HARM AND OFFENSE TODAY

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I. INTRODUCTION

The law has long sought to distinguish harm from offense. Often, the law has sought to treat differently behavior that imposes harms on others from behavior that is considered offensive, but not harmful. The distinction has long been of broad interest. Perhaps we could think of some forms of liberalism in particular as quite centrally more open to regulating harmful behavior than offensive but not harmful behavior.

What should count as a harm, rather than as an offense, for purposes of possible legal regulation, is, however, contestable. It is technically possible to argue that everything the law recognizes as offensive is also, by definition, therein legally harmful. Offensive behavior, at least if it is perceived as offensive by its target, would on that view necessarily be harmful in a legally cognizable way, even apart from any psychological or other effects of the behavior in question.

But it seems much more sensible to instead treat the relation between offense and harm as contingent. Suppose that Person A intentionally directs offensive language, perhaps in the form of a group or personal insult, at Person B, who hears the language and rightly interprets it as intentionally insulting. As it happens, though, Person B turns out to be the Stoic philosopher Marcus Aurelius, at the height of his moral powers. The response of Marcus Aurelius is then in accord with his own highest

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commitments. Thus Marcus Aurelius combines "complete freedom from passion with the greatest human affection."[1] Immoral words and deeds should on his view not infect, and should not harm, one who recognizes their immorality.[2] There should thus be a self-sufficiency of mind,[3] independent of reputation.[4] Wickedness harms the perpetrator, and not the recipient, in such a view.[5]

The relationship between harm and offense is thus best seen as contingent. Crucially, though, the relationship between harm and offense varies historically, and the nature of both are culturally conditioned in vital respects. Harm and offense according to John Stuart Mill[6] differ substantially from harm and offense in the jurisprudential context of fighting words and other tort related contexts.[7] Further, our understanding of harm and offense in legal cases has very recently evolved, most notably in school and university contexts in particular.[8] Contemporary theorists are in the process of both leading and catching up with[9] the law's understanding of the expansion, contraction, re-direction, conjunction, and even indiscriminability of harm and offense today.[10]

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1. MARCUS AURELIUS, MEDITATIONS 4 (Martin Hammond trans., 2006) (~172 CE).
2. *See id*. at 10.
3. *See id*. at 19.
4. *See id*. at 71.
5. *See id*. at 81. *See also* EPICTETUS, THE ENCHIRIDION 35 (Thomas W. Higginson trans., 1948) (~140 CE); Much more broadly, a response to any offense could track the Aristotelian judgment. C.D.C. REEVE, ARISTOTLE ON PRACTICAL WISDOM 7 (2013) (finding that we should "feel the things that we should, in the way that we should, when we should, about the things that we should, toward the people we should, for the end that we should.").
6. *See infra* Part II.
7. *See infra* Parts III. & IV.
8. *See infra* Part V.
9. *See infra* Part VI.
10. To establish the scope of this discussion, we do not herein address any attempt to distinguish between offensiveness and a violation of some public moral principle apart from harm. The public nudity cases, including those involving rules that are arguably different for men and women, are commonly thought to involve non-harmful behavior that is either offensive, or otherwise prohibitable as violative of the public morals. For discussion of purported violation-of-moral-code cases, *see, e.g.,* Eline v. Town of Ocean City, MD, 7 F.4th 214, 218 (4th Cir. 2021) (referring to expert testimony purportedly documenting changes over time in public opinion with respect to beachwear); *Id*. at 216 ("[P]rohibiting females from publicly showing their bare breasts is substantially related to an important government interest—protecting public sensibilities—and satisfies at least the heightened scrutiny of the Equal Protection Clause"); Free the Nipple - Springfield Residents Promoting Equality v. City of Springfield, 923 F.3d 508 (8th Cir. 2019) (per curiam) (upholding an indecent exposure ordinance against an equal protection claim); Tagami v. City of Chicago, 875 F.3d 375, 379 (7th Cir. 2017) (finding a self-evident public interest in "promoting traditional moral norms and public order," and referring to "societal disapproval," "morals," and "moral disapproval"); *Id*. at 380 (Rovner, J., dissenting)

II. JOHN STUART MILL'S HISTORIC TREATMENT OF HARM AND OFFENSE

The classic discussion of harm as potentially subject to legal restriction is that of John Stuart Mill.[11] It is, however, far from clear that Mill established any reasonably clear sense of harm, let alone a sense that persuasively marks out harm as a distinctive subject of possible legal regulation.[12]

(referring to taking offense and to offensiveness); Edge v. City of Everett, 636 F.Supp.3d 1247, 1256 (W.D. Wash. 2022) at *1256 ("[A]lthough public attitudes . . . are constantly changing and evolving, there is simply no basis on this record to conclude that the public exposure of female breasts no longer violates the community standards of the City of Everett"); State v. Lilley, 171 N.H. 766, 776–77, *aff'd*, 204 A.3d 198, 208–09 (2019) (finding public nudity ordinance prohibiting conduct "contrary to the societal interest in order and morality" and as protecting moral sensibilities from invasion); City of Seattle v. Buchanan, 90 Wash. 2d 584, *aff'd*, 590, 584 P.2d 918, 920–21 (1978) (en banc) (finding despite arguable changes in morality and propriety over time, the reality of offensiveness, and actual offendedness in the present public nudity case, remains). In a different context, consider the horse meat consumption case of Cavel Int'l v. Madigan, 500 F.3d 544 (7th Cir. 2008); *see also* CA PENAL CODE § 598d (2021). And consider finally the recent case of State v. Howard, 325 Or. App. 696, 529 P.3d 247 (2023) (involving second degree abuse of a corpse, with the case focusing on purported public morals without cognizable harm, or even offense to any targeted persons or direct observers).

For jurisprudential discussion of harm, offense, and purported moral rules or principles not exhausted by the categories of harm and offense. *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 40–43 (1963) (distinguishing social harms, behavioral offensiveness, and violation of moral principle); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 16–17 (1965) (discussing offense, harm, and moral principle). For accounts of the classic Hart-Devlin debate over the legal enforcement of moral rules, *see, e.g.*, Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999); Joel Feinberg, *Some Unswept Debris From the Hart-Devlin Debate*, 72 SYNTHESE 249 (1987); Robert P. George, *Social Cohesion and the Legal Enforcement of Morals: A Re-Consideration of the Hart-Devlin Debate*, 25 AM. J. JURIS. 15 (1990); Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47 (1990).

Similarly set aside herein are questions of paternalistic regulation for the presumed benefit of the person thereby constrained. For background, *see* Gerald Dworkin, *Paternalism*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (rev. ed. September 9, 2020) (visited May 20, 2023), https://plato.stanford.edu/entries/paternalism [https://perma.cc/WNM8-VA85]. *See also* R. George Wright, *Legal Paternalism and the Eclipse of Principle*, 71 U. MIAMI L. REV. 194 (2016).

11. JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003) (1859). The classic response to Mill is James Fitzjames Stephen, Liberty, Equality, Fraternity (1991 ed.) (2d. ed. 1874).

12. *See* Piers Norris Turner, *"Harm" and Mill's Harm Principle*, 124 ETHICS 299, 300 (2014) ("Mill never clearly indicates where to draw the line on 'harm.'"). *See also* DALE E. MILLER, J.S. MILL: MORAL, SOCIAL, AND POLITICAL THOUGHT 119 (2010) ("[j]ust as Mill does not define 'harm' in *On Liberty* neither does he define 'interests' there"); *see also id*. (thinking of 'harm' in terms merely of any distinct loss of utility opens up as many problems as it resolves); *see* MILL, *supra* note 11, at 81; Alan Ryan, *Mill in a Liberal*

Mill famously holds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[13] Alternatively, "the conduct from which it is desired to deter him, must be calculated to produce evil to someone else."[14] This category is then further formulated as a distinction between conduct that "concerns others"[15] and conduct that "merely concerns himself."[16]

It is hardly clear that these already multiple and diverse formulations are equivalent in practice. But Mill then adds a further complication by focusing explicitly on the 'interests' of other persons.[17] Perhaps someone could act so as to concern other people, or to affect them in some way, without also concerning or affecting their interests.[18] Or perhaps Mill is really seeking to instead distinguish between a person's interests and their 'vital' interests.[19] Or yet again, perhaps Mill is attempting to focus on certain interests that are widely shared and "readily appreciated."[20] Or perhaps Mill's real concern is only for something like acts that primarily,[21] or else directly,[22] affect the interests of others.

It is also possible that Mill is gesturing at something more than interests in referring, as he does, to 'doing evil' to other persons.[23] Perhaps the sort of harm that is properly subject to potential legal penalty involves a violation of a legal or customary right,[24] or else of some binding rule.[25]

Landscape, *in* THE CAMBRIDGE COMPANION TO MILL 497, 501–02 (John Skorupski ed., 1998).

13. MILL, *supra* note 11, at 80. We here set aside the differences between prevention and punishment, and between appropriately consensual and non-consensual harms.

14. *Id*.

15. *Id*. at 81.

16. *Id*.

17. *See id*. at 81–82.

18. *See* J.C. Rees, *A Re-Reading of Mill on Liberty, in* LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY 87, 93 (Peter Radcliff ed. 1966) ("there is an important difference between just 'affecting others' and 'affecting the interests of others'").

19. *See* JOHN GRAY, MILL ON LIBERTY: A DEFENSE 57 (2d ed. 2006) ("'[H]arm to others' is best construed as 'injury to the vital interests of others,' where these comprise the interests in autonomy and in security"). On this reading, Mill would then have to distinguish between mild and severe injuries to vital interests, and to flesh out the readily contestable meanings of 'autonomy' and 'security.'

20. David Lyons, *Liberty and Harm to Others*, *in* MILL'S ON LIBERTY: CRITICAL ESSAYS 115, 129–30 (Gerald Dworkin ed. 1997) (referring to physical necessities, personal security, social freedom, and opportunities for self-development).

21. *See* MILL, *supra* note 11 at 140–45.

22. *See id*. at 82.

23. *See id*. at 80, 81, 14–45.

24. *See id*. at 139–45.

25. *See* C.L. TEN, MILL ON LIBERTY 55 (1980) ("[a]part from the infliction of bodily injury, the sorts of harmful conduct . . . seem to involve the infringement of certain rules").

But this approach would risk question-begging, or circularity. Mill could thus try to determine what counts as legally cognizable harm by referring to the violation of rights, or to some sort of rule. But Mill could not then use the idea of harm in defining the rights or rules in question.

Mill does wish to distinguish between interests and some sorts of feelings, emotional reactions, and sentiments. Thus, someone may dislike, perhaps intensely, what another person has done, without thereby being relevantly harmed by the act in question.[26] It has been suggested that for Mill, harm must involve "perceptible damage"[27] to the affected party. But it is not clear that perceptible damage marks the most important distinction in these cases.

Imagine, for example, a person engaging in widely disapproved behavior on a public sidewalk. Some observers are embarrassed, disturbed, or offended, but not otherwise perceptibly affected. One observer, though, is so shocked by the disapproved behavior as to fall into a faint and collapse on the sidewalk, and thus suffer perceptible damage in the form of bruises and abrasions. Should our focus really be, as Mill suggests, on the actual perceptibility of the damage? Injury, damage, and harm may be quite real, even if not perceptible or empirically confirmable. Some forms of genuine pain and suffering may be like this. As well, the law might wish to declare that some forms of widely offensive public behavior do indeed cause perceptible damage, but only because of bigoted, discriminatory, or otherwise illegitimate attitudes and beliefs of the adversely affected persons. Such perceptible damage could well then be legally set aside.

Professor Jeremy Waldron has argued that for Mill, some forms of offense, emotional disturbance, and even outrage on the part of observers may be, all things considered, a good thing.[28] The idea is that a healthy and constructive moral confrontation may be taking place.[29] The problem, though, is that any disutility of emotional distress, whether based in bigotry or not, may lead not to morally healthy confrontations, and to

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26. *See, e.g.*, JONATHAN RILEY, MILL ON LIBERTY 98–99 (1998).

27. *Id*. at 98. *But see* JOHN PETER DILULIO, COMPLETELY FREE: THE MORAL AND POLITICAL VISION OF JOHN STUART MILL 194 (Princetown University Press 2022) (discussing the proverbial "sticks and stones" approach to harms).

28. *See* Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUDIES 410, 413 (1987); Jeremy Waldron, *Debate: Taking Offense*, 28 J. POL. PHIL. 343, 350 (2020) ("[t]he distress that the moralist feels is a sign that healthy ethical confrontation is taking place. Sometimes being offended is a good thing"). Presumably, Mill's version of utilitarianism is not confined to determining whether the obvious disutility of upset, offense, or distress is outweighed by the sheer psychological gratification of other persons.

29. *See generally* Waldron, *Mill and the Value of Moral Distress*, *supra* note 28; Waldron, *Debate: Taking Offense*, *supra* note 28.

moral progress, but instead to hyperpolarization, extreme chronic political and pervasive distrust, mutual hostility, and other dysfunctional long-term outcomes.

Despite Mill's wish to distinguish between "merely offensive and genuinely harmful behavior,"[30] in the end, "Mill may not have a consistent view about offense."[31] But even if Mill can consistently define 'offense,' he would then still need to trace the relationships, including the various overlaps, between offense and harm. Only on that basis could Mill then begin to build a persuasive theory of when harm, or offense, should be subject to legal sanction.

Mill rightly observes that many persons "consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings . . .."[32] Mill's version of utilitarianism allows him to respond that "there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it."[33] Mill analogizes the distinction to the difference between "the desire of a thief to take a purse, and the desire of the rightful owner to keep it."[34] This analogy assumes, however, that the relevant rights have already been properly allocated.

In any event, Mill is apparently willing to criminalize some offensive public behaviors without regard to any harm or impairment of the interests, vital or otherwise, of other persons. Thus Mill declares that "there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offenses against others, may rightly be prohibited."[35] By way of attempted clarification, Mill suggests that this category of prohibitable offenses includes "offences against decency; on which it is unnecessary to dwell."[36]

We would not have expected Mill to have opened the door to legally prohibiting mere violations of good manners, as that term is normally used. Instead, we would have assumed that violations of good manners, in themselves, are not inherently harmful, and perhaps not often even accompanied by harm to others, in any sense of interest to Mill. And we might well think of the admittedly unclear idea of publicly "indecent"[37] acts in a similar way.

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30. DAVID O. BRINK, MILL'S PROGRESSIVE PRINCIPLES 196 (2013).
31. *Id*. at 198.
32. MILL, *supra* note 11, at 147.
33. *Id*.
34. *Id*.
35. *Id*. at 160 (emphasis added).
36. *Id*.
37. *Id*.

Perhaps Mill has in mind something like public sexual activity between freely consenting adults, where passersby have no advance indication that such activity would take place in their line of vision. Perhaps Mill, at least in this mood, fits Victorian stereotypes. But it is then unclear why Mill would specify that the ill-mannered conduct in question is harmful, directly, to the actual participants.[38] Perhaps Mill here means only to specify that if the activity in question is directly harmful at all, it is thus harmful only to the actual participants, and not to any observers.

The deeper problem for Mill is that cases of apparent mere offensive belief become much more complicated, particularly as cultures have evolved since Mill's time. We could begin with someone who claims to be profoundly offended by observing, or even merely knowing of, some practices that are consensually engaged in by other persons, but who admits to suffering no cognizable harm himself. This would be a case of profound offense, but with no harm sufficient to justify legal intervention. Increasingly, though, our culture involves claims of harm along with, if not closely linked with, a claim of offense.

Even in Mill's own culture, an argumentative move from a claim of offensiveness to a claim of harmfulness should have been available. Mill himself asks us to "consider the antipathies which men cherish on no better grounds than that persons whose religious opinions are different from theirs, do not practice their religious observances."[39] Mill appreciates that many religious believers take particular activities to be either divinely commanded, or divinely forbidden.[40]

But religious believers may believe in particular that they themselves will be divinely punished if they do not prevent others from engaging in the divinely prohibited activity in question. On such a belief, the activity of others, behind closed doors or not, is not merely offensive, but a clear threat of serious harm to religious believers, and to their vital interests. Even in Mill's time, the distinction between offense and harm would thus have been questionable.[41]

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38. *See id.*

39. *Id*. at 148.

40. *See id.*

41. Incidentally, Mill believed that the dominant opinions of his day were often expressed and defended with much more offensive language than were the less popular opinions. *See id.* at 119. This belief is today echoed in the claim that calls for civility, temperateness, moderation, and inoffensiveness in political debate reflect the repressive interests of dominant groups. But Mill then further claims that "[i]n general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence." *Id.* In our own social media culture, however, the less popular opinions are often enough expressed in knowingly offensive terms. Perhaps, though, such expressions tend to limit or undermine their own cause, as Mill imagined. *See id.* All of this may still be compatible with the ability of

III. HARM AND OFFENSE IN THE CLASSIC FIGHTING WORDS CONTEXT

The United States Supreme Court gestured toward a possible distinction between offensive speech and speech that causes harm in the classic fighting words case of Chaplinsky v. New Hampshire.[42] The New Hampshire statute in question referred explicitly to offensiveness of speech at several points,[43] as did the criminal complaint.[44] The Supreme Court itself nodded toward the relevance of offense, or offensiveness,[45] but instead focused, without explaining any logical transition, on two sorts of possible speech-harms.[46]

Thus, the Chaplinsky Court referred to a category of speech known as insulting or "fighting" words.[47] This category was said to comprise words "which by their very utterance inflict injury"[48] and, as well, those words that "tend to incite an immediate breach of the peace."[49]

Let us assume that the Court here is subdividing categories of words which are already deemed to be offensive. Then we have a division between offensive words that by their very utterance inflict injury, or are hurtful in themselves, in context, and then offensive words likely, under

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offending speech to attract attention to the speaker. *See* ROCHELLE GERSTEIN, THE REPEAL OF RETICENCE 107 (1996).

The most significant mid-twentieth century updating of Mill's broader attempt to characterize and assess harm and offense was that of philosopher Joel Feinberg. The most directly relevant of Feinberg's works includes Joel Feinberg, Harm to Others (1984) and Joel Feinberg, *Offense to Others* (1988). For discussion by Feinberg of legal limitations on supposedly harmless but arguably immoral behavior, *see* Joel Feinberg, Harmless Wrongdoing (1989).

For the merest sampling of the extensive response to Professor Feinberg on harm, offense, and the legal interdiction thereof, see, e.g., Larry Alexander, *Harm, Offense, and Morality*, 7 CAN. J. L. & JURIS. 199 (1984); Robert Amdur, *Harm, Offense, and the Limits of Liberty*, 98 HARV. L. REV. 1946 (1985); Harlon L. Dalton, *"Disgust" and Punishmen*t, 96 YALE L. J. 881 (1987); R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13 (2001); Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006); A.P. Simester & Andrew von Hirsch, *Rethinking the Offense Principle*, 8 LEGAL THEORY 269 (2002); Hamish Stewart, *Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law*, 5 BUFF. CRIM. L. REV. 47 (2001); Judith Jarvis Thomson, *Feinberg on Harm, Offense, and the Criminal Law: A Review Essay*, 15 PHIL. & PUB. AFF. 381 (1986); Andrew von Hirsch, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others*, 84 MICH. L. REV. 700 (1986).

42. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). For broader commentary, see R. George Wright, *Fighting Words Today*, 49 PEPP. L. REV. 805 (2022).

43. See *Chaplinsky*, 315 U.S. at 569.

44. *See id.*

45. *See id.* at 572.

46. *See id.*

47. *Id.*

48. *Id.*

49. *Id.*

the circumstances, to provoke an immediate fight, battery, or breach of the peace.[50]

There are doubtless instances in which an utterance can inflict injury, and in that sense be harmful, even though the language is not, in form, offensive. Imagine, under this heading, an exquisitely polite, unexpected, and unmerited betrayal of an addressee, or profound ingratitude toward an addressee. The words in question may thus not be offensive in form, yet understandably, and quite predictably, deeply injurious, hurtful, or harmful to the addressee.

But the Court may well have had in mind language that is in form recognized as typically offensive, at least in context. Hostilely deployed racial or ethnic epithets would presumably be the classic case. The infliction of injury would inevitably draw implicitly upon the relevant racial or ethnic history and culture but would also be visceral and immediate.[51] In such a case, teasing apart the offensiveness of the language from the immediately inflicted injury or harm would be difficult, even if the harms manifest in various dimensions over time.

The other sort of "fighting words" focuses on the prospect of a reactive physical, bodily, interpersonal harm. The risk of a breach of the peace may be immediate, but that risk may not come to fruition in any actual breach of the peace. The concrete harm, in the form of actual physical conflict between speaker and addressee, and any associated bodily injuries, may or may not ensue. The concrete harm in this form of fighting words would flow from the likely physical, interpersonal reaction, or retaliation, by the addressee of the fighting words.

The Court in *Chaplinsky* devotes most of its attention not to offensive words that by their very utterance inflict injury, as in many a typical hate speech case,[52] but instead to offensive words that are likely to cause harm in the form of a fight or breach of the peace.[53] These two scenarios are often, but hardly always, clearly distinguishable. Imagine, for example, an offensive speaker who directs immediately injurious language at a vulnerable target-listener who is unarmed, behind a chain link fence, elderly, otherwise preoccupied, physically disabled, known to be a committed pacifist, or much physically weaker than the offensive speaker. In such cases, there can be no reasonable apprehension of harm in the form of an immediate battery by the target.

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50. *See id*.

51. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

52. *See id*.

53. See the relatively extensive discussion of the breach of the peace version of fighting words in *Chaplinsky*, 315 U.S. at 573–74, citing, *e.g.*, the disparaging religious message case of *Cantwell v. Connecticut*, 310 U.S. 298, 311 (1940).

That would leave, though, the possibility of the first variant, in which the offensive language inflicts immediate, legally cognizable-injury.[54] As the case law has unfolded, though, it has become clear that the Supreme Court, and other courts for the most part, have been reluctant to meaningfully develop this obvious potential linkage between offensive speech and closely related sorts of harms.[55] This unfortunate state of affairs, in the face of accumulating evidence with respect to hate speech generally,[56] apparently reflects the defeatist, if in a sense realistic, judgment that "due to changing social norms, public discourse has become coarser in the years following *Chaplinsky*."[57] Why such arguments from increasing verbal coarseness do not also cut in the other direction, and thus in favor of potential legal regulation, is unclear.

IV. HARM AND OFFENSE IN SOME FURTHER CONTEMPORARY TORT AND RELATED CONTEXTS

Many contemporary versions of common law torts seek explicitly to distinguish between harm and offense, perhaps with some sort of relationship between these two categories. Consider first the familiar tort of battery. A recent Fifth Circuit case includes the quote "[p]ersonal indignity is the essence of an action for battery; and consequentially the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting."[58] This understanding would seem to leave it unclear whether there can be a battery, requiring offense and insult, if the victim is unaware of the contact, at the time of the contact, or even later. It is thus unclear whether someone can be offended or insulted without being subjectively aware of any relevant acts. Perhaps offense and insult in the law of battery can be thought of, curiously, as in this sense entirely objective in nature.

A bit more elaborately, California understands the elements of a civil battery to be "(1) defendant intentionally performed an act that resulted in

54. *See Chaplinsky*, 315 U.S. at 572.

55. *See, e.g.*, United States v. Bartow, 997 F.3d 203, 207 (4th Cir. 2021); Purtell v. Mason, 527 F.3d 615, 623 (7th Cir. 2013); Barnes v. Wright, 449 F.3d 709, 718 (6th Cir. 2006); Greene v. Barber, 310 F.3d 889, 896 (6th Cir. 2002); Sandul v. Larron, 119 F.3d 1250, 1255 (6th Cir. 1997); State v. Drahota, 788 N.W.2d 796, 802 (Neb. 2010) ("the Supreme Court has largely abandoned *Chaplinsky*'s 'inflict injury' standard"); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 580–81 (1980).

56. *See, e.g.*, JEREMY WALDRON, THE HARM IN HATE SPEECH (2014).

57. State v. Liebenguth, 250 A.3d 1, 12 (Conn. 2020). *See also Barnes*, 449 F.3d at 718; *Greene*, 310 F.3d at 896; State v. Bacala, 163 A.3d 1, 7–8 (Conn. 2017).

58. Huynh v. Walmart, Inc., 30 F.4th 448, 457 (5th Cir. 2022) (quoting City of Watauga v. Gordon, 434 S.W.3d 586, 590 (Tex. 2014) (quoting Fisher v. Carousel Motor Hotel, Inc., 424 S.W.2d 627, 628–29 (Tex. 1967))).

a harmful or offensive contact with the plaintiff's person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss, or harm to the plaintiff."[59]

This understanding seems to recognize that offensive contact may also be, in one way or another, harmful.[60] It seems unlikely that the point is merely that already harmful contact may, or must, somehow involve causing some distinct but unspecified further harm. The nature of any relation between any kind of offense and any kind of harm is left entirely open.[61]

While the courts distinguish between harmful and offensive batteries,[62] they may also find a battery to be harmful precisely because it is offensive. The offensiveness in such a case is the harm.[63] Thus a Virginia court recently declared that it "has previously held that spitting 'constitute[s] an infliction of bodily harm' because it is 'an act that involve[s] physical contact and [is] deeply offensive.'"[64]

Common law assault similarly distinguishes between harm and offense. Thus, it has been said that assault as a tort must involve "defendant's intent to cause bodily harm or offensive contact, or apprehension of either."[65] Similarly, common law assault may be thought of as "an attempt to offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct."[66]

Curiously, though, harm and offense in the context of assault are not always treated in parallel fashion. Under California law, for example, a civil assault plaintiff must show:

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59. Wood v. City of Sacramento, No. 2:20-cv-00497, 2023 WL 415143, at *7 (E.D. Cal. Jan. 25, 2023) (quoting Brown v. Ransweiler, 171 Cal. App. 4th 510, 526–27, 89 Cal. Rptr. 3d 801, 811 (2009)). *See also* O'Brien v. Reed, No. 1:22-cv-00780, 2022 WL 18027819, at *8 (E.D. Cal. Dec. 30, 2022); Libman v. United States, No. 2:21-cv-09455, 2022 WL 18284664, at *20 (C.D. Cal. Dec. 1, 2022) (quoting Tekle v. United States, 511 F.3d 839, 855 (9th Cir. 2007)); Alston v. City of Sacramento, No. 2:21-cv-2049, 2022 WL 4664668, at *8 (E.D. Cal. Sept. 30, 2022); Jones v. County of San Bernadino, No. EDCV 21-695, 2022 WL 3013060, at *7 (C.D. Cal. May 19, 2022).

60. *See* cases cited *supra* note 59.

61. The courts may distinguish between the "actual physical harm" of a battery and those batteries that "are offensive and insulting." *See, e.g.*, Fisher v. Carousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967).

62. *See id*.

63. *See, e.g.*, Yancy v. Commonwealth, No. 0076-22-1, 2022 WL 17096546, at *4 (Va. Ct. App. Nov. 22, 2022).

64. *Id*.

65. Devitre v. Orthopedic Ctr. of St. Louis, LLC, 349 S.W.3d 327, 335 (Mo. 2011) (en banc).

66. Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236, 244 (S.C. Ct. App. 2008). The tort of nuisance, as well, seems to distinguish between harm and offense. *See* CP2 BP Assoc. v. CSL Plasma, Inc., 645 S.W.3d 654, 666 (Mo. Ct. App. 2022).

(1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner . . . (3) plaintiff did not consent to the defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm.[67]

The elements of assault thus treat harm and offense as alternative forms the tort may take, at least until we reach the fourth and fifth elements immediately above. The fourth element seems to require a showing of harm to the plaintiff with no explicit acknowledgement of showing offense instead.[68] And the fifth element, specifying a substantial factor test for causation, follows up by assuming, evidently, that the plaintiff has shown harm rather than offense.[69]

It is possible that this formulation of the assault tort refers to "harm" in two distinct senses, one narrow and one broader. On this interpretation, "harm" in the first two elements above would refer narrowly to harm, often bodily, as distinct from offense, taken to ordinarily be more mental in character. And then, without any notice or acknowledgment, "harm" in elements four and five would instead refer much more broadly to something like any legally cognizable injury of any sort, including non-physical harms and offensive behavior. We should not, however, casually conclude that the law has crucially equivocated on the meaning of a basic term within the scope of the elements of a single tort.

In the separate context of the tort of intentional infliction of emotional distress, the Supreme Court has referred to the "emotional harm"[70] that may result from, or be caused by, "offensive"[71] speech. Unfortunately, one thing being caused by another tells us only that the two, in this case offense and harm, must somehow differ, without clarifying the nature or extent of any differences. A cause may or may not resemble its effect.

Intriguingly, the separate crime of disorderly conduct distinguishes between harm and offense, but with a restriction of the category of offense to the realm of the "physically offensive,"[72] or, in the alternative, to "a risk of physical harm to persons or property."[73] Here, we find a striking lack of

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67. So v. Shin, 212 Cal. App. 4th 652, 668–69 (Cal. Ct. App. 2013).

68. *See id*.

69. *See id*.

70. Hustler Magazine v. Falwell, 485 U.S. at 46, 50 (1988).

71. *Id*.

72. *See, e.g.*, Rocky River v. Alaref, 2023 WL 2607436, at *2 (Ohio Ct. App. March 23, 2023); Warrensville Heights v. Parker, 2022 WL 17685291, at *1 (Ohio Ct. App. Dec. 15, 2022); Niese Holdings Ltd. v. Ohio Liquor Control Comm'n, 199 N.E.3d 1073, 1077 (Ohio Ct. App. 2022).

73. *See* cases cited *supra* note 72.

parallelism, in that disorderly conduct can take the form of a mere risk of physical harm, but not a mere risk of physical offensiveness.[74] We might tend to think of offensiveness as somehow mental, in large measure. The reference here to physical offensiveness may not be so much to a physical reaction, perhaps in the form of nausea or some other physiological responses, but to physically offensive behavior, in the sense of, say, releasing highly offensive chemicals into the air, apart from any harm or any risk of harm involved in such a chemical release.

The tort of invasion of privacy, in contrast, links harm and offense in a distinctive way. In this context, the harm of a privacy invasion is thought to be relevant, but not necessarily decisive, with respect to whether the invasion would be highly offensive to a reasonable person. In particular, there must be "a holistic consideration of factors such as the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive."[75] More generally, even severe harm can be inflicted on a victim without any genuinely distinct offensiveness of the harmful behavior in question. Perhaps there is a strong public interest in the invasion. Of course, we can always hyper-technically think of any serious imposition of harm, or any serious norm violation, as "offensive" in a broad sense.

What is unusual about the privacy tort context is this possible use of harm as a consideration in arriving, perhaps, at a further, ultimate finding of offensiveness.[76] Even in the privacy tort context, it is more typical to either try to completely unlink harm and offense,[77] or to ask whether there was highly offensive conduct leading to harm to the victim.[78] Elsewhere, in yet other separate contexts, as in the immigrant persecution cases, courts may be interested in whether the way in which a harm was inflicted can itself be characterized as offensive.[79]

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74. *See id*.

75. *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 606 (9th Cir. 2020).

76. *Id*.

77. Thus, the false light privacy tort requires that the disclosure be highly offensive to a reasonable person and, conjunctively, also cause harm, presumably to reputation. *See* Brophy v. Almanzar, No. SACV 17-01885-CJC (JPRx), 2022 WL 18278468 (C.D. Cal. Dec. 28, 2022).

78. *See, e.g.*, I.C. v. Zynga, Inc., 600 F. Supp. 3d 1034, 1049 (N.D. Cal. 2022) ("the harm is caused by the disclosure of or intrusion upon matters of a kind that would be 'highly offensive to a reasonable person'"). We may assume that it is the disclosure or intrusion that would be highly offensive, and not the subject matter itself that is disclosed or intruded upon.

79. Thus, in the persecution cases under immigration law, the question arises whether the suffering or harm was inflicted in a way that could be characterized as offensive. *See, e.g.*, Kaur v. Wilkinson, 986 F.3d 1208, 1216, 1222 (9th Cir. 2021); Guo v. Sessions, 897

V. HARM AND OFFENSE TODAY IN SCHOOLS AND UNIVERSITIES

In the increasingly important context of public school bullying, hate speech, and harassment, the emphasis of late has been on recognition of the harms typically associated with offensive speech. In such cases, any substantive distinction between giving offense and inflicting harm has come to seem increasingly doubtful.

Illustrative of the contemporary, ongoing, near fusion of offense and harm in this broad context is the case of *Harper v. Poway Unified School District*.[80] This case involved a sophomore public high school student who wore to school a t-shirt with handwritten messages on the front and back.[81] The front of the t-shirt read: "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED."[82] The back of the t-shirt read "HOMOSEXUALITY IS SHAMEFUL."[83] The Ninth Circuit adjudicated the case under the rights-of-others limitation on student speech rights recognized in *Tinker v. Des Moines Independent Community School District*.[84]

Considering the language in context, we can judge the messages to be offensive in character. We can reach that judgment while bearing in mind the circumstances of the readers of the message, without taking into account any actual reactions to, or consequences of, reading or learning of the messages in question. But perhaps in our culture, what is legally cognizable as offensive is increasingly thought to be a matter largely of subjective, relativist judgments and the exercise of power.[85] If so, perhaps we should expect a shift in cultural emphasis over time from contestable claims of offensiveness to claims of a widening range of legally cognizable harms.

Thus the touchstone in *Harper* is not alleged the offensiveness, objectionability, or inappropriateness of the language in question, but a variety of more and less objective, empirical, or tangible harms to fellow students. Judge Reinhardt's opinion for the majority declares that "[p]ublic school students who may be injured by verbal assaults on the basis of a

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F.3d 1208, 1213 (9th Cir. 2018); Lanza v. Ashcroft, 389 F.3d 917, 934 (9th Cir. 2004); Li v. Ashcroft, 356 F.3d 1153, 1158 (9th Cir. 2004).

80. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1263 (2007).

81. *See id*. at 1170–71.

82. *Id*. at 1171.

83. *Id*.

84. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

85. Contrast the relativism, and then the pretense of a non-relativist consensus, respectively in *Cohen v. California*, 403 U.S. 15 (1971) and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[86] The idea of an "assault" or an "attack" may certainly suggest the idea of offensiveness, but more clearly and directly, the possibility of harm.

The focus in *Harper* is thus not on something like offense, insult or affront, but on a range of harm phenomena including alleged injury;[87] damages;[88] detriment to health;[89] detriment to well-being;[90] detriment to educational development;[91] academic underachievement, truancy, and dropout;[92] difficulty in concentrating;[93] fear for personal safety;[94] destruction of self-esteem;[95] crushing of a sense of self-worth;[96] vulnerability;[97] and significant injury.[98]

Similar harm phenomena were reported in the recent Ninth Circuit case of *Chen v. Albany Unified School District*.[99] *Chen* involved off campus social media posts that "aimed highly offensive racist insults at identifiable Black classmates."[100] The offensive and insulting posts were categorized as "severe bullying or harassment"[101] under Supreme Court precedent.[102] The range of reactions included upset,[103] missing days of school,[104] withdrawal from school,[105] feeling devastated,[106] lowered grades,[107] fears for safety,[108] trauma,[109] inability to study,[110] inability to

86. *Harper*, 445 F.3d at 1178.
87. *See id*.
88. *See id*.
89. *See id*. at 1179.
90. *See id*.
91. *See id*.
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.* at 1182.
98. *See id.*
99. Chen v. Albany Unified School District, 56 F.4th 708 (9th Cir. 2022).
100. *Id.* at 712.
101. *Id.* at 711.
102. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021).
103. *See Chen*, 56 F.4th at 713.
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.* at 714.
109. *See id.*
110. *See id.*

attend classes,[111] and loss of sleep.[112] Some of these effects were reported in students not directly targeted by the relevant social media posts.[113]

These sorts of harms are reported in a range of contexts and circumstances.[114] Plainly, these harms—arising however inseparably from offensive language—can vary in their severity, duration, empirical confirmability, and treatability by professionals or by the victim. Not every harm resulting from offensive speech in school will be legally actionable as severe or pervasive.[115] But in all such cases, the crucial legal focus is not on speech as offensive, as insulting, or as an affront, but on the admittedly tightly related range of psychological, physiological, emotional, somatic, motivational, social, cognitive, and other sorts of harms and impairments.

As a matter of terminology, it is certainly possible to treat language or displays that are offensive, insulting, or an affront as necessarily dignitary harms, and thus inherently harmful simply by virtue of being offensive. But this amounts to a denial of a distinction between offensiveness and harm simply as a matter of a more or less arbitrary definition. And on this definition, the possibility of remaining stoically unharmed by offensive behavior is simply ruled out, even though we can imagine persons who, as a matter of personality, character, social status, and circumstance, remain genuinely unharmed by an offensive word or act.

At the very least, then, we must recognize that however slight or even non-existent the harm caused by offensive conduct may be in some cases, a range of often concrete and readily measurable harms may also quite inescapably, if not inseparably, flow from offense. Thus, summarily, as one scholar has observed,

> [t]he harm done to those who are excluded can extend beyond the epistemic and the dignitary, possibly leading to a reduction in

111. *See id.*

112. *See id.*

113. *See id.* at 721.

114. *See, e.g.,* Kluge v. Brownsburg Community Sch. Corp., 64 F.4th 861, 884 (7th Cir. 2023) (concluding that a school system's claim that a practice of calling on students solely by their last name would result in "harming students and negatively affecting student learning"); Perlot v. Green, 609 F. Supp. 3d 1106, 1114 (D. Idaho 2022) (demonstrating assertions of lack of personal safety and concern for grades and career progress); Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 674 (7th Cir. 2008) ("[I]f there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school . . . the school can forbid the speech." (involving public high school student wishing to wear a t-shirt with slogan "Be Happy, Not Gay")).

115. *See, e.g.,* Meriweather v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021); Doe v. Miami Univ., 882 F.3d 579, 590 (6th Cir. 2018) (involving a Title IX hostile environment claim).

> individuals' self-esteem, thus stunting performance in educational and job contexts. Microaggressions can negatively affect the mental health of racial minorities, and hostile work environments can lead to reduced earnings for women, even driving them out of certain professions.[116]

VI. THE BROADER EXPANSION, CONTRACTION, RE-DIRECTION, INCREASED OVERLAP, AND EVEN INDISCRIMINABILITY OF HARM AND OFFENSE

Of late, the historical tendency to try to conceptually—let alone practically—separate harms and offenses has fallen into some degree of disfavor. In particular, the classic libertarian inclination to focus the possibility of legal sanctions on a relatively narrow class of harms, as distinct from offensive behavior, has come under increased criticism.

To begin with, the lack of clarity—and the apparent multiplicity—of the idea of harm itself has been increasingly apparent. There are said to be "various accounts of the nature of harm in the literature."[117] There are thus "significant disagreements about what counts as a harm,"[118] such that "when we look at attempts to explain the nature of harm, we find a mess."[119]

Merely for illustration, we have no consensus even on whether a harm involves some sort of comparison between a less and a more favorable state or condition, or else some sort of state of being.[120] We can be offended by certain harmful behaviors in ways that seem inseparable from the harm itself. Experiencing, observing, and perhaps even just knowing about certain instances of grave, calculated offensiveness may, given our

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116. SIGAL BEN-PORATH, CANCEL WARS: HOW UNIVERSITIES CAN FOSTER FREE SPEECH, PROMOTE INCLUSION, AND RENEW DEMOCRACY 64 (2023). For other attempts to somehow reconcile free campus speech with limiting campus-based harms to students, see ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2018); KEITH E. WHITTINGTON, SPEAK FREELY, WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018); Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, UNIV. OF CHI. COMM. ON FREEDOM OF EXPRESSION, https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf (last visited Oct. 4, 2023) [https://perma.cc/KGQ5-3X9U]. For an examination of a range of the relevant official university statements, see R. George Wright, *University Missions and Legal Limitations On Campus Speech*, 52 J. L. & EDUC. 222(2023).

117. Anna Folland, *The Harm Principle and the Nature of Harm*, 34 UTILITAS 139, 139 (2022).

118. Ben Bradley, *Doing Away With Harm*, 85 PHIL. & PHENOMENOLOGICAL RES. 390, 391 (2012).

119. *Id.*

120. *See* Matthew Hanser, *Still More on the Metaphysics of Harm*, 82 PHIL. & PHENOMENOLOGICAL RES. 459, 459 (2011).

psychology, inherently involve a corresponding harm. And equally clearly, we may well be deeply offended by the imposition of particular harms.[121] Arguably, some words may cause harm in the absence of any offense—or at least any proportionate offense—to the victim.[122] Someone might thus be severely harmed by a lie without ever recognizing or being offended by the act of lying or by the lie in question. And someone can be severely but inadvertently harmed by well-intentioned, competent, and responsible acts of speech with no offensive element. Thus, a specific word or phrase from Person A to a previously traumatized Person B may trigger psychological harm to B even though A had no reason to anticipate any such harm.

It also seems possible for someone to take grave and sincere offense at activities that most of us judge to be harmless, benevolent, useful, or even vital or morally required.[123] Consider someone who is genuinely appalled, and suffers some significant physiological harm, upon witnessing or even just imagining an interracial social date.[124] Or someone who is genuinely offended by, and suffers the largely physical harm of hypertension as a result of hearing a mild and apparently reasonable critique of their country's foreign policy.[125] In such cases, it is the offendedness, and the associated physiological harm, that is properly subject to moral and legal dismissal, if not moral condemnation. We think of such reactions not as matters of hypersensitivity,[126] but of objectionable moral defect to be legally delegitimized rather than even minimally accommodated. The sorts of contexts in which we have this response have been evolving rapidly over the past few decades, as the related civil rights laws, antidiscrimination principles, and underlying culture have changed.

And thus, of late, the classic attempts to distinguish between the wrongfulness of harm and of offense, of taking harms presumptively more seriously than offenses, and of confining and stabilizing the concept of harm have all faltered. As a result, the classic Millian approach to legally cognizable harms, as largely distinct from offense, has been undermined.

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121. Query also whether we can be offended because particular conduct is considered immoral, and then whether we can also judge particular conduct to be immoral because of its offensiveness. *See* Larry Alexander, *Harm, Offense, and Morality*, 7 CAN. J.L. & JURIS. 199, 210 (1984).

122. *See* Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCH., PUB. POL'Y & L. 81, 81 (2009).

123. See Robert Amdur, *Harm, Offense, and the Limits of Liberty*, 98 HARV. L. REV. 1946, 1950 (1985).

124. *See id.*

125. Chang Liu, *Toward A Theory of Offense: Should You Feel Offended?*, 96 PHIL. 625, 635 (2021).

126. For discussion of what is taken to be mere hypersensitivity, see Harlan L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881 893 (1987).

It has been said that "claims of harm have become so pervasive that the harm principle has become meaningless."[127] Thus, "the harm principle has been stretched to the breaking point even with respect to fear of harm itself."[128]

Today, in various contexts, including some hate speech cases, there is a sense of an expansion of the notion of psychic and communal harms[129] beyond any classic Millian understandings.[130] This evolving trend is not without its current skeptics. Some scholars have argued, for example, that "[t]here is no evidence of serious psychological harm resulting from hearing positions ideologically opposite to the listener's own views, nor from hearing incautious word choices."[131] More fundamentally, others have claimed that a harm distinctively differs from a mere offense in that a genuine harm involves an invasion of an interest—of something in which the harmed person has a distinctive stake or a claim.[132]

In contrast, though, there has been an increasing and more dominant sense that, beyond the narrow realm of the abstract, disembodied, disinterested exposition of ideas, direct and indirect genuine harms of a tangible sort, and not mere offendedness, can result from bigoted speech.[133] From this perspective, the classic Millian approach improperly relies on an arbitrary, unjustifiably narrow understanding of the scope of cognizable harms.[134] Some speech can, under the circumstances, really be inherently battery-like.[135] Racial insults, for example, can be offensive, and can at the same time inflict legally cognizable psychological harms.[136]

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127. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999). Doubtless the idea of a legally cognizable offensive word or act has mutated—expanded, contracted, and been refocused—as well.

128. Kimberly Kessler Ferzan*, Prevention*, *Wrongdoing, and the Harm Principle*, 10 OHIO ST. J. CRIM. L. 685, 691 (2013).

129. See Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 14 (2006).

130. *See id.*

131. Michael Huemer, *When to Suppress Speech*, 20 GEO. J.L. & PUB. POL'Y 825, 828 (2022).

132. *See* Andrew von Hirsch, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others*, 84 MICH. L. REV. 700, 709 (1987).

133. *See id.*

134. *See, e.g.,* Melina Constantine Bell, *John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm*, 33 UTILITAS 162 (2021).

135. *See* Stephanie H. Barclay, *First-Amendment "Harms*", 85 IND. L.J. 331, 348 (2020).

136. *See* Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). *See also* Tasnim Motala, *Words Still Wound: IIED and Evolving Attitudes Toward Racist Speech*, 56 HARV. J. C.R. - C.L. L. REV. 115 (2021); Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309 (2021).

In such cases, there is, at a minimum, an inseparability, a dominating confluence, or a conjunction and merger of offense and harm. Thus, increasingly, language abusing members of racial or sexual and other basic identity groups is recognized as imposing harms worthy of legal recognition.[137] There is also an increasing recognition that the distinction between physical and psychological harm beyond offense can blur to the point of untenability, as when an attack on one's basic identity becomes paralyzing or when fear and insecurity impair one's ability to adequately concentrate or function more generally.[138]

In part, the blurring of harm and offense may stem from the clearly increasing degrees of group polarization, generalized social distrust, and mutual political and cultural animosity that have developed over the last few decades.[139] A distinction between offense and threat of harm—let alone actual harm—that may seem sensible in the abstract may seem far less persuasive under our current circumstances of severe and increasing group polarization, distrust, and animosity. From our highly motivated enemies, we may anticipate both offense and harm, with no obvious or systematic separation between the two.

Consider, finally, in this regard the illuminating hypothetical posed by Professor Arthur Ripstein.[140] Professor Ripstein envisions a home invasion that goes undetected at the time. The home invader enters and then simply sleeps, briefly, in the homeowner's bed and then wakes and undetectedly leaves, having observed every conceivable hygienic and other precaution.

Professor Ripstein's point is that absent any further complication, this act would amount to a trespass, with legal culpability in that respect, but not to any genuine harm in a sense relevant to the classic distinction between offense and a legally cognizable genuine harm.[141] And this point is certainly well-taken under some hypothetical circumstances or in the abstract.

Of course, we could inject a complication into this hypothetical by imagining that the homeowner is a woman living alone in what she has

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137. *See, e.g.,* A.P. Simester & Andrew von Hirsch, *Rethinking The Offense Principle*, 8 LEGAL THEORY 269, 288 (2002).

138. *See* Thomas Sobirk Petersen, *No Offense! On the Offense Principle and Some New Challenges*, 10 CRIM. L. & PHIL. 355, 360 (2016); *see also* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

139. *See, e.g.*, KEVIN VALLIER, TRUST IN A POLARIZED AGE (2020); KEVIN VALLIER, MUST POLITICS BE WAR? RESTORING OUR TRUST IN THE OPEN SOCIETY (2018); Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized [https://perma.cc/AEG6-XUAE].

140. Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 218 (2006).

141. *See id.*

heretofore regarded as a safe neighborhood, and that the hypothetical intruder is later revealed to be a male stranger. Under these newly assumed circumstances, we may already be urged to think of the home invasion as merely surprising, disconcerting, contemptuous, or technically violative, and in that sense offensive but not relevantly harmful.

Perhaps, to further extend the assumptions, the homeowner believes that she already lives in a culture of large and increasing polarization, mutual distrust, and animosity. Her sense of living in a reasonably secure, mutually respectful community may thus already be dissipating or absent. But perhaps not. Perhaps only now, in light of the home invasion in question, her elemental social expectations of safety and security are not met. Evidently, in the homeowner's new and reasonable judgment, all of the classic social contract and communitarian assumptions and bets are now off. What the homeowner previously took utterly for granted—her basic, general home security and reasonable inviolability—is now entirely, suddenly, and permanently, lost.

The homeowner may or may not exhibit physical or medical symptoms as a result of this experience and her re-assessment. But in any event, her reasonable expectations as to minimal safety, personal security, mutual social respect, reasonable inviolability, and home sanctity have now been shattered, specifically by the home invasion. Could this result not be thought of as a relevant and significant harm resulting from what we otherwise might think of as a technical trespass?

Now, it is barely technically possible to regard this victim's reaction as a matter of being offended, as someone might be offended by a display of sexual intimacy in a public park, or by some other purportedly unseemly public behavior. Perhaps one could be offended by a societal breakdown. But it seems more natural and appropriate, given all of the assumed circumstances, to conclude that the homeowner has been genuinely harmed, whether we choose to hold the home invader at all legally or morally culpable for that harm or not.[142]

It is also technically possible to argue that the home invader has actually done the homeowner a useful—indeed valuable—service. Perhaps he has shattered the homeowner's dangerously inaccurate illusions as to her degree of realistic vulnerability, and has, in this respect, left her better off. In some abstract sense, we might see this effect as something of a setoff to the harm done to the homeowner. But the harm of being suddenly and more or less involuntarily thrown into a broadly less desirable social worldview remains. And this harm is not reducible to

142. We might easily conclude that however reasonable the homeowner's reaction may have been, such a reaction might not have been reasonably foreseeable by a home invader who took precautions to avoid being detected at the time.

anything like a narrow, present fear of some future, unspecified physical harm. The involuntarily imposed harm consists, at least in part, of being forced to live in a perceived social world that is reasonably considered to be much less appealing, day in and day out, than that which the homeowner may have previously imagined.

VII. CONCLUSION

In the broadest sense, the best possible personal response to attempts to harm or offend us have not changed over time. In such cases, we, as targets of such behavior, should again "feel the things that we should, in the way that we should, when we should, about the things that we should, toward the people we should, for the end that we should."[143]

Such broad admonitions, however, are insensitive to the ways in which harm and offense mutate over time in culturally dependent ways. In our time, notions of harm and offense, and the legally recognized incidents thereof, have been variously expanding, contracting, undergoing re-direction and re-focusing, and increasingly overlapping—if not merging—into practical indistinguishability. In these respects, the mutations of judicially cognizable harm and offense have both tracked and contributed to our descriptive and normative cultural judgments.

143. C.D.C. REEVE, ARISTOTLE ON PRACTICAL WISDOM 7 (2013).