:

It is difficult to understand how the public nudity of others invades one's privacy or causes one embarrassment. Surely the privacy involved is the nude's, but one has not invaded it. For one to be ashamed of something, it must have a relation to oneself, be something for which one takes responsibility. 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 . . .²⁴

Shame, in the relevant sense, is "a painful emotion caused by consciousness of guilt, shortcoming, or impropriety in one's own behavior or position, or in the behavior or position of a closely associated person or group."²⁵ It is, therefore, difficult to understand how the painful emotion felt by the captive observer of nudity or sex play on the bus could possibly be shame, for *he* is not the one who is behaving improperly or indecorously. If the nude passenger or lewd lovers were his fellow countrymen in a foreign country, his children, friends, or business partners, he might well feel ashamed of *them*, but in our hypothetical story, the offending persons are total strangers and the offended observer is in his own country.

Still, for all of that, it does seem natural to describe the offended reaction of the observer as "shame." After all, the unexpected apprehension of nudity or "indecent" can be expected to bring a blush to the face of the observer, which is a recognized symptom both of intense self-consciousness and "shame, modesty, or confusion."²⁶ How then could the reaction to another's misconduct be shameful embarrassment? There are at least two answers to this question. First, the "guilt, shortcoming, or impropriety of

one's own" that is the object of the shame may well be the instantaneous reaction of one's own to the offending experience, a sudden loss of control, soon recovered, over impulses normally restrained by the firmest reins. One reacts in a certain way and then is immediately ashamed of that reaction. Second, one can feel shame or embarrassment vicariously in a way other than that which Bayles acknowledges. Bayles accounts for those cases where one person is ashamed of or *because of* another person with whom he is closely associated or for whom he is responsible. In those cases some of the other's shame "rubs off" on him, so to speak. But there are other cases in which the improper or inept actions of a total stranger can induce shame or embarrassment in an observer. In these cases, the observer, by a kind of sympathetic identification with the other party that comes naturally to sensitive and imaginative people, feels ashamed or embarrassed *for* the other party. In these cases the observer feels the shame he would feel were he in the other's place. In many cases, an observer's painful emotion is complex and contains elements of shame of both the personal and vicarious kinds.

And sometimes the offended mental state is still more complex. When the observer can perceive the whole embarrassing situation not only from his own vantage point, but also imaginatively from the point of view of the offenders, he comes to feel that whatever *they* may think about it, his own presence is a jarring foreign element in their privacy. His own witness then seems a part of their humiliation, and since they neither know nor care about their own public disgrace, their human dignity is further diminished in his eye, to his further distress. Still another quite independent element in the unwilling observer's painful emotion may be the feeling that he is threatened by what is happening, that either the unrestrained public performers or his own stirred up feelings may surge out of control. Thus one becomes anxiously apprehensive, and concerned lest unwilling revelations of one's own feeling discredit or embarrass one at any moment. Another element may be a response to the whole spectacle, performance *and* audience, not merely the performers themselves. What may seem obscene to the observer is not simply that the offenders are there nude or tumescent in his eye, but that they stand (or lie) revealed to many other eyes. (See Chap. 9, §5 on "obscene spectacles.") The obscenity consists not in the object of observation but in the fact that many people are looking and 'collectively' experiencing their own inadmissible feelings. The observer might thus feel embarrassed to be part of the spectacle perceived by the other members of the observing audience and also vicariously embarrassed on *their* behalf. And so, a final element steals into the complex mental state of the offended observer: a near total confusion and disarray of feeling.

The stories of abnormal sexual acts (numbers 20–23) provide examples of

public behavior that would be even more disagreeable to witness. Two elements are present in the painful feelings induced in these stories that are rarely present to the same degree in mere nudity and ordinary sex: (1) The witnessed incidents are taken to be immediately and powerfully *threatening*, and (2) "lower-level sensibilities" are shocked so that a spontaneous *disgust* arises to mingle with the other painful elements in the experience. The point about threats is best illustrated by the example of male homosexuality. The general nervousness about this subject is even reflected in the way it is treated in the most iconoclastic pornographic films. The celebrated film *Emmanuelle*, for example, included numerous scenes of female homosexuality (not very graphically displayed) presumably because such scenes are thought to be especially titillating to the males who constitute the bulk of the audience for those films. But there was not so much as a suggestion of male homosexuality, a practice which many males loathe and execrate, and hold in considerable terror. Not only do homosexual acts violate powerful taboos in our culture; they also threaten the "ego ideals" of heterosexual men. Homosexuals are the objects of near universal contempt and ridicule, and their peculiar practice is held inconsistent with the ideals of genuine manhood. Hatred of homosexuality, therefore is a part of the psychic fortress many men build around their self-esteem. The point about disgust is best illustrated by the story about bestiality (number 23). Not even the story of the feces-and-vomit-eating picnickers in group B is more disgusting to most of us than that.

After considering such jolts to sensibility, it may seem altogether anticlimactic to turn to the offenses in group E, for the boredom of radio shows and dull conversation are of such a common type that we suffer from it to some degree almost every day of our lives. At their extremes, however, the mental states they induce can be almost as intensely disliked and difficult to tolerate as fingernails on a slate board or unavoidable witness to homosexual couplings. Boredom is sometimes conceived as mere listless aimlessness or ennui, the state of a solitary person who cannot think of anything to do. That condition is unhappy enough, but there is nothing acute or piercing about it, and it is not necessarily an "offense" directly caused by another person. When one is button-holed by a "cocktail party bore," or a "discussion-period bore," on the other hand, the displeasure can be so sharp and penetrating as to suggest the pointed revolving tool that "bores" holes in firmly held objects. The bore is persistent and undivertable; he *will* command your attention; there is no escape. The offended state he produces results from another kind of tense inner conflict: one is trying desperately to escape by thinking up stratagems, excuses, and diversions, but clear thinking is impossible in the face of the bore's peremptory demands on one's

attention. Often there is no escape possible without unacceptable rudeness, so one resigns oneself in depressed and weary annoyance. At that point one is "crushed with irksome tediousness." The boring people on the bus are surely not that bad, however, if only because (stories 24 and 25) they do not attempt to exact responses from you, whereas in story 26, the officious talker can in the end be requested, without rudeness, to be quiet. But insofar as the boring passengers commandeer one's attention irresistibly, they are nuisances in the same manner, even if to a lesser degree, as their disgusting, shocking, embarrassing, and threatening counterparts in the other stories.

The group insults issued by passengers in the stories in group F, the contemptuous mockery, the deliberate baiting and taunting through the display of offensive signs and symbols, can be the most disturbing behavior of all in its effects on members of the insulted groups, and even on others to whom such conduct is odious. In these cases, as in the others, disagreeable emotions are aroused that have to be coped with, but it is distinctive of these cases that the emotion is the most difficult of all to handle, namely sudden violent anger, conjoined with anxious fear, and a feeling of humiliation and impugned "honor." Again, as soon as the emotion flares it is likely to be followed by a feeling of shame and worry over its presence and a desperate effort at repression. But the offending symbols are still there in one's visual field, still mocking and threatening, nagging and tugging at one's attention, like another kind of efficient boring tool. And attendant upon one's shame is a new anxiety: fear of making a fool of oneself by losing control. These conflicting elements pull a person in all directions and throw him into confusion. Despite the legal doctrine of "fighting words" which permits states to ban "personally abusive epithets . . . that are inherently likely to provoke violent reaction,"²⁷ it is unlikely that present laws would permit one who is personally insulted to accept what he takes to be a challenge and vent his anger in retaliatory aggression, any more than it would permit the sexually excited witness of nudity or indecency on the bus to force his lust on the provoking person. But again, having to cope with one's rage is as burdensome a bore as having to suffer shame, or disgust, or noisome stench, something unpleasant to experience and inconvenient to accommodate, even when it causes one no harm. (See Chap. 9, §7.)

It should be clear at this point that despite the miscellaneous character of "offended states" they have some important characteristics in common. They are at the very least unpleasant to the one who suffers them, though the mode of displeasure varies from case to case. With the exception of irritations to the senses, and only some of these, they are complex states whose unpleasantness is in part a function of the tension between conflict-

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

5. The relation between offense and privacy

In what manner, if any, do the offensive people on the bus violate the privacy of their fellow passengers? The word "privacy" may seem clear enough in ordinary discourse, but its ever more frequent use in law courts and legislatures has caused increasing bewilderment and controversy. Privacy as a legal category came into American law less than a century ago. Its first appearance was in the law of torts, where it served to protect persons from misappropriation of their names or pictures for commercial purposes, and then was gradually extended to include protection of persons from embarrassing publicity, from being put in a false light by the public attribution of beliefs they do not hold, and most importantly, from unwarranted intrusion into their personal affairs by such means as wire tapping, electronic surveillance, shadowing, and peeping. The moral rights to be free of these various evils are certainly genuine ones, and the evils themselves, genuine evils. These rights, moreover, had not been adequately protected by the common law before the "right to privacy" was invented or discovered. But they have an irreducibly heterogeneous character summarizable in a unitary way only by such an imprecise phrase as "the right to be let alone."

Soon it became popular to designate still other legal protections under the same flexible rubric. The old privilege of confidentiality protecting certain special relationships is now considered a special case of privacy.²⁸ In torts, the right to privacy came to encompass not only the right not to be known about in certain ways by others, but also the right to avoid "seeing and hearing what others say,"²⁹ apparently on the ground that "it may be as distasteful to suffer the intrusions of a garrulous and unwelcome guest as to discover an eavesdropper or peeper."³⁰ In constitutional law, the Supreme Court has come to discover a miscellany of "penumbral rights" of privacy against governmental action that impose limits even on otherwise valid legislation, including a right to marital privacy which is violated by a state statute prohibiting the sale of contraceptives even to married couples.³¹ (See *infra*, Vol. III, Chap. 19, §8.) The tendency to apply the one concept