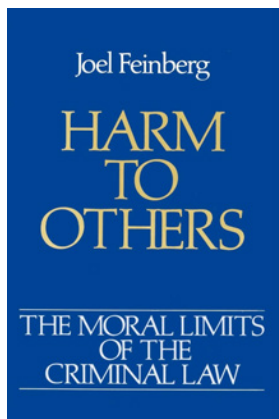


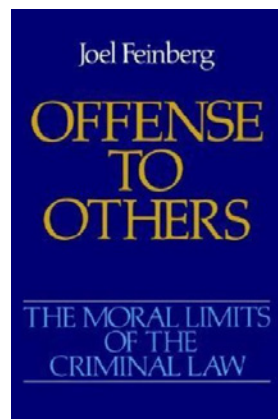
24.150 Liberalism, Toleration, and Freedom of Speech, Fall 2023

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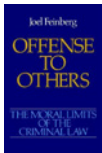
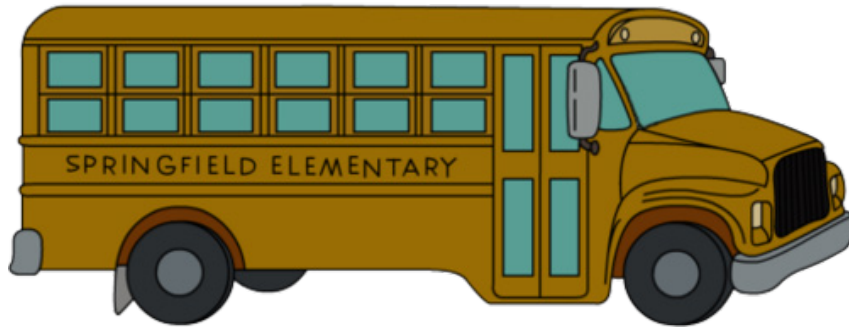


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"A ride on the bus," pp. 10-13. Which stories describe acts that should be illegal? Why?



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3

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.

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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.

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5

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.

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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.

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7

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!"

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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.

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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.

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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.

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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! I Sit 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.

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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.

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13

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.

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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.

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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.)

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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."

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The "offense principle" (ch. 8)

The law may prohibit offensive conduct if

- (i) the offense to others is serious enough, and
- (ii) the cost, to the actor, of the prohibition is low enough.

18

The offense to others is serious enough. Core factors determining the “seriousness” are:

the magnitude (intensity, duration, extent) of the offense;

the unavoidability of the offense.

19

The cost of the prohibition is low enough. Core factors determining the cost are:

its importance to the actor and to society;

the availability of alternative but unoffensive times/ places.

20

2. What distinguishes a “mere nuisance” from a “profound offense”?

Mere nuisance: the offense requires “direct perception of the offending conduct”; the “offended party thinks of himself as the wronged victim”; the offense is an “affront to one’s senses, or to one’s lower order sensibilities”; “the offending behavior is thought wrong because it produces unpleasant states...not the other way around.” (57-58)

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Mere nuisance:

direct perception required

offended person = victim

affront to one’s senses or lower sensibilities

believed wrong because it causes unpleasant states

Profound offense:

mere idea enough

offended person ≠ victim

“cannot be avoided by averting one’s eyes”

offends because believed to be wrong

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Examples of profound offense

One day [some women employed as miners] discovered to their horror that there were peepholes bored through a wall that separated a supply room to which the men had access from the womens' shower room and lavatory. (51)

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The feelings of an aged Jewish survivor of a Nazi death camp as a small band of American Nazis strut in full regalia down the main street of his or her town.

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To a principled vegetarian, the very presence in his community of a meat eater “may cause him fully as much pain as a blow to the face or a theft of his purse.” (52-53)

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Profound offense as a problem for the offense principle

The endorsement of the offense principle by the liberal theorist thus creates tensions for him in two directions. Those who are impressed with the unique character of profound offense urge a relaxing of the normal balancing tests...so that even unwitnessed offensive conduct might be prohibited...Those who are impressed by the great value of liberty...urge the liberal theorist to stand more resolutely against any acceptance of criminal statutes that ban harmless and unwitnessed conduct. (64)

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3. “The advocate of punishment for those whose unwitnessed and unarmful activities offend in their very description can now be confronted with a dilemma. Either he bases his argument on an application of the offense principle, or else on a (tacit) appeal to the illiberal principle of legal moralism” (68). What is the principle of legal moralism? Feinberg thinks that principle is false—why?

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Profound offense as a problem for the offense principle

The principle of legal moralism “enforces moral conviction and gives effect to moral outrage even when there are no violated rights, and in general no persons to ‘protect.’” (69)

How much does Feinberg really say about why he rejects it?

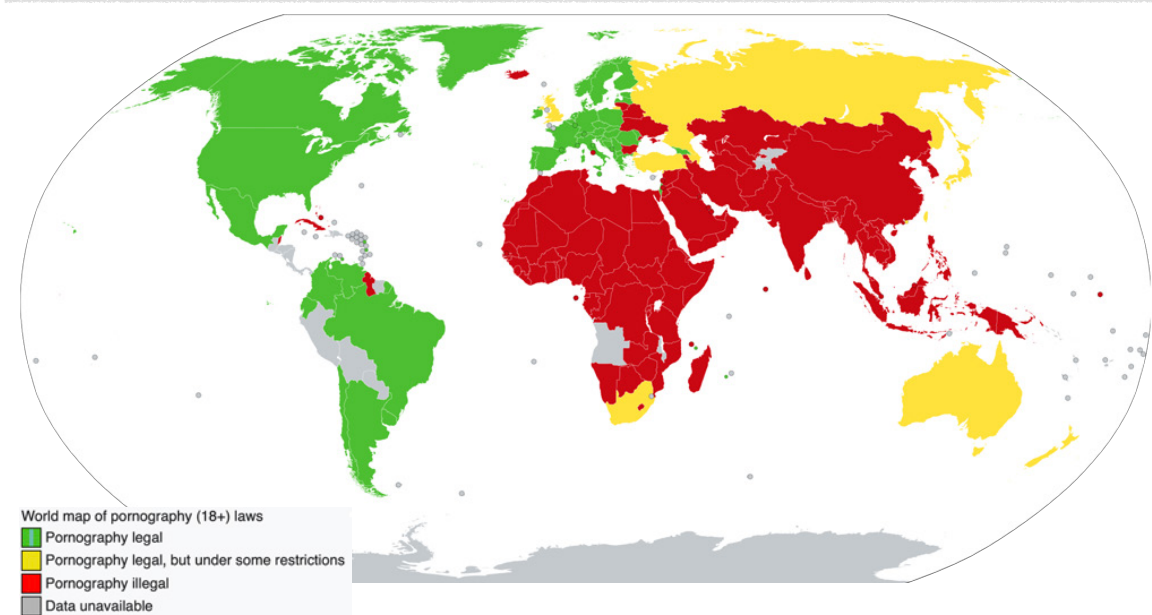
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Pornography



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Pornography: current status under 1A

Long story short: “obscene” expression is not protected under 1A.

“In *Miller v CA* (1973), the Court reasoned that individuals could not be convicted of obscenity charges unless the materials depict ‘patently offensive hard core sexual conduct.’ Under that reasoning, many sexually explicit materials — pornographic magazines, books, and movies — are not legally obscene.”


Hudson, David L., Jr. From "Obscenity and Pornography." Free Speech Center at Middle Tennessee State University, January 1, 2009. © Middle Tennessee State University. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

[<https://firstamendment.mtsu.edu/article/obscenity-and-pornography/>]

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Pornography: current status under 1A

Which premise is false?

1. The right to freedom of speech (only) protects the *expression of ideas or opinions in words*. 
2. Making pornography is not a case of expressing ideas or opinions in words.
3. The right to freedom of speech does not protect pornography.

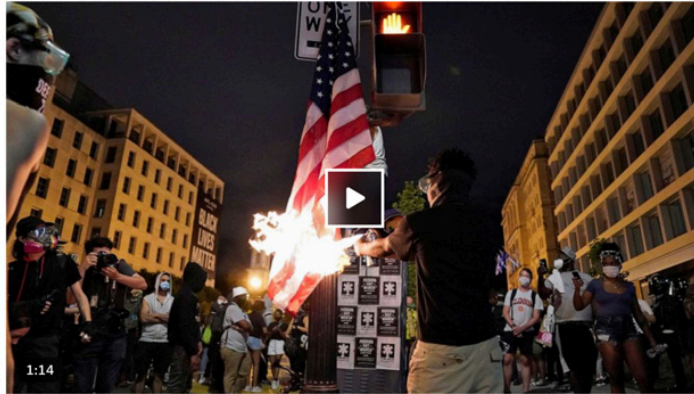
32

Trump demands end to flag burning as protests flare again near White House

Some protesters have tried to establish a police-free autonomous zone.

By [Jack Arnholtz](#)

June 24, 2020, 1:17 PM



Arnholtz, Jack. From "Trump Demands End to Flag Burning as Protests Flare Again Near White House." ABC News. June 24, 2020. © ABC News. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

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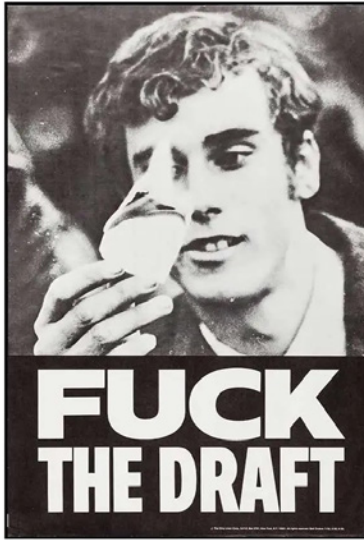
Pornography: current status under 1A

Which premise is false?

1. The right to freedom of speech (only) protects the *expression of ideas or opinions*, no matter what the means. ("Idea or opinion" = something that can be true or false.)
2. Making pornography is not a case of expressing ideas or opinions.
3. The right to freedom of speech does not protect pornography.



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Pornography: current status under 1A

Which premise is false?

1. The right to freedom of speech (only) protects the *expression of ideas, opinions, feelings, attitudes, etc.*, no matter what the means. 
2. Making pornography is not a case of expressing ideas, feelings etc.
3. The right to freedom of speech does not protect pornography.

Examples (?): works of art; films, photographs, tv shows. "I made X to entertain, not to express any ideas, feelings etc."

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