

ETHICAL ISSUES SURROUNDING THE CENSORSHIP OF PUBLIC SITE  
ART

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CENSORSHIP OF PUBLIC SITE ART

By

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## ABSTRACT

This thesis is an examination of justifications for freedom of offensive, permanent, unavoidable artistic expression situated in a public place. I argue that sufficiently offensive public site specific artworks become profoundly offensive, and that insofar as they are profoundly offensive public site-specific artworks may justifiably be censored within the context of liberal democratic society. I show that a distinction between the aesthetic value of the content of an artwork and the offense given by that artwork allows us to recognize that artworks are contextually offensive independent of their aesthetic value. Given that the offensiveness of an artwork may be considered apart from its aesthetic value, I argue that sufficiently offensive public site-specific art is justifiably censored insofar as it is (1) an immediate harm to the privacy autonomy of individuals forced to interact with it, and (2) mediately offends symbols of shared values, and (3) an elitist dictation of taste which is out of keeping with the values of a democratic society.

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## Table of Contents

### Chapter 1

#### Introduction

1. Site specificity.
2. Public space and majoritarian concerns.
3. Contextual valuation and rights of artworks.
4. Conclusion.

### Chapter 2

#### 1. Introduction

2. Legal protection of free expression.
3. Millian liberalism and free expression.
4. Feinberg's notions of offense and harm.
  - 4.1 Offense and harm defined.
  - 4.2 Offense and privacy.
  - 4.3 Standards for seriousness of offense.
  - 4.4 Profound offense.
5. The Williams Report.
6. Group right to privacy autonomy against offense, and the possibility of justified censorship.

### Chapter 3

#### Introduction

1. History of censorship.
  - 1.1 Remarks on the history of censorship.
  - 1.2 Content and offense distinguished.
  - 1.3 Contextual evaluation of value and offense.
2. Richard Serra's Tilted Arc.
  - 2.1 History of Tilted Arc.
  - 2.2 Reasonableness of Serra's expression.
  - 2.3 Evidence of offense: objections to Tilted Arc.
  - 2.4 Analysis of offense and extent of offense.

### Chapter 4

#### Introduction

1. Profound offense and justifiable censorship.
  - 1.1 Criteria for profound offense.
  - 1.2 Arguments for justifiable limitation of profoundly offensive public site specific art.
    - 1.2.1 Immediate harm to privacy-autonomy.
    - 1.2.2 Paternalism: elite dictation of taste.
    - 1.2.3 Symbolic harm to shared values: mediate offense.
2. Conclusion.
3. Implications and objections

Conclusion of thesis.

## Chapter I

### Introduction

Publicly displayed art works have received a great deal of exposure, criticism, and comment in recent years, and many conflicting claims have been made about allowing certain pieces of art to be installed in or removed from public sites. There are aesthetic, legal, and moral issues attending the public display of artworks, and the installation of public site art. Should artists' legal rights to free expression override the public's right to non-interference in their daily lives? Is it morally objectionable to interfere with or remove a public site work of art? Of what value is the expression of a public site-specific artwork? Within these widely construed areas, I intend to examine: (1) contextual evaluation of art together with a discussion of site specificity and public site art; (2) the relation between censorship and liberty; and (3), the possibility of morally justified censorship of art within an ostensibly free and democratic society.

In the remainder of the first chapter I will explain the notion of site specificity and the nature and purpose of public site-specific art. I will discuss the sorts of public sites with which my argument is concerned,

and describe the political context of public site-specific art as confrontational expression designed to engage the public in what artists have called "oppositional art."<sup>1</sup> The nature of this opposition will be examined with reference to contextual valuation of public site-specific art, and the sorts of rights or interests which the artwork or its author might have insofar as the work is an expression guarded by law and the liberal justification of law in a liberal democratic society predicated on majoritarian decision-making procedures.

The second chapter will consider the nature of free expression and censorship in relation to historical and contemporary conceptions of personal liberty. John Stuart Mill and Joel Feinberg will be taken as expositors of historical and contemporary views on censorship respectively. I will also be concerned with the debate over public availability of pornography, insofar as that debate is concerned with morality and legislation in relation to offense and community standards. This section will discuss Bernard Williams' recent inquiry into pornography in Britain, and his comments insofar as he attempts to explain the relation between offense and harm.<sup>2</sup>

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<sup>1</sup> See, for example, Ingrid Jenkner, "Sculpture in the Diminished Field" C 32, Winter 1991. p. 18.

<sup>2</sup> I will refer to Skillen's remarks on the Williams Report as a concise account of the philosophical implications of Williams' findings. Anthony Skillen, "Offences Ranked: The Williams Report on Obscenity", Philosophy 57, 1982. pp. 237-245.

Within the theoretical framework of competing legal and moral interests established by these commentators, I will discuss the possibility of a group right to censorship of an offensive practice or object. The conditions for justifiable censorship of a practice or object will be established with reference to Feinberg's "offense principle," and Mill's distinction between self- and other-regarding actions. I will be concerned with Feinberg's notion of offense to others, and how a prima facie right to privacy might conflict with a purported 'trump right' of free expression. In this discussion, I will note the moral distinctness of public and private acts. This delineation of the competing public and private interests will ground my examination in the fourth chapter of the elitist nature of lack of censorship of offensive art which will become harmful if left uncensored. The second chapter will conclude with a discussion of the nature and variety of censorship which might be justifiable within an ostensibly free and democratic society. I will argue that the public has a group right, insofar as each member of the public possesses this right individually, to non-disclosure of profoundly offensive expression in public sites. This notion of a group right will be used in the fourth chapter in connection with profound offense giving rise to harm to an individual or group.

The third chapter will begin with a brief survey

of the history of censorship of art (restriction, mutilation, or destruction), with minimal reference to ecclesiastical restriction of art. I will be concerned primarily with secular, state imposed, sanctions and historical justifications for censorship. I will discuss the recent removal of Richard Serra's Tilted Arc from the Federal Plaza in Manhattan, and suggest that my following arguments will provide moral grounds justifying the public censorship of Serra's work.

Following this survey I will argue that the moral rights of a work of art are contextually determined, and that no special moral or legal 'trump' rights ought to accrue to the artist in virtue of her having created a work of art. I will further argue in the fourth chapter that personal liberty and a perceived absolute moral right to free expression cannot justifiably trump public wishes with respect to use of public sites, and public interest in avoiding profound offense. I will show that the artist is not done any morally objectionable damage by the removal of the public site artwork; the interests of the public, even if the public is ignorant of the aesthetic merit of the public site artwork, outweigh the interests of the artist. I will argue that to ignore public interest in a public site is inconsistent with the values which liberal democracies are committed to taking seriously, and tends to undesirable elitist dictation of what art or ex-

pression is acceptable or unacceptable in the public sphere.

I am concerned with a particular sort of public art in this thesis: public site-specific art. I will first discuss the nature of site specificity before considering the explicitly public political context of public site-specific art as explicitly public. I will also comment on contextual valuation of art, and the notion of rights of artworks before moving to the second chapter's consideration of liberal justifications for protection of free expression.

### 1. Site specificity.

Public site-specific art always occupies a public site, and the piece is designed and installed in such a manner as to interact in a particular way with its surroundings: the piece is site-specific. As Richard Serra remarks:

Site specific works are determined by the topography of the site, whether it is urban, landscape or an architectural enclosure. My works become part of and are built into the structure of the site, and often restructure, both conceptually and perceptually, the organization of the site.... The historical concept of placing sculpture on a pedestal was to establish a separation between the sculpture and the viewer. I am interested in a behavioral space in which the view interacts with sculpture in its context.... Space becomes the sum of successive perceptions of the place. The viewer becomes the subject.<sup>3</sup>

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<sup>3</sup> Richard Serra, "Selected Arguments in Support of Tilted Arc," in Richard Serra's "Tilted Arc," ed. Clara

The artist seeks a particular artistic effect through the placement of the work; thus the situation and location<sup>4</sup> of the work are essential to its identity.

Artists creating public site-specific art are careful to note that the situation and location of the work are essential to its identity. In an essay introducing the methods and ideas behind Serra's sculpture, Douglas Crimp explains that the site-specific art pioneered in the 1960s is a reaction to the "illusory sitelessness" of modern sculpture and its concern with the internal relationships of the sculptures various aspects of colour, shape and texture as they interact in the sculpture. The site-specific artists sought to create "Minimalist objects [which redirected] consciousness back on itself and the real-world conditions which ground consciousness" of the artwork.<sup>5</sup> The desired effect of

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Weyergraf-Serra and Martha Buskirk (Eindhoven, 1988), pp. 64-65 and Richard Serra, "Art and Censorship" Critical Inquiry 17 (Spring 1991), p. 574, footnote 1.

<sup>4</sup> By situation I mean the particular placement and say, vertical attitude, of the work. By location I refer to the particular public site involved. Thus a particular site-specific work might be altered even by a repositioning on the same public site.

<sup>5</sup> Douglas Crimp, "Serra's Public Sculpture: Redefining Site Specificity" Richard Serra/Sculpture. R.E. Krauss ed. New York: Museum of Modern Art, 1986. p. 43. Crimp cites Daniel Buren, Hans Haacke, Michael Asher, Lawrence Weiner, and Robert Smithson as exemplars of the turn to site specificity led by Serra.

directing attention to the conditions surrounding the work requires that the work be situated in a particular manner. Crimp remarks that:

Whatever relationship was now to be perceived was contingent upon the viewer's temporal movement in the space shared with the object. Thus the work belonged to its site; if its site were to change, so would the interrelationship of object, context, and viewer.<sup>6</sup>

On these grounds artists often claim that to change or relocate the work is to destroy it, since removal or mutilation of the artwork changes its identity. Thus in defence of his controversial public site sculpture Tilted Arc, Richard Serra claimed that "...a site-specific sculpture is one which is conceived and created in relation to the particular conditions of a specific site and only to those conditions. To remove Tilted Arc, therefore, is to destroy it."<sup>7</sup>

## 2. Public space and majoritarian concerns.

Public site-specific art inhabits a peculiar political context: it is located on a public site whose use is in principle reviewed by the public, yet the in-

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<sup>6</sup> Ibid.

<sup>7</sup> Sherrill Jordan ed., Public Art, Public Controversy: The Tilted Arc On Trial. New York: ACA Books, 1987. p. 149.

tegrity of the work depends on its not being moved. In this way site-specific art differs from other public art such as statues of political leaders, which may be displayed in a variety of locations without compromising the expression of the work. I am concerned with works whose expression or integrity will be changed by movement of the work. More particularly, I am concerned with those works which are located in clearly public places whose secondary purpose is the display of art.

Thus my examination of the conflict between (a) the demands of protection of free expression and (b) the interest of the public in avoiding offence excludes such questions as how to justifiably limit e.g., an artwork which is offensive to individuals who must view it while exercising their right to cross land under an easement, or the offense suffered by patrons of a business which displays art in a foyer which is open to the public. These examples are concerned not with public offence and free expression, but with issues of property rights and the extent to which ownership of property allows display of a particular expression. I am further unconcerned with site-specific art located on public land in an area set aside for display of art, effectively making the display private insofar as it is easily avoidable. For the purposes of this thesis I will consider private display to be display where the site's primary purpose is the display of

art, and knowledge of this purpose is readily available to the public so that they might avoid it, e.g. public art galleries, or the site of display is private insofar as the public does not have a dominant share in its use e.g. a private gallery, or private dwelling.

My focus is on site-specific art which is clearly in the public purview in a place where the art is an addition to the purpose of the site as a location of public service. This includes, for example, parks, courthouses, and federal and provincial buildings. I am concerned with these places as public space in which all hold a share, even if only in principle, as common areas. These public places are 'neutral ground' for citizens, insofar as they are not reserved for a particular use which precludes other uses without public ratification (or ratification by representatives) and review of that use. As I will discuss further in the second chapter, free expression in liberal democratic societies is regulated by pressures from both majoritarian grounds, and rule-based constraints of the sort offered by constitutions. In this thesis I will emphasize the function of majoritarian review of use of public sites, and note the grounding of rule-based constraints on majoritarian consent and amendment.

### 3. Contextual valuation and rights of artworks.

While writers such as C.I. Lewis and C.D. Broad

have argued that artworks are intrinsically valuable, and others have argued that the intrinsic value of artworks provides a basis for ascribing rights to artworks, I am going to set these charges aside as irrelevant to my argument.<sup>8</sup> I do so on two grounds: first, the method of site-specific art requires viewers to interact with the work in order to complete the work's effect<sup>9</sup> and thus the work is necessarily embedded in a particular social and geographic context; second, my analysis proceeds on utilitarian grounds, and treats legal considerations surrounding limitation of offense as rule utilitarian restrictions. Even if artworks do have intrinsic value, my utilitarian model accords them nothing more than conventional rights as interests which may be trumped by other sufficiently weighty interests. And, as I will argue in the third chapter, censorship of public site art is not censorship

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<sup>8</sup> For example, Sam Hunter (Professor of Art History, Princeton University, and Curator of Contemporary Art, Princeton University Art Museum) claimed in his comments in support of retaining Tilted Arc that the offense suffered by those working in buildings around Tilted Arc was distinctly secondary to the "entirely overriding...need to preserve and uphold the integrity -- indeed the sanctity -- of sincere and earnest and indisputedly accomplished artistic work in the public domain." Hunter's invocation of the "sanctity" of art relies on an implicit appeal to intrinsic value of art that cannot legitimately be tampered with. See: Sherrill Jordan, ed. Public Art, Public Controversy: The Tilted Arc on Trial. New York: ACA Books, 1987. p. 80.

<sup>9</sup> Otherwise put, the site specific work does not stand apart from its context as e.g. a representation of a person; the site specific work is only a complete work when it is situated and located in its intended space.

of the content of the work, whatever its value; rather, I am concerned with censorship of a work insofar as it is offensive. Thus I am able to consistently hold both that I find Serra's sculpture Tilted Arc aesthetically valuable, and that it is justifiably removed from its site.

#### 4. Conclusion.

The remainder of the thesis is concerned with the last of the three claims made implicitly and explicitly by Serra. Serra claims (1) that site specificity is intrinsic, or necessary to a site-specific work's identity, and (2) that change or removal of the work destroys that identity. I have no objection to these claims. The position I reject is clearly, if emotionally summarized by sculptor Donald Judd. Judd argues in support of Serra that "the destruction of art or the alteration of its intended environment is a visual form of the threat to free speech."<sup>10</sup> I agree that the work is expression; however, I object to the further claim that the work is free expression of the sort that is not justifiably restricted. My concern is that the protection of public site-specific art by liberal democratic respect for free expression mistakenly and unnecessarily protects an offensive expression which is justifiably limited.

The philosophical significance of my argument lies

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<sup>10</sup> Jordan, p. 134.

in the consequences of my distinction between justifiably limited offensive expression which leads to harm, and offensive expression which is not harmful and does not warrant restriction in a liberal democratic society. My exploration of the boundary between offense and harm isolates enduring, repetitive, unavoidable public offense which leads to a setback of interest, and describes the implications of this sort of offense for liberal protection of free expression. Public site-specific art is an example of a particular sort of profound offense which we are justified, I will argue, in restricting not as an offense but as a harm. I will argue that sufficiently offensive public site-specific art is an example of a type of harm-causing offense which we are obligated to limit if we are to consistently maintain free expression as an instrument to social and individual good, and not simply as an abstract good independent of a context. Permanent, unavoidable public site-specific art harms individual and group interests, I will argue, in participating in review of the use of public sites, and in maintaining free expression as an instrument to circulation of ideas. This leads to the conclusion of the fourth chapter that it is illiberal (inconsistent with liberal justification for protection of free expression) to refrain from censoring some instances of harm-causing offensive expression which are prima facie protected by liberal democratic protection

of free expression.

There are several significant implications of this conclusion. The type of offensive free expression exemplified by permanent display of unavoidable sculpture is described as profoundly offensive artistic elitism which is potentially a stifling influence on circulation of ideas, and a potentially tyrannical dictatorship of taste to the majority -- a peculiar inversion of Mill's worry that the majority might establish a tyranny. Further, the analysis of individual free expression in relation to privacy clarifies the distinction between self- and other-regarding actions, and determines which profoundly offensive artistic expression ought to be protected as free expression in a liberal democratic society. The examination in the second chapter of offence, harm, and profound offence will provide an analytical toolbox for the arguments of the third and fourth chapters which I have briefly anticipated above. At the beginning of the arguments specifically directed at public site-specific art I will summarize the tools and steps my attack will take.

## Chapter II

### 1. Introduction

My central purposes in this chapter are to determine what sorts of constraints on free expression are morally justifiable in a liberal democratic society, and to lay the groundwork for the examination in the third and fourth chapters of the relation of the notions of offense and harm to free expression. In the first part of this chapter, I will discuss legal protections of free expression, and Mill's liberal justification of nearly unrestricted free expression. My examination of the liberal justification for free expression will rely on Mill's distinction between self- and other-regarding actions, and his insistence that society can justifiably impose its will on an individual only when that individual's actions prejudicially affect the interests of others. Also in part one, I will discuss the notions of offense and harm with respect to the rights and interests of both individuals and the public. These notions will be examined with reference to Feinberg's "Offense Principle"<sup>1</sup> and "Harm Principle."<sup>2</sup> While I will briefly remark on Bernard Wil-

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<sup>1</sup> Joel Feinberg, The Moral Limits of the Criminal Law. vol. 2, "Offense to Others". New York: Oxford UP, 1985.

<sup>2</sup> Joel Feinberg, The Moral Limits of the Criminal Law. vol. 1, "Harm to Others". New York: Oxford UP, 1984.

Williams' consideration of pornography and community standards as a useful example of the intersection of philosophy and public policy on the issue of censorship, I will note that pornography and public site art require different criteria under which each might justifiably be censored, since public site art is in the public sphere, and viewing of pornography may be strictly private. I am interested in Williams' remarks for their guidance in delineating the competing requirements of individual liberty and the need to limit offense causing harm to others. Williams' discussion of pornography engages the same problem facing a discussion of how offensive art might give rise to harm. Williams attempts to show which offenses may give rise to harms, and how we might acceptably limit those offenses while not limiting other offenses which will not lead to harms.

With the interests of privacy and free expression delineated, I will argue that the public may have a 'group right', insofar as the public is constituted of individuals all possessing the same right, against disclosure of certain types of expression. I will argue in the third and fourth chapters that to ignore appropriately constituted public demand for censorship of an offensive object or practice constitutes an unjustifiable overemphasis of that side of liberal democracy which values individual expression, and is further objectionable as a promotion of

elitist interests inconsistent with the fundamental values espoused by a liberal democracy.

## 2. Legal protection of free expression.

The notion of a moral right to freedom of expression has long been linked to legal discussions of autonomy and liberty. I will comment on some American and Canadian legal devices protecting free expression before examining the philosophical underpinnings of those views.

The American constitution provides a strong declaration in support of nearly unlimited free expression. The first amendment states that "Congress shall make no law ... abridging the freedom of speech."<sup>3</sup> Historically, this has been interpreted as a wide-scope right to free speech, and this right has often been extended to the so-called "penumbral rights" of freedom of press, freedom of distribution, and other allied rights.<sup>4</sup> Similar provisions exist in the more recent Canadian Charter of Rights and Freedoms (1982). Section 2(b) states that everyone has

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<sup>3</sup> First Amendment, Bill of Rights, U.S. Constitution.

<sup>4</sup> Notably, it has been argued that some of these penumbral rights are illegitimately derived from the constitution, and further, that the first amendment refers to specifically political expression regarding the method and institutions of government of the United States. See, for example, Robert H. Bork, "Neutral Principles and Some First Amendment Problems." (1971) 47 Indiana Law Journal.

the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."<sup>5</sup> Significantly, this array of legal rights to free expression is described under the heading "Fundamental Freedoms." That these freedoms should be considered fundamental indicates that free expression is held to be not only a conventional right,<sup>6</sup> but something of important moral status as well, a precondition for achievement of the highly valued goals of a "free and democratic society."<sup>7</sup> The Canadian constitutional provision for free expression differs, however, from the American provision in one important way. The rights and freedoms enshrined in the Canadian constitution are "subject only

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<sup>5</sup> Constitution Act, 1982. Part I, 2.(b).

<sup>6</sup> My use of "right" carries two senses. First, as I noted in the first chapter, I am proceeding on utilitarian grounds and moral rights are for me simply instrumentally valuable conventions which may be set aside if utilitarian considerations warrant doing so. The second sense of "right" is a right established strictly by convention, e.g., a legal right to subdivide one's property. I suggest that the writers of these constitutions intended that the rights they speak of are not defeasible rights in the sense that e.g. a legal right to subdivide is. Rather, these are basic, inalienable rights of individuals, similar to the rights proclaimed in the United Nations declaration of the rights of man. These rights are believed to have a moral force which is sufficiently strong to render invalid other lesser conventional legal rights without the moral status of the basic constitutional rights. I read these constitutions as rule utilitarian documents, on the grounds that American judicial review and interpretation of the constitution supports a rule utilitarian reading, and the Canadian constitution has an explicit clause (s.1) allowing rights to be set aside if consequences warrant doing so.

<sup>7</sup> Op. cit., Part I, 1.

to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>8</sup> This limitation clause has the effect of allowing law to transgress the area of freedom surrounding individual expression if the goal of establishing a free and democratic society will be better pursued by abridging the right to free expression.

There have been various theoretical inspirations for these constitutions. Philosophers such as Burke and Locke influenced the writers of the American Constitution, and the Canadian constitution undoubtedly took much of its inspiration from the American model while making additions such as the "limitation clause" noted above. I do not intend to argue for a particular view of constitutional origins, but I will claim that John Stuart Mill's classic expression of liberalism, On Liberty, provides a reasonable way to begin an examination of the sorts of rights (particularly free expression) espoused by both the American and Canadian constitutions. I am particularly interested in Mill because his arguments for liberal policy in the area of free expression lend moral weight to the assertions of the American and Canadian constitutions. My discussion of Mill is not intended to be a full dress justification of liberalism, but rather a discussion of one account important to Feinberg.

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<sup>8</sup> Ibid.

### 3. Millian liberalism, and free expression.

In On Liberty Mill defends free expression under the notion of liberty, claiming that free expression is liberty-preserving. Liberty is, in his view, a precondition for a good society (i.e., one that promotes human flourishing), and nearly unlimited free expression is an instrumentally good thing, since it promotes circulation of various ideas from which the best may be taken and put into practice as society strives to improve itself. This is not to say, however, that free expression is an indefeasible moral right. Rather, free expression is a precondition for individuals to make autonomous decisions about how to maximize happiness.<sup>9</sup> Thus free expression is seen as instrumental to social happiness, and ought to be protected as a conventional right with emphasis proportional to its instrumental value. For a utilitarian, the number of affected individuals is a factor in determining the worth of an action, and the difficulty of empirically determining whether the majority are harmed or benefited by a particular action does not change the utilitarian

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<sup>9</sup> I do not intend here to indicate some sort of communal pursuit of happiness; rather, I intend to indicate individuals who maximize happiness qua individuals, and group happiness is simply the aggregate of member individuals' happiness. I use "happiness" and "utility" interchangeably here, while recognizing Mill's preference for "utility" as a step away from the Benthamite notion of happiness as simply a pleasant mental state.

commitment to assessing harm and benefit in terms of numbers of individuals. I will trace the progression of Mill's argument for liberty, autonomy and free expression as instrumental to utility.

Mill argues that human flourishing cannot be promoted if individuals are not free to act in the way they think will maximize their happiness. Freedom, according to Mill, is found not just in the absence of undue institutional restraint, but in freedom from unjustified social constraints.<sup>10</sup> Thus it is insufficient that individuals be protected merely from being done injustice by the courts; they must also be protected against other unjustifiable social pressures to conform. Mill writes:

...there needs protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, the formation, of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own.<sup>11</sup>

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<sup>10</sup> Mill admits that there are some justifiable social constraints: specifically, society may restrain an individual when the individual's actions harm society or other individuals or when society has good reason to believe that the individual's actions will eventually result in unacceptable harm to others. This will be discussed in more detail below.

<sup>11</sup> John Stuart Mill, On Liberty. ed. David Spitz. New York: W.W. Norton, 1975. p. 6.

This protection is appropriate, according to Mill, because the unrestricted rule of the opinion of the majority tends to stifle the sort of innovation which will result in human flourishing. Mill holds that none know better than ourselves how we each best gain happiness, and therefore there ought to be no general policy limiting our actions: we must have freedom as unlimited as possible. "The only freedom which deserves the name," Mill writes, "is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."<sup>12</sup>

The only ground on which imposition of individual or social will on another (limiting individual freedom) is justified is self protection. Mill argues that "...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection."<sup>13</sup> Mill clarifies the sort of self protection he intends this principle to include, noting "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."<sup>14</sup><sup>15</sup>

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<sup>12</sup> Ibid., 14.

<sup>13</sup> Ibid., 10.

<sup>14</sup> Ibid., 11.

<sup>15</sup> Both of the passages I have cited above have excited much comment and argument. I am interested in the notion of harm Mill has advanced, and note that it is not clear whether Mill means physical harm, harm to non-physical interests, or some other sort of harm. My discussion of Feinberg will be principally concerned with the kindred

Mill provides a useful, though much contested distinction between (1) other-regarding actions which affect others' interests harmfully and thus are candidates for limitation by society, and (2) self-regarding actions which do not affect others harmfully and therefore may not be interfered with. This distinction between other-regarding and self-regarding actions allows Mill to distinguish public and private spheres of interest, without failing to recognize that many ostensibly private actions may have public consequences. Mill presents a formulation of the distinction:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no person besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.<sup>16</sup>

While this distinction between self-regarding and other-regarding actions establishes a clear division between

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notions of harm and offense, so I will put off until then an explanation of the notion of harms in the liberal moral and legal context, noting only that Mill provides an entirely plausible justification of a liberty limiting principle -- avoidance of utility-diminishing harm to others.

<sup>16</sup> On Liberty, 70.

public and private spheres of interest if it is correct, it has been objected that there is no such thing as a truly self-regarding action.

However, Mill is not so naive as to assume that society is composed of individuals who may usefully be considered as moral agents abstracted from the context of that society. He acknowledges that any individual's actions do affect others to some extent; but the morally significant aspect of the individual's actions is the harmfulness of their effect on others. Mill remarks:

The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.<sup>17</sup>

It remains to determine how Mill construes the notion of harm. Mill provides an example of the exercise of freedom and self-regarding actions, contrasted with other-regarding actions:

...When a person disables himself, by conduct purely self-regarding, from the per-

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<sup>17</sup> On Liberty, p. 74.

formance of some definite duty incumbent on him to the public, he is guilty of a social offence. No person ought to be punished simply for being drunk; but a soldier or policeman should be punished for being drunk on duty. Whenever, in short, there is definite damage, or risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.<sup>18</sup>

Mill's distinction between self- and other-regarding actions holds an other-regarding action to be within the domain of morality or law when definite or possible damage to other individuals or the public is posed by an individual's actions. However, Mill provides insufficiently subtle criteria of what constitutes damage and possible damage. How are we to determine which practice's consequences are worse than those of another practice, and deserving of a greater degree of restriction?

Simply clarifying the criteria of harm is not enough; since we would like to examine offenses as possible harms insofar as they may become harms in virtue of their repetitiveness, or unavoidability. Also, a more adequate examination of setbacks to interest must discuss conflicts between protected interests such as free speech which are prima facie self-regarding actions, but may conflict with the privacy and autonomy of others. Feinberg's discussion of offenses and harms provides appropriate

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<sup>18</sup> On Liberty, p. 76.

criteria for discussion of these sorts of problems, while remaining grounded on the basic Millian distinction between self- and other-regarding actions and the concern to limit unjustified damage to others.

#### 4. Feinberg's notions of offense and harm.

Feinberg provides a clear study of offense and harm. I will describe Feinberg's notions of offense and harm before considering his examination of privacy, and profound offense. My discussion of privacy will include Feinberg's "extent of offense" criteria, which determine the extent to which a purported offense is other-regarding and thus deserving of a proportionate amount of socially or politically<sup>19</sup> imposed restraint. I will ground the legitimacy of Feinberg's criteria of offense and harm on Mill's distinction between self- and other-regarding actions. With criteria for offense, harm, profound offense, and extent of offense established, I will discuss Bernard Williams' "Williams Report on Obscenity and Film Censorship," as an example of the difficulty of determining when an offense gives rise to a harm, and the type of intersection of philosophy and public policy I will discuss in the

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<sup>19</sup> I refer here to Mill's distinction between political sanctions imposed by the government or its agents, and social sanction of the general public.

third chapter. With Williams' discussion in mind, I will conclude the chapter with a discussion of how the public could, and as I will argue later in the case of public site-specific art, does have a group right against disclosure of offensive expression in public spaces when that expression will become harmful.

#### 4.1 Offense and harm defined.

I will begin by noting Feinberg's most general formulation of offense. Feinberg writes: "For convenience I have used the word 'offense' to cover the whole miscellany of universally disliked mental states..."<sup>20</sup> The sorts of 'disliked mental states' to which Feinberg refers include "...hurt feelings, aroused anger, shocked sensibility, alarm, disgust, frustration, impatient restlessness, acute boredom, irritation, [and] embarrassment...."<sup>21</sup> Feinberg notes that these sorts of offense are often part of daily life, and are not objected to as such; yet in certain contexts these sorts of experiences constitute harms which are candidates for restriction when we are harmed by a setback of our interests. Our interests<sup>22</sup> may be set back in a number of ways. Feinberg observes that:

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<sup>20</sup> Feinberg, vol. 1., p. 1.

<sup>21</sup> Feinberg, vol. 1., p. 45.

<sup>22</sup> By setback of interests I mean interference or limitation of habits, procedures, or social or material goods which are instrumental to achievement of autonomously chosen goals.

If these unpleasant experiences are intense or prolonged enough... or if they recur continuously or occur at strategically untimely moments, they can get in the way of our interests. A grating noise or evil smell is just an unpleasant sensation to be put up with grudgingly, irritating to be sure, but not harmful or injurious; but if it keeps one awake all night, then it interferes with one's interest, in the way ill health might, by making it impossible to work the next day.... If the experience is severe, prolonged, or constantly repeated, the mental suffering it causes may become obsessive and incapacitating, and therefore harmful.<sup>23</sup>

Feinberg holds that certain types of offense can become harms if they are sufficiently serious. The difference in seriousness between an offense and a harm will involve the degree of intrusiveness, measured in the example above by the repetition and enduring nature of the offense.<sup>24</sup> The boundary between harms and offenses is unclear, and I am concerned with exploring and delineating a particular aspect of the boundary: repetitive, enduring, public offense which can become harmful. My discussion of Tilted Arc in the third and fourth chapters will consider the reactions of its viewers with specific reference to the possibility that Tilted Arc is sufficiently offensive that it might set back the interests of viewers.

Feinberg devises a principle to describe the policy which would restrict actions offending others.

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<sup>23</sup> Ibid., 46.

<sup>24</sup> Feinberg provides other criteria, which I will discuss after describing his "offense principle."

Feinberg's "offense principle" holds that

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....<sup>25</sup>

Feinberg notes that the principle claims that "the prevention of offensive conduct is properly the state's business."<sup>26</sup> The prevention and regulation of offensive conduct is the state's business because of the status of offensive conduct as other-regarding action, affecting the common good, and thus a subject of common regulation.

Feinberg's offense criteria, together with criteria of seriousness, or 'extent of offense' will provide us with a theoretical framework against which purported offenses can be measured. Feinberg asserts that:

In the strict and narrow sense, I am offended (or "take offense") when (a) I suffer a disliked state, and (b) attribute that state to the wrongful conduct of another, and (c) I resent the other for his role in causing me to be in that state.<sup>27</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Feinberg, vol. 2., p. 2. The general sense of taking offense differs only insofar as one does not blame and resent a particular individual or group for the offense suffered.

For this part of my analysis the most significant aspects of this formulation are clauses (b) and (c).<sup>28</sup> This definition of "offense" notes that when we take offense, it is offense with regard to a specific agent (or group of agents) who ought to know that their conduct is offensive. Thus offense carries an element of resentment, since the offensive conduct offends nearly everyone,<sup>29</sup> and the offensive agent should be aware of the general offensiveness of her conduct. This notion of resentment (and extent of setback of interest), brings us to the question of determining the extent to which an action must invade privacy before it may justifiably be censored or otherwise restrained.

#### 4.2 Offense and privacy

I am going to argue that sufficiently offensive conduct is justifiably censored because it is an un-

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<sup>28</sup> The sorts of disliked emotional states referred to in clause (a) have been discussed above.

<sup>29</sup> Feinberg notes that we assume a standard of "reasonableness" akin to the legal notion of the "reasonable man." Certainly, some individuals will tend to be oversensitive, and will take offense at almost anything. When we are concerned with offense, we are concerned not with individual foibles, but with general social consensus that an action is offensive. There remains considerable work to be done to explain why the skittish person ought to be regarded as abnormally and inappropriately sensitive, and not as a legitimate opposing view which simply happens to oppose a particularly short-sighted and dull-witted majority. This, however, is a topic for another essay.

acceptably liberty-limiting invasion of privacy autonomy. I will describe some conventional protections of privacy before examining Elizabeth Beardsley's distinction between privacy as autonomy, and privacy as a right to non-disclosure of information about oneself.

Privacy is traditionally considered a fundamental right of individuals in liberal democratic societies. The United States Constitution protects households from unreasonable search and seizure in a way that business offices are not protected, and English common law has long sustained the notion that a 'man's home is his castle.' Similar guarantees are embedded in the Canadian Constitution's declaration that "everyone has the right to life, liberty, and security [emphasis added] of the person...."<sup>30</sup> This affirmation of the privacy of the individual is further emphasized by the following section's guarantee of freedom against unjustified invasion of personal (bodily) privacy: "everyone has the right to be secure against unreasonable search or seizure."<sup>31</sup> While the Canadian Constitution is so new that little case law regarding privacy has resulted from challenges to law under the vague terms of the constitution, American judicial interpretation has determined specific "penumbras," of constitutional protection of privacy.<sup>32</sup>

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<sup>30</sup> Pocket Criminal Code. Agincourt, Ontario: Carswell Co., 1985. p. 476. Section 7, Constitution Act, 1982.

<sup>31</sup> Ibid. Section 8, Constitution Act, 1982.

<sup>32</sup> See, for example, the decision contra the State of Connecticut that its law prohibiting the use of contracep-

Feinberg's discussion of privacy relies on Elizabeth Beardsley's distinction between invasions of privacy which violate an individual's autonomy, and invasions which violate the individual's right to selective disclosure. Feinberg observes:

Elizabeth Beardsley has put the distinction well: "Alleged violations [of privacy] seem to fall into two major categories: conduct by which one person A restricts the power of another person B to determine for himself whether or not he will perform an act X or undergo an experience E, and conduct by which one person acquires or discloses information about B which A does not wish to have known or disclosed." Beardsley labels the right to privacy violated in the former case the right to autonomy, and that violated in the latter case, the right to selective disclosure.<sup>33</sup>

Offensive conduct can violate either of the two types of privacy distinguished by Beardsley. Feinberg provides examples of violations of what I will call 'privacy autonomy' and 'disclosure privacy.' He suggests that:

A typical violation of privacy in the sense of autonomy occurs when unwanted noises obtrude upon one's experience restricting one's power to determine for oneself 'whether one will

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tives unconstitutionally violated the traditional right of couples to privacy within marriage. The court's reasoning held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help them give life and substance.... Various guarantees create zones of privacy." Griswold v. Connecticut (United States Supreme Court) 381 U.S. 479 (1965)

<sup>33</sup> Feinberg, vol. 2., p. 23.

do X, or undergo E, or not.' 'Noise removes [one's] power to choose effectively between sound and silence, or between one sound and another, as features of [one's] immediate experience.'<sup>34</sup>

The distinction is, as Feinberg suggests, between two species of privacy: the first holds that we have a right to privacy from others causing us to experience certain unpleasant mental states, while the second holds that certain information about oneself ought to be privy to oneself alone. I am concerned for the purpose of my discussion of public site art with 'privacy autonomy,' the right which holds that others ought not to force us without our consent to experience certain mental states, when there is no compelling reason to believe that temporary unpleasantness is instrumental to later, greater good.<sup>35</sup>

This conventional right can easily be justified on Millian grounds: (1) autonomy ought to be respected as instrumental to utility, unless there are compelling consequential reasons to disregard it; (2) no one knows bet-

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<sup>34</sup> Ibid.

<sup>35</sup> This good may include factors of the personal importance of the offence to the offender, possibilities for alternative expression, and the value of maintaining free expression. These "reasonableness" criteria aid in evaluating the reasonableness of the offender's behaviour, compared against the offence (and in some cases of enduring offences, harm) suffered by the offended individual or group.

ter than each individual what creates utility for him or her; and (3) limitation of another's liberty is justified only if that individual's actions are causing harm to the interests of others. In the case of an invasion of privacy, each of these conditions instrumental to creation of utility is disregarded. It remains unclear, however, on Mill's account, just what sort of sanction society might be justified in imposing on those who knowingly<sup>36</sup> create disutility for others through their actions, and how we are to assess the disutility of actions which are offensive but have no obvious setback of interest as their consequence. Feinberg's discussion of "extent of offense" criteria provides some guidance as to how we should rank the seriousness of offenses.

#### 4.3 Standards for seriousness of offense.

Feinberg suggests that criteria for establishing the extent of offense caused by a given action be taken from the model provided by nuisance law. An evaluation of the extent of offense of an act "will have to weigh, in each main category and context of offensiveness, the seriousness of the offense caused to unwilling witnesses against the reasonableness of the offender's conduct."<sup>37</sup>

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<sup>36</sup> This is intended to include those who might reasonably be expected to know that their actions would fail to maximize net good.

<sup>37</sup> Feinberg, vol. 2., p. 26.

Feinberg forwards three criteria for evaluation of seriousness of offense:

(1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated by the general reaction of strangers to the conduct displayed or represented (conduct offensive only to persons with an abnormal susceptibility to offense would not count as very offensive); (2) the ease with which the unwilling witnesses can avoid the offensive displays; and (3) whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or anticipation of pleasure.<sup>38</sup>

These criteria require some explication, and assignment of shorter names for ease of reference. The first criterion, called the "intensity" criterion by Feinberg, is aimed at determining what is offensive to the 'reasonable man,' and the degree of his repugnance. This criterion excludes the "skittish person" (Feinberg's term) who will take offense at nearly anything, yet takes account of the fact that different offenses will give rise to different amounts of offense or unhappiness.

The second criterion forwarded by Feinberg, the "reasonable avoidability standard," holds an action to be increasingly offensive to a witness as exposure to the offense is increasingly unavoidable. For example, a pornographic film projected onto a wall in a public square would be more offensive than the same film shown in a

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<sup>38</sup> Ibid.

theatre. Anyone using the square would be unable to avoid the film, and their privacy autonomy would be violated, while the theatre (and the screen) showing the film would be much more easily avoided.<sup>39</sup> The context of display determines the amount of offense given.

The third criterion, the "volenti" criterion, claims that offense may be given even if the "participants" (loosely construed) apparently consented.

Feinberg claims that these aspects of offense must be weighed against the reasonableness of the offender's actions. Feinberg provides three criteria of reasonableness of an action:

(1) its personal importance to the actors themselves and its social value generally, remembering always the enormous social utility of unhampered expression (in those cases where expression is involved); (2) the availability of alternative times and places where the conduct in question would cause less offense; (3) the extent, if any, to which the offense is caused with spiteful motives.<sup>40</sup>

These criteria establish the extent to which a purported offense has socially redeeming value. Feinberg grounds the "enormous social utility" of free expression on the Millian argument that "...unpopular, unorthodox, and ex-

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<sup>39</sup> In the third chapter I will discuss the unavoidability of public site art, and how this relates to the offense a particular work of public site might inflict on the public.

<sup>40</sup> Feinberg, vol. 2., p. 26.

treme opinions, no less than any others, need their spokesmen, in order that our chances of discovering truths and making wise decisions be increased."<sup>41</sup> On Feinberg's view, considerable disutility would have to result from "public advocacy... of any policies or values whatever, pertaining to sex, religion, politics or anything else..." with respect to public policy before we would be justified in limiting that expression. Feinberg seeks to protect explicitly political, though offensive, expression especially strongly, in contrast with lesser protection given expression which is not in accord with the protection of expression as an instrument to social improvement.<sup>42</sup>

The second criterion holds an offense to be increasingly unjustifiable as it is increasingly unavoidable. The 'reasonable man' ought to realize which actions are likely to cause offense, and try to minimize that offense by limiting it to times and places where the least offense would be taken.

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<sup>41</sup> Ibid., 38.

<sup>42</sup> For example, offensive, though explicitly political offensive expression such as "immigration to Canada should be controlled on a quota system designed to preserve current racial proportions in the population" will be protected as unpopular but legitimate public advocacy. In contrast, the expression of an individual bellowing "Sod off, niggers" from a soapbox need not be protected as the sort of expression instrumental to social utility. I diverge from Feinberg's apparent wish to justify limitation of hate literature insofar as I favour limitation only if the disutility incurred by consumption of hate literature in a particular context outweighs the utility of protection of free speech in that context.

The third criterion's concern with possible spitefulness of a moral agent leads me to Feinberg's discussion of profound offense. Before I proceed to examine the notion of profound offense, I will note that spitefully caused offense decreases the acceptability of an action, since the diminishment of autonomy privacy involved in forcing someone to view one's offensive conduct or expression decreases the possible net good created by the offensive action.<sup>43</sup>

I will briefly summarize Feinberg's account of offense before proceeding to examine the notion of profound offense. Feinberg holds that judgement of whether a purportedly offensive action ought to be restricted is a matter of weighing the seriousness of the offense (criteria of extent of intensity and durability, reasonable avoidance, and assumption of risk) against the reasonableness of the offender's action, judged by its social value, time and place of occurrence, and intent to offend. An offense does not necessarily harm the offended person, although a sufficiently extensive offense may cause harm. The 'offense' principle and its accompanying sets of

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<sup>43</sup> I am aware that this assumes that beneficial exchange in the marketplace of ideas need not involve offensive communication. I will examine the conflict between the benefits of free expression and the value of privacy autonomy more thoroughly in the third chapter, where I will balance the value of a piece of public site specific art forcing the viewer to reevaluate her perceptions of the site, versus the value of privacy autonomy.

criteria of offense and reasonableness are intended to allow a reasoned weighing of consequences in order to determine whether or not a particular offensive practice warrants restriction.

#### 4.4 Profound Offense.

There are certain offenses, according to Feinberg and as I will argue, which are so pervasive that they must be considered a distinct class of 'profound offenses.' Feinberg distinguishes profound offenses from the above discussed 'nuisance' offenses in five respects.

First, "...they have an inexpressibly different felt 'tone,' best approximated by saying that they are deep, profound, shattering, even more likely to harm by their obsessiveness to those who experience them."<sup>44</sup> Receiving hate literature directing unsubstantiated criticism or incitement to violence against one's race is a familiar example of an offense of a distinctly deeper, potentially dangerous character than a neighbor's insistence in playing a stereo loudly. The 'tone' of the offense is capable of making one obsessed with the offense. It is a direct attack on deeply held values. The sort of deep repugnance directed to hate literature is an example of the sort of offense whose 'tone' is politically

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<sup>44</sup> Feinberg, vol. 2., p. 58.

charged in a way which the offense given by loud music is not. An attack on one's racial characteristics attacks the legitimacy of one's existence and position in society -- a much more probing and serious offense than the offense felt at having to listen to loud music. A profound offense attacks a higher order value which is so important that the offense feels much more significant than the offense of loud music as a conflict with the lower order value of appreciation of quietness.<sup>45</sup>

Second, "...even when one does not perceive the offending conduct directly, one can be offended 'at the very idea' of that sort of thing happening even in private."<sup>46</sup> One might easily feel offended that anyone receives hate literature, and feel that e.g. consumption of hate literature in private remains offensive.

Third, while offense may be felt only in perceiving an action, say, an individual publicly vomiting while demanding applause, a profound offense occurs when "...something offends us and not merely our sense or lower

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<sup>45</sup> I diverge from Feinberg's wish to justify limitation of hate literature insofar as I favour limitation only if the disutility incurred by consumption of hate literature in a particular context outweighs the utility of protection of free speech in that context. The context of interchange of hate literature between academics studying racism is considerably less inflammatory and threatening than the context of distribution of hate literature at a political rally. Thus the degree of profound offense given by a particular expression is keyed to the interpretive context of that expression.

<sup>46</sup> Ibid.

order sensibilities."<sup>47</sup> Otherwise put, "profound offense cannot be avoided by averting one's eyes."<sup>48</sup> Following the example described above, simply avoiding reading hate-literature does not make it any less offensive. In contrast, were the obnoxious neighbor to play her stereo loudly at a different time, or play different music, it might not be offensive, or the offense might be less serious. A nuisance offense, on Feinberg's model, is an offense within a limited context, and enjoys acceptability in many contexts. The stereo music is not objected to as such; it is only offensive when one must listen to it. A profound offense, in contrast, presents an offense which is offensive regardless of its current presence or absence.

Fourth, a profound offense is profound "because it is believed to be wrong... It is not believed to be wrong simply and entirely because it causes offense."<sup>49</sup> Thus loud stereo music would not constitute a profound offense, since it is not generally considered to be wrong as such. Hate literature, however, could constitute a profound offense, since it is objected to on a number of grounds other than the unpleasant mental states it causes in offended individuals.

Feinberg's fifth criterion holds that "profound

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<sup>47</sup> Ibid., 59.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

offenses in all cases are experienced as at least partly impersonal, and in most cases as entirely impersonal."<sup>50</sup> Feinberg notes that the victim of the offense does not "...think of himself as the victim in unwitnessed flag defacings... and he does not therefore feel aggrieved (wronged) on his own behalf."<sup>51</sup> A profound offense is as nearly universal as an offense may be: a profound offense subverts a dominant value of a large portion of the society in which it is committed.<sup>52</sup> The emotionally charged burning and stomping underfoot of a Quebec flag at Brockville, Ontario, is a familiar example of this sort of profound offense.

The sorts of offense meeting the above criteria share a distinct characteristic: they are not simply reactions to present conditions giving offense. Rather, profound offenses are offensive because they remain offensive even when unseen and directed at others.

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> I am intentionally inspecific in my use of 'society' here. Profound offense may occur as an intentional violation of an organization's fundamental rules by a member of that organization, or as a violation of a fundamental value of a particular segment of the society constituted by a given nation-state. Examples of profound offense to the individuals of a particular social group of a larger society are easily found. Consider, for example, white supremacist demonstrators marching through a black neighborhood in an American city, carrying a black maniki bearing the slogan "Apes Go Home."

## 5. The Williams' Report.

In this section I will comment on a recent attempt to draw a firm distinction between private action, and public interest and sanction. I wish to note some of the problems associated with the interaction of public and private value choices before arguing for a group right to privacy autonomy against offensive expression in public places.<sup>53</sup> This section will discuss the Williams' Report as an example of the clash of offensive free expression with public feelings of offense. I am concerned with the failure of the report to provide an adequate definition of offense, and the distinction between offense and harm. The shortcomings of the report will highlight the aspects of the border between offense and harm which must be clearly delineated in a consistent theory of justifiable limitation of offense which leads to harm.

In 1979, Bernard Williams headed an inquiry into the value of pornography, and the justifiability of censoring 'offensive' films and literature in Britain. The Williams Committee Report on Obscenity and Film Censorship<sup>54</sup> used the familiar terminology of 'harm' and 'offense' in its discussion of public interest in

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<sup>53</sup> I will provide criteria for the idea of "information" as I proceed with my argument in the last part of this chapter.

<sup>54</sup> HMSO November 1979 (Cmnd 7772)

ostensibly self-regarding private activities. The committee's consideration of harm and offense holds that the two are related, and that offense is justifiably restricted because of its relation to harm. As Skillen remarks,

... it is clear from the body of the report that the 'harm' of pornography as such is seen as a function of its 'offensiveness.' Where there is harm, coercion, and exploitation suffered by models, actors and actresses, it is recommended that production be illegal."<sup>55</sup>

This view sees offense in the reaction of viewers to what they perceive as harm to models, actors and actresses. The offense of pornography is found in its harmfulness. As Skillen appropriately interprets the report, it appears to regard offense as a sort of 'function' of harm: the public takes offense at harmful or harmless actions when they are made public, but, as the report later argues, we are only justified in limiting harmful offensive conduct.

Instances of pornography where there is no harm may still be offensive, according to the committee, and thus deserving of restriction. Skillen notes that

Professor Williams' Committee says:

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<sup>55</sup> Anthony Skillen, "Offenses Ranked: The Williams Report on Obscenity," Philosophy 57 1982, p. 237.

"Laws against public sex would generally be thought to be consistent with the harm condition in the sense that, if the members of the public are upset, distressed, disgusted, outraged, or put out by witnessing some class of acts, then that constitutes a respect in which the public performance of those acts harms their interests and gives them reason to object."<sup>56</sup>

Williams' committee interprets the harm condition as being met when the offensive conduct is "witnessed" by the public -- otherwise put, when the conduct is explicitly other-regarding. The committee's view is a recapitulation of Wolfenden's position that "...'immoral' but 'harmless' conduct should be permitted so long as it remained out of sight..."<sup>57</sup> Both Wolfenden's earlier (1957)<sup>58</sup> distinction and the committee's position seem to be direct descendants of Mill's distinction between self- and other-regarding actions. In both cases, actions or objects (films, or particular practices by individuals within society) were held to be offensive; however, this offense was regarded as more or less offensive in proportion to its invasion of the privacy autonomy of members of the public.

The committee held that pornography should be restricted only insofar as it caused offense, where the

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<sup>56</sup> Ibid. Skillen cites the Report, p. 99.

<sup>57</sup> Ibid.

<sup>58</sup> The Wolfenden Report of 1957 advised that while homosexuality and prostitution might reasonably be considered immoral, so long as those activities were not other-regarding, they could be tolerated as part of desirable social diversity.

standard of offense is determined by "what is offensive to reasonable people."<sup>59</sup> As Skillen notes,

Williams concedes that this is 'loose or rough.' But as they say in Soho, there is rough and 'rough.' What would reasonable people take the principle to mean? How are these terms 'reasonable' and 'offense' to work? The Committee says 'a magistrate will have to use his or her judgement.' Judgement of what? We are given scarcely any idea.<sup>60</sup>

Skillen's commentary accurately points out some of the many difficulties facing a policy-maker who wishes to balance our social, moral, and legal principles promoting individual liberty, with the need to preserve the liberty of others to pursue their own goals. It is extremely difficult, as Skillen notes, to determine what hypothetical 'reasonable people' would find 'offensive.' We are left with a notion of offense as a function of harm, and a note about offense and harm arising from having to witness certain expression or activities. This does not, however, provide for profound offense, or provide any scale other than vaguely defined 'reasonable people's' views about what is offensive. Most importantly, the idea that offense is found in 'witnessing' conduct or expression does not seem to give sufficient content to the notion of offense. Particularly, unwitnessed, or periodically wit-

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<sup>59</sup> Ibid, 238. Skillen cites the Report, p. 122.

<sup>60</sup> Ibid., 238. Skillen cites the Report, p. 122.

nessed offense is not considered, leaving us with dubious grounds for censoring conduct which is considered by the vast majority of society to be profoundly offensive, but is immediately witnessed by a small portion of society. In the third and fourth chapters I will be concerned to avoid these problems, with clear delineations of the nature of public offense which may not immediately affect the offended person, and criteria for reasonableness of an offense compared against the degree of offense suffered. I will argue that the liberal protection of the instrumental value of free expression, and the nature of a democratic society provide us with guidance to more clearly mark the limits of justifiable offensive expression. In the last section of this chapter, I will argue for a group right to privacy autonomy against offense which may not be immediately evident to more than a few individuals in society.

6. Group rights to privacy autonomy against offense, and the possibility of justified censorship.

I am concerned in this section to show that groups can possess rights against offense to privacy autonomy insofar as every member of the group possesses a certain in-

terest in claiming that right. I am not arguing for some sort of notion of "class action": I wish merely to show that an offense to privacy need not affect just a single individual or a very small group, but may affect a group large enough to constitute an aggregate disutility if an offense is left unrestricted. I will further argue that profound offenses can create disutility of such a magnitude that the right-possessing group is justified in censoring or restricting circulation of information unless that information has a superior value, as determined by criteria of reasonableness.

The sort of right I speak of here is a morally justified conventional right.<sup>61</sup> In accord with Mill's principle that utility is the ultimate ground of justification of an action, I consider rights to be conventions which are morally justified so long as they tend to maximize net utility. On this model, a right is defeasible if consequences warrant setting the right aside.

In the case of offense,<sup>62</sup> and particularly in the case of profound offense, we assume that individuals have a conventional right to privacy autonomy, given the instrumental value of autonomy to social net good. Unless

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<sup>61</sup> This method of formulating a right is found in, among others: Wayne Sumner, The Moral Foundation of Rights. New York: OUP, 1987.

<sup>62</sup> In my reference to 'offense' and 'profound offense' I am appealing to Feinberg's criteria.

there is some compelling reason to force someone to observe or participate in an event, they ought not to be coerced to do so. Otherwise put, the individual within a liberal democratic society is supposed to be free from others' offensive other-regarding actions when there is no compelling reason to believe that the discomfort caused by the offensive actions is somehow instrumental to a good consequence greater than the disutility created by the offensive action. A group would be said to have a right against offense if each member of the group possessed the right (no good consequences outweigh the instrumental value of autonomy privacy) against that type of offense.

Admittedly, it is difficult to establish that all members of a group have been offended by a given action; however, it is quite understandable how this group offense might come about. It seems to me that the argument for a group right is much stronger in the case of profound offense.<sup>63</sup> In the example constructed above, white supremacists paraded through a black neighborhood with an offensive manikin symbolizing disrespect for the fundamental liberal democratic principle of racial equality. Under Feinberg's five criteria for establishing profound of-

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<sup>63</sup> In the case of a profound offense, the offense is to a much more basic value than the values mocked by a nuisance offense. It would be easier to determine affected groups and extent of offense in the case of an offense which subverts values which all of a group hold, rather than the lower order values which vary from member to member of the group.

fense, this action is offensive on various grounds, including for example, that the demonstrators could advocate political change in ways much less likely to cause deep resentment and mental distress in the offended group. Insofar as each black person (or people of any colour) would be offended by white supremacists demonstrating against racial equality, a group is constituted by the common interest in avoiding this invasion of autonomy privacy.

It is not my concern to argue conclusively that this is an example of profound offense to a group giving rise to a group interest describable as a group right which must be weighed against the reasonableness of the offensive action; rather, I wish to suggest only that a group right against profound offense is a coherent notion. I would like to suggest further that the sorts of profound offenses which will be offensive to groups within a society, or an entire society, will be offenses to fundamental values. In many cases, offenses to fundamental values will take the form of invasion of privacy autonomy of a group by presenting a particular point of view in an offensive manner. The degree of offensiveness may be determined by Feinberg's criteria.

It seems to me that objections to fundamental values which take the form of profound offense to a group are certainly candidates for group restriction. (Whether a certain point of view actually is censored or restricted

by the group will be a result of the weighing of the reasonableness of the action of the offense against the offense created.) A liberal democracy typically espouses such values as racial equality, majoritarian decision making, and equality of all citizens before the law. I will argue in the next chapter that to ignore a majority consensus that a particular offensive expression ought to be restricted is inconsistent with the majoritarian decision-making process embedded in the notion of liberal democracy, and overemphasizes some variety of elitist decision making which ignores the legitimate claims of majorities.

### Chapter III

In this chapter I will begin my arguments justifying censorship of public site-specific art. In the first part I will briefly remark on the history of art censorship, noting that the main purpose of censorship has been to limit the expression of the content of the work of art. In the case of public site-specific art, I will argue, the aesthetic value of a work's content is irrelevant to whether censorship is justified, since the context of the display of public site art is different from that of privately displayed art. The permanence and unavoidability of public site-specific art imply a degree of offense and harm which distinguish it from the more easily limited offense caused by privately displayed art. Given that censorship of public site art is concerned with offense and not the value of the aesthetic content of a given work, I will argue that the contextual aesthetic value of an artwork warrants no special protection not afforded other forms of expression.

The second part will introduce the grounds on which censorship may be justified in a liberal democratic society -- limitation of profound offense and harm to others, and harm to shared values -- before examining the

preconditions a piece of public site-specific art must meet before it may be justifiably censored. I will discuss Richard Serra's Tilted Arc as an example of public site-specific art which is offensive in a way which gives rise to harm. The fourth chapter will argue that non-removal of sufficiently offensive public site-specific art can be profoundly offensive and harmful. At the beginning of the second part of this chapter I will outline the steps my argument will take, with reference to the analytical tools set out in the second chapter.

1. History of censorship, the distinction between restriction of content and restriction of offensive acts, and contextual evaluation of value and offense.

1.1 Remarks on the history of censorship

Censorship as alteration, suppression, or destruction of art<sup>1</sup> is found in various early cultures: our evidence is strongest for Egyptian, Chinese, and Greek censorship. Since western notions of propriety and methods of censorship are principally derived from the Mediterranean cultures, I will begin with Greek comments

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<sup>1</sup> This is an uncontroversial notion of censorship of art. See, for example: John Henry Merryman and Albert E. Elsen, Law, Ethics, and the Visual Arts. Philadelphia: U of Pennsylvania Press, 1987. p. 243.

on censorship of art. Plato observed in the Laws that the Egyptians provide a useful model of appropriate art censorship as a means of preserving culture, insofar as "no painter or artist is allowed to innovate... or to leave the traditional forms and invent new ones."<sup>2</sup> Aristotle adds a normative element, claiming in the Politics that when educating citizens we should "take care that there be no image or picture representing unseemly actions" and "banish pictures or speeches from the stage which are indecent."<sup>3</sup>

In the middle ages and early modern period censorship was generally under the auspices of the church, which controlled or commissioned most artwork. While the theological grounds for restriction or modification of particular works are largely irrelevant to political or artistic censorship,<sup>4</sup> there remain many examples of censorship of art on political and moral grounds. In 1505 a prominent German artist, Lucas Cranach, "ceased painting

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<sup>2</sup> Jane Clapp, Art Censorship. Metuchen, N.J.: Scarecrow Press, 1972. p. 15. Clapp cites Plato's Laws II, in: Dialogues. 2 vols. trans. B. Jowett. New York: Random, 1937. p. 656.

<sup>3</sup> Aristotle, Politics Bk. 7 Ch. 17 1336b14-16 in The Basic Works of Aristotle, Richard McKeon ed. New York: Oxford UP, 1941. p. 1309.

<sup>4</sup> By theological grounds, I mean such issues as those delineated in Gillo da Fabriano's Dialogue on the Errors of the Painters which analyzed art according to the rules promulgated by the Council of Trent. Artists' errors included representing angels without wings and showing Christ unbearded. Clapp, p. 68. Clapp cites: Gimpel, Jean. The Cult of Art; against art and artists. New York, Stein and Day, 1969. p. 57.

nudes for almost thirty years because his first patron, Frederick the Wise of Saxony, did not approve of 'erotic art.'"<sup>5</sup> Sixty five years later the English miniaturist Nicholas Hilliard was forbidden by Elizabeth I to experiment with shadows in his painting, since this experiment was out of keeping with the standards of excellence set by the Italians.<sup>6</sup>

Insofar as objections demanding censorship or restriction are directed against the content of art, the nature of art criticism changed very little. In 1898 "the raw emotion and grotesqueness" of Rodin's "Balzac" caused the Societe des Gens de Lettres to refuse to accept the work they had commissioned.<sup>7</sup> In 1913, the erotic theme of Rodin's sculpture "Le Baiser" [The Kiss] caused perturbed curators to partially drape it with a tarp before allowing the public to view the work.<sup>8</sup> Both of these works were censored (or accepted only with modification) because they appealed to inappropriate interests and had morally

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<sup>5</sup> Clapp, 56. Clapp cites: "Story behind the painting: Cranach: The Impish Nudes." Look 23:64-65 January 20, 1959.

<sup>6</sup> Clapp, p. 57. Clapp cites: Carter, Robert L. et al. "Two thousand years of censorship; programme and exhibit, History of Banned Books, at Enoch Pratt Free Library." Library Journal 79:1003-1005 June 1, 1954.

<sup>7</sup> Clapp, p. 174. Clapp cites: Ponente, Nello. The Structures of the Modern World, 1850-1900. Geneva, Skira; distributed in the United States by World Publishing Co, Chicago, 1965. p. 45.

<sup>8</sup> Clapp, p. 191. Clapp cites: Kroeber, Alfred Louis. Style and Civilization. Ithaca, N.Y., Cornell UP, 1957. pp. 12-13.

dubious content. This trend continues: in 1936 William Zorach's painting of a Texas pioneer family was rejected by the Texas State Centennial Commission because "the woman in the family group wore no wedding ring and the figures were nude."<sup>9</sup> Even as late as 1970, a work expressing political opinion, generally protected under the first amendment in the United States, was censored. A sculpture was removed from "an exhibition preview of the Art Show at the Minnesota State Fair in St. Paul because it included an American Flag with a dynamite box, a molotov cocktail, and a red flag."<sup>10</sup>

#### 1.2 Content and offense distinguished.

The examples I have listed above are concerned with censorship of the content of an artwork. This concern with censorship of content is misguided when arguing about censorship of public site-specific art. Two possible grounds of objection to both privately displayed<sup>11</sup> art and public site-specific art can be distinguished, with a view to explaining why censorship need not be concerned with content alone.

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<sup>9</sup> Clapp, p. 253. Clapp cites: Craven, Wayne. Sculpture in America. N.Y. Crowell, 1968. p. 578.

<sup>10</sup> Clapp, p. 379. Clapp cites: New York Times August 30, 1970. p. 53, column 6.

<sup>11</sup> By "privately displayed" I intend an opposition to public site specific art. Privately displayed art is art displayed in a public gallery, private business, or private home in such a way that the public may avoid that art by not entering the area in which it is displayed. Or, in the case of a public gallery, the a piece of art currently displayed may be moved and not permanently installed.

First, there is criticism of the aesthetic value of the content which may hold, for example, that a representational painting is a proportionally inaccurate representation or a representation of a subject in a misleading setting. Second, there are grounds for objection to the offense caused by an artwork independent of its aesthetic value. A work of art may offend a variety of sensibilities: e.g. it may be shocking, violently pornographic, or represent some other sort of morally repugnant scene. Or it may be displayed in an inappropriate context. However, that an artwork offends does not imply that it is not aesthetically good and valuable. For example, many find Robert Mapplethorpe's admittedly technically accurate and creative photographs offensive insofar as they are shocking, while others argue that their 'shock value' proves their artistic merit insofar as it indicates Mapplethorpe's ability to use appropriate techniques to vividly express the themes he chooses to explore.<sup>12</sup> Alternatively, inoffensive art may be bad art: a shoddy artist's black velvet rendition of a

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<sup>12</sup> Well known examples include his untitled 1978 photo of a bloody penis caught in a mousetrap, or his 1977 photo entitled "Jim Sausalito" showing a man crouching beside a ladder in a cement room, clad only in leather boots, gloves, pants, and a zippered face mask. These photographs may be good art insofar as they represent their subjects or achieve their purpose within a recognized form of artwork, but are inappropriate for display in, for example, the foyer of a hospital or library. See: Robert Mapplethorpe, Ten by Ten. Munich: Schiremer-Mosel, 1988. "Jim Sausalito" #7 and Untitled #14.

tiger may be bad art, but quite inoffensive. Thus the aesthetic value of the content may be divorced from the offense the work can cause. This is particularly evident in the case of aesthetically good artworks which offend religious or moral sensibilities.<sup>13</sup> When we object to art, we may thus object to it on two distinct grounds: content, and offense.

### 1.3 Contextual assessment of value and offense: the avoidability criterion.

To the extent that private and public art exist in different social and geographic contexts, they are morally distinct with respect to censorship. The distinction relies on the difference in the extent of both potential and actual offense. Someone offended by a privately displayed work of art may limit the actual offense suffered by leaving the display once offended, or e.g. choose not to attend a gallery which displays art she knows she will find offensive. Public site-specific art is different. As I noted in the first chapter, public site-specific art is most often permanent,<sup>14</sup> is located in a public place,

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<sup>13</sup> Consider, for example, the offence to Christians caused by e.g. the representation of Jesus Christ as a self-doubting saviour in film "The Last Temptation of Christ" adapted from the novel by Nikos Kazantakis. Consider further the offence to popular moral sentiments by erotic art.

<sup>14</sup> I am concerned with permanently installed public site specific art; however, as I will demonstrate below, my conclusions are equally applicable to temporary installations of public site specific art.

and is unavoidable. Due to these attributes public site-specific art has the potential to give rise to a greater amount of offense and harm than does a privately displayed work of art.

To recapitulate some of the tools for analysis of offense described in the second chapter, the amount or intensity of offense caused by an event increases as the time that one is offended is prolonged, if the offense is continuous, and if it is repetitive. Further, offense increases as the display is increasingly unavoidable, and if encountering the offensive display is not a reasonably assumed risk. The context of the display and evaluation of public site art immediately raises questions about its avoidability and likelihood of giving offense, leading to an evaluation of the reasonableness of the display.

Public site-specific art is located in public areas which serve as gathering points or thoroughfares. Unlike an art gallery, which is easily avoided, a public square may be unavoidable for people conducting their daily affairs. Richard Serra says of his public site-specific sculpture that "after the piece is created, the space will be understood primarily as a function of the sculpture."<sup>15</sup> As noted in the first chapter, it is the intention of public site-specific art to force the viewer

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<sup>15</sup> Robert Storr, "Tilted Arc: Enemy of the People?" in Art in the Public Interest, Arlene Raven ed. Ann Arbor: UNI Research Press, 1989. p. 270.

to reevaluate the space surrounding the artwork and her own interaction with the space and work. Public site-specific art occupies a unique artistic position: it enters the perception of viewers who are not intentionally seeking aesthetic experience. Unlike an avoidable display in a gallery, the expression or argument of a public site-specific work of art is constantly reinforced as viewers encounter it. This can be offensive as the argument tires, or as the point of the expression is understood and the work becomes an offensive symbol of a completed argument or unnecessarily permanent use of public space to perpetuate one person's (or group's) expression. The permanence of a public site-specific artist's expression is explicitly other regarding, and once objections are made, the work's social value must be shown if it is to be a candidate for protection by our high regard for free expression. The expression is other-regarding in the same way that a message broadcast with loudspeakers in a public place is other-regarding: a message attributable and intentionally expressed by a moral agent is communicated to others.

The unique context of the display of public site art determines the sorts of objections or calls for censorship which may be appropriately voiced. While the content of privately displayed art may be objectionable, we generally tolerate privately displayed art because the

offense it causes is easily limited.<sup>16</sup> Yet, as I have argued above, the permanence, unavoidability, and public nature of public site art means that calls for censorship may not be directed at the aesthetic value of the content at all, but at the offense created by having to repeatedly encounter the same artistic expression or argument in the same place. It is worth reiterating the distinction: given that offense is contextually relative, different works will be offensive or inoffensive in different contexts, and when one objects that a work is offensive, the objection need not be an assessment of low aesthetic value of the work. Rather, one objects to the offense given by the situation of the work in a particular context. Thus one may agree that a work of public site-specific art is good art, but object to the offense created by its permanence or unavoidability, and on those grounds wish to have it removed.

This is not to say that all public site-specific art ought to be removed at the slightest indication of public dissatisfaction. Public site-specific art may still be defended as insufficiently offensive, or sufficiently beneficial as an exercise in free expression that the offense is outweighed by the benefit created. (The

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<sup>16</sup> Insofar as privately displayed art is displayed within galleries or other areas where a reasonable person may easily avoid it and thereby limit the offense one feels, the display is self-regarding.

nature of this "balance defense" will be further examined in parts two and three of this chapter.) For the moment, I am satisfied with noting that the context of evaluation of public site art involves elements of unavoidability and permanence, which require a defense in order to justify the offense they might cause.

Historically, different contexts have produced different valuations. Consider, for example, Pope Julius II's demand that Michelangelo drape the "obscene" nudes on the ceiling of the Sistine Chapel -- work now regarded as an exemplary study of human form. Similarly, African carved masks once viewed as crude pagan icons are now recognized by many as legitimate artworks providing important insight into complex cultures. The view that context determines interpretation and the value assigned an artwork is not unusual: as Francis Sparshott remarks, Arthur Danto contends

that the status of artwork is bestowed by interpretation: that all and only those artifacts are artworks to which the "is of artistic identity" properly applies, and that whatever loses its susceptibility to interpretation loses its status as art.<sup>17</sup>

Danto recognizes that the interpretive context of presentation of an artwork determines whether the symbol

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<sup>17</sup> Francis Sparshott, "Why Artworks Have No Right to Have Rights," The Journal of Aesthetics and Art Criticism vol. 1 1983, p. 10. Sparshott cites: Arthur C. Danto, The Transformation of the Commonplace. Cambridge: Harvard UP, 1981. See especially Chapter 5.

or representation it contains carries the aesthetic meaning and import that distinguishes the work as art. Just as variable contexts have produced variable notions of what is and is not art,<sup>18</sup> those changing contexts have provided varying aesthetic valuations of the same works of art. Even within a society at one time, various competing interpretive schools exist: some are concerned with the intention of the artist when interpreting a work, while others attempt to interpret the work independent of the artist -- each school arriving at a different valuation of the same work.<sup>19</sup> Notably, schools often differ over what constitutes art (e.g. controversy over the distinction between pornography and erotica). Even when we agree on what is art, art is still considered along with other contextually valued things like poems, novels, or films, which are considered variably appropriate for different audiences in different contexts. For example, while Stanley Kubrick's film "A Clockwork Orange" may be an excellent film, we may not wish to project it against the wall of a public library for all to see. The propriety of

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<sup>18</sup> For example, the Temple of Zeus in Athens was regarded by locals after the fall of the Greek empire as a handy quarry for building stone, and not as an inviolable artwork. See Clapp, p. 26. Consider also the perhaps apocryphal stories of art experts "recognizing" the peasant's mixing bowl as a priceless antique or artwork.

<sup>19</sup> Or, some works are regarded as seminal examples whose time is past -- effectively, the argument is stale, and newer art goes beyond the old paradigm as it provides new and different artistic arguments about space, colour, and perception.

the display of the work is determined by the context of its display.

Given that different valuations are given the same work at different times or contexts, and display of certain works is variably appropriate, it follows that the amount of aesthetic enjoyment or offense caused by a work may vary with the propriety of the location and manner of display to a particular audience. The best defense of art qua art appears to lie not with intrinsic value or rights claims, but insofar as it is instrumental to social goods. This leads again to a need to balance the social benefit of protecting art with the desire to limit the disutility of offense to others.

The conclusion that valuation and offense or pleasure varies with context has important implications for censorship of public site art. First, the fact that a work of art is currently popular or meets current interpretive paradigms does not guarantee its continuing popularity or propriety, since its argument may grow stale, or banal and trite. (I will discuss this in the next section together with my consideration of the permanence of public site art.) Second, offense of a work may be considered separately from the aesthetic value of its content. Thus a defense of an offensive artwork based on the aesthetic value of the work may miss the point: good artwork can be offensive.

## 2. Richard Serra's Tilted Arc.

In this section I will examine Richard Serra's sculpture Tilted Arc, with a view to showing that it is not simply offensive, but profoundly offensive. The discussion of how public site-specific art can be profoundly offensive will be continued by the fourth chapter's discussion of justification of censorship of free expression found in public site-specific art. I will first describe Tilted Arc, the context of its display and the demands for its removal, before discussing how Tilted Arc is offensive. I am going to argue in this chapter and the next that Tilted Arc is offensive, and that the sort of offense it gives leads to harm because of the permanence and unavoidability of the work. I will argue that the profound offense given by Tilted Arc beyond the simple offense I will establish in this chapter justifies trumping the important instrumental value of free expression. The permanence and unavoidability of the work give rise to harms to public and individual interests if the profoundly offensive work is maintained in a public location contrary to public wishes. I will argue that allowing an offensive work to remain on a public site contrary to the public's wishes is an elitist imposition of a particular type of expression which illegitimately uses the liberal

protection of free expression to justify its existence, and further that this imposition damages public interests in participating in review of the use of the square and the further interest in maintaining the diversity of free expression.

## 2.1 History of Tilted Arc.

Richard Serra was commissioned by the General Services Administration (GSA) of the United States federal government to design and install a sculpture in the plaza of the U.S. Customs and Federal Buildings in Manhattan. Tilted Arc was installed under Serra's supervision in July of 1981, and removed despite Serra's protests in March, 1989 after a series of hearings into the appropriateness of the work to its site. The site of Tilted Arc was "a decoratively paved square and inoperative fountain flanked on two contiguous sides by federal buildings."<sup>20</sup> Merryman and Elsen describe the work and Serra's intentions for the work:

Fabricated of Cor-ten steel that has a permanently rusted surface, and weighing 73 tons, the final curved sculpture is 12 feet high, 120 feet long, and 3 inches thick. It tilts one foot off its vertical axis and is securely anchored to the steel and concrete plaza. Serra's avowed intent was to create a work of art that was confrontational with respect to the view and the setting, as he sought to "alter and dislocate the decorative effect of the plaza."<sup>21</sup>

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<sup>20</sup> Merryman and Elsen, p. 358.

<sup>21</sup> Ibid., p. 358.

Serra described the goal of Tilted Arc at the hearings which led to the removal of the work. Serra commented that his sculptures are designed for

a behavioral space in which the viewer interacts with the sculpture in its context... Tilted Arc was constructed so as to engage the public in a dialogue that would perceptually and conceptually enhance its relation to the entire plaza...<sup>22</sup>

Thus the intention of the work is confrontational: Tilted Arc is designed to make the viewer participate with the work, and become part of the work. Even Serra's supporters admit this aggressive aspect of the work -- art critic Roberta Smith described Tilted Arc as a "confrontational, aggressive piece..."<sup>23</sup>

The relation of the sculpture to the plaza is vital to Serra's work: he states that he does not make "portable objects" and that his works "become part of and are built into, the structure of the site and often reconstruct, both perceptually and visually, the organization of the site."<sup>24</sup> For this reason, that the work is

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<sup>22</sup> Jordan, p. 148.

<sup>23</sup> Jordan, 72.

<sup>24</sup> Ibid., p. 148.

meant to reorganize the site, and is integrated with the site, Serra's sculpture is permanent and cannot be removed from the site for which it is designed without ruining the original work. Serra claims that "...a site-specific sculpture is one which is conceived and created in relation to the particular conditions of a specific site and only to those conditions. To remove Tilted Arc, therefore, is to destroy it."<sup>25</sup> Serra's art makes few concessions to the convenience of the viewer, and Serra feels that there is no need for it to do so. Serra's antipopulist attitude to dislike of Tilted Arc is exemplified by his comment in an interview: "I find the idea of populism in art defeating. It is the needs of art, not the public, that come first."<sup>26</sup>

Supporters of Serra argued for the preservation of Tilted Arc against the wishes of protesters on three main grounds: first, that the GSA was breaking a legal contract with Serra when it began hearings into removing the work; second, that Tilted Arc was a good work of art, and thus no one had any reason to complain;<sup>27</sup> and third, that

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<sup>25</sup> Ibid., p. 149.

<sup>26</sup> Merryman and Elsen, p. 358.

<sup>27</sup> Examples of this sort of argument are easily found in the testimony for retention of Tilted Arc. William Rubin claims that "Richard Serra's Tilted Arc is a powerful work of great artistic merit...posing the question now [of removing the work without an extensive period of acclimatization to the work] seems to me inappropriate and unethical." (Jordan, p. 101.) Further, Diane Brown argues that "To allow a piece of art which has been chosen by people that look at art and think about art everyday to be removed is really dangerous... Education is slow and we have to be pushed to grow...If the Richard Serra piece is

Serra's right to free expression was infringed by the removal of Tilted Arc. I am interested in the free expression defense, since (1) the disputed legal contract settled in favour of the GSA is not relevant to the moral permissibility of censoring art, and (2) the 'aesthetically good content' defense misses the issue shown above to be limitation of offense and not limitation of content. I am concerned with the content only insofar as it is offensive, and more pressingly concerned with the issue of justifiable limitation of free expression. This concentration is not out of keeping with Serra's concerns: while Serra sued the GSA for legal breach of contract, his defense of Tilted Arc in an article published in Critical Inquiry argued against the removal of the work as censorship of free expression.<sup>28</sup>

## 2.2 Reasonableness of Serra's expression.

As part of the procedure of balancing the importance of free expression with limitation of offense, I will evaluate the reasonableness of Serra's expression. I will treat Tilted Arc and Serra's remarks as its author as one unit of free expression, since critical understanding

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allowed to be taken to another location, then it opens up the possibility for any group of people for whatever reason to challenge art that has been carefully considered and carefully installed. I really think it's enormously dangerous to let that happen." (Jordan, p. 74.)

<sup>28</sup> Richard Serra, "Art and Censorship" in Critical Inquiry 17, Spring 1991. pp. 575-581.

of the artwork may be tied to the intentions and explanatory comments of the author when they are known.

In my analysis of the reasonableness of Serra's expression I will draw on the criteria established in the second chapter. Three criteria of reasonableness were set out in the second chapter: (1) the value of protecting free expression; (2) the extent of the attempt to minimize offense to others; and (3) the decreasing value of the action as it is increasingly spiteful. I will discuss each criterion in turn in relation to Tilted Arc.

(1) Serra's expression is protected by the high instrumental value of free expression to some degree which remains to be determined. Since the practice of free expression will be damaged if we routinely allow it to be set aside if any offense is given, we must balance the offense given with the reasonableness and social importance of the expression, even if it is shockingly offensive. Yet, as Feinberg and others have remarked, it is important to remember that the utility of shocking or startling expression diminishes as familiarity with the expression makes it more an object of resentment or indifference than shock. Some shocking expression may serve to jolt observers out of apathy or ignorance, and into a recognition of better ways of living, or recognition of new truths. However, as the once shocking expression is uttered again and again, it becomes less shocking with each repetition,

as the point is made and what once was shocking becomes understood and unremarkable. Thus when we protect shocking expression we must examine both the initial utility of the expression, and the later utility or disutility of the expression when it is no longer remarkable, and by lacking shock value, the message is lost or distorted. So, while we will wish on liberal principles to protect Tilted Arc as a particular instance of the instrumental value of free expression, even the instrumental value may be outweighed by other considerations -- offense and harm.

(2) Serra made little attempt to minimize offense to others, beyond ensuring that Tilted Arc did not obviously block the entrances to the buildings of the plaza. He did not provide any information (e.g. an explanatory plaque) to the public, and did not offer information (e.g. a public lecture) on the motivation and execution of Tilted Arc. As noted above, Serra feels no need to justify possible offense to others: art is not answerable to the public. In a 1976 interview, Serra commented: "I've never felt, and I don't feel now, that art needs any justification outside of itself."<sup>29</sup> This attitude was emphasized by his refusal to discuss acceptable relocation of Tilted Arc, and his insistence that removal of the sculpture is destruction. Interestingly, he previously

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<sup>29</sup>Clara Wyergraf, ed. Richard Serra: Interviews Etc., 1970-1980. Yonkers: Hudson River Museum, 1980. p. 63.

agreed to move another of his sculptures when it was found inappropriate to its original setting.

(3) Serra's actions were spiteful insofar as his insistence that Tilted Arc not be removed disregards and disavows the value and importance of others' concerns. Serra's disregard for the interests of others seems undisguisedly contemptuous of others' views. Serra was well aware that his art is controversial: for example, his site-specific sculpture "Terminal" installed in Bochum, Germany in 1977 was considered so offensive that the Christian Democratic party campaigned with a poster "showing a photograph of Terminal montaged against one of a steel mill. The slogan announced: 'This will never happen again -- CDU for Bochum.'"<sup>30</sup> While Serra himself recognized the contentious nature of his work, he maintained his view that as free expression his work ought not to be subject to the will of politicians and the public. Observers noted, however, that Serra's position wasn't simply an appeal for respect of the integrity of art and the artist. Serra's argument from free expression for retention of Tilted Arc depends on the fact that the expression conveyed by the sculpture is inextricably embedded in its context in the Federal Plaza. As Sherrill Jordan remarks in her discussion of the freedom of expression argument

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<sup>30</sup> Rosalind E. Krauss, Richard Serra/Sculpture. Laura Rosenstock, ed. New York: Museum of Modern Art, 1986. p. 50.

for retention of Tilted Arc, "One critic writing about Tilted Arc stated: 'The feeling is inescapable that the sculpture is a symbol of the artist's pleasure at fancying himself interfering with the bureaucracy in its own front yard."<sup>31</sup> This, together with Serra's lack of concern for public opinion regarding his views, and his avowed intention to "alter and dislocate the decorative effect of the plaza,"<sup>32</sup> combines to indicate that Serra's expression is at very least abrasively and arrogantly presented; and more probably highly offensive in that he has little regard for the public's privacy autonomy and their right to determine use of public space. I will comment more extensively on these public interests in the next section.

Given this extensive evidence that Serra refused to move the sculpture and thereby minimize offense, and that he appears to have spitefully maintained the dominance of the needs of art over offense to others, the high instrumental value of free expression and the value of the expression to the author is the most likely defense of Tilted Arc. And indeed, as noted in 2.1 above, this was the avenue of defense pursued by Serra.

### 2.3 Evidence of offense: objections to Tilted Arc.

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<sup>31</sup> Jordan, p. 41.

<sup>32</sup> Op. cit.

The second chapter demonstrates that free expression is not regarded by either law or liberal moral philosophy as an absolute freedom; rather, it is highly valued as an instrument to circulation of ideas and promotion of social good. Accordingly, my task is to examine the offense caused by Tilted Arc, and to determine whether that offense trumps the value of free expression. I will first examine the evidence showing that Tilted Arc is offensive, before comparing the evidence against Feinberg's criteria of seriousness of offense. I will argue in the fourth chapter, based on this section's analysis of the offense given by Tilted Arc, that non-removal of unavoidable, spiteful, enduring, offensive works incurs great disutility for individuals and the public in general. Yet we tolerate offensive expression as a particular aspect of free expression which we value as an instrument to social utility, so long as the offensive expression does not outweigh (1) the utility of protecting free expression in general, and (2) the value of that particular offensive expression. This section will discuss the offense given by Tilted Arc, and the fourth chapter will balance that offense with the value of unhindered free expression, leading to the conclusion that the type of offense given by permanent, unavoidable expression represented by Tilted Arc can become harmful and thus is legitimately restricted. I will show that Tilted Arc, as

a symbol of paternal, elitist dictation of taste misappropriates liberal protection of free expression, and is legitimately censored since it cannot justifiably be protected as free expression.

Opponents of Tilted Arc are easily found: many of them work in the buildings which surround the site of Tilted Arc. The most vocal opponent was Edward Re, Chief Judge of the U.S. Court of International Trade, whose court is in the Federal Plaza. Re observes in his correspondence with the GSA that his is not an isolated complaint: "over thirteen hundred federal employees have signed petitions demanding its [Tilted Arc's] removal."<sup>33</sup> Significantly, Re also claims that "the negative impact of the wall goes far beyond aesthetic distaste." Re is offended that the work is often covered with unsightly graffiti, "litter and waste which accumulate in the well dug to support this structure."<sup>34</sup> The work is further cited as a hazard to security: personnel are unable to see beyond the wall the work creates across the plaza.<sup>35</sup> Notably, the attack on Tilted Arc is not directed at its aesthetic value as a sculpture. Re points to the offense

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<sup>33</sup> Clara Weyergraf-Serra and Martha Buskirk, eds. The Destruction of Tilted Arc: Documents. Cambridge: MIT Press, 1991. p. 27.

<sup>34</sup> Ibid., 28.

<sup>35</sup> At the hearings plaza security personnel also testified that the sculpture would direct the blast of a bomb explosion "both upward and in an angle toward both buildings." See Weyergraf-Serra and Buskirk, eds. p. 117.

given by the sculpture in the context of permanent location in Federal Plaza.

Other testimony from tenants of the federal buildings describes the daily interaction with Tilted Arc as "an irritant and impediment."<sup>36</sup> Tilted Arc was further described as an installation which makes "access to the building awkward and confusing, and the normal walking patterns of those who enter and exit the building are disrupted... Tilted Arc rends the serenity of the plaza."<sup>37</sup> While it was the goal of the artist to effect a shift of the plaza's function as a restful area to a challenging influence on individuals' perception of and interaction with the space, the result was found to be offensive and personally disruptive by those who must interact with the sculpture. A senior administrator in the plaza commented:

During my seventeen years of employment in this building nothing has offended me and my [172] staff more than the erection of this huge, rusted metal barrier. It has been a source of continued complaint by my staff, who are affronted by its appearance on the plaza whenever they have to look at it. I venture to say that those who support it do not work at 26 Federal Plaza. They don't have to look at it, and they don't have to negotiate it to walk across the plaza.<sup>38</sup>

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<sup>36</sup> Ibid., 111.

<sup>37</sup> Ibid., 115.

<sup>38</sup> Ibid., 119.

Finally, an attorney who works at the plaza observed in a similar vein that the sculpture "[denies] those of us who work here [the enjoyment of the plaza] as an art form, [in] the way the architects foresaw it... and we can't see the beautiful park across the street."<sup>39</sup>

#### 2.4 Analysis of offense and extent of offense.

A brief recapitulation of the conditions for offense<sup>40</sup> will aid my analysis of the offense described in the above section and the extent of offense caused by Tilted Arc. One (or a group) is offended when one (1) suffers a disliked state, (2) attributes that state to wrongful conduct by others, and (3) resents the other's causal role in effecting this disliked state.<sup>41</sup> Tilted Arc satisfies each of the conditions.

(1) Section 2.3 above demonstrates that those who are forced by their daily lives and the nature of Tilted Arc to encounter, or "negotiate" the new function it gives

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<sup>39</sup> Jordan, ed. p. 142. The square brackets are in the Jordan edited text and are not my addition.

<sup>40</sup> As stated in Chapter 2, offense covers "the whole miscellany of universally disliked mental states" including hurt feelings, alarm, and disgust. (Feinberg, vol. 2. p. 43.)

<sup>41</sup> There are, as Feinberg notes, broad and narrow senses of offense. Offense in the broad sense exists when one is offended, and the offended individual or group need not resent the individual or group causing the offense. Offense in the strict sense exists when one is offended, and the offender is resented. In the case of Tilted Arc, we may resent not only the work, but also Serra's attitude and expression regarding the work. Thus Serra and Tilted Arc offer an offense in the narrow sense.

the plaza are offended. Some objections use the term explicitly: the opponents of Tilted Arc describe it as an "irritant" by which they are "offended," and "affronted."

(2) These complainants also make clear that it is the "120-foot piece of rusted iron"<sup>42</sup> and Serra's intention to "dislocate and alter the decorative effect of the plaza" that offends them. Commenting on Serra's stated intentions, Congressional Representative Theodore Weiss observed that "If that was the intent, one may conclude from its harsh, disorienting effect that the artist has eloquently succeeded in executing his concept. But what of those who live and work within its confines?"<sup>43</sup> The intention and the work of the artist are specifically as well as implicitly identified in the above statements as the cause of the offense felt.

(3) Weiss' remarks are also instructive in determining whether the agent causing the offense is resented. Serra is resented because his intention in turning the plaza into a function of the sculpture has resulted in a "harsh, disorienting effect," and a "barrier" that prevents people from seeing the park across the street, and forces them to "negotiate" the unsettling effect of the work as they move across the plaza. The opposition to Tilted Arc is rarely advanced on the grounds of

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<sup>42</sup> Dominick L. DeCarlo, Judge, U.S. Court of International Trade in Jordan, p. 141.

<sup>43</sup> Weyergraf-Serra and Buskirk, p. 115.

aesthetic quality: people are offended by the placement of the artwork in a manner which offends, rather than educates or pleases. The work is contextually offensive, and the aesthetic value of the content is not at issue.

Recall the critic's comment that there is a sense of Serra's thumbing his nose at those who sponsored the work: many find this attitude toward use of public space offensive, and further resent Serra's "cleverness" at designing a work whose identity depends on permanence. As Norman Steinlauf, a Federal Plaza worker put it: "No one asked those of us who 'live' here for an opinion; that I believe is the democratic process -- the missing element in this hearing."<sup>44</sup>

Evidently, Tilted Arc offended a substantial number of people. Here, however, a difficulty arises. In order to adjudicate between the value of free expression and social desire to limit unwarranted offense, the extent or seriousness of the offense must be determined. The three measures of seriousness or extent of offense set out in the second chapter must be given content; but in the case of Tilted Arc this poses several problems. While the first index, intensity and durability of offense, may be given content by examining the vehemence of the complaints against Tilted Arc, it is difficult to assess how much offense is sufficient offense to warrant removal of the work

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<sup>44</sup> Weyergraf-Serra and Buskirk, p. 112.

and the subsequent harm to the value of free expression. I will argue in the fourth chapter that the amount of offense is only part of the weight against the value of free expression; the type of offense offered by Tilted Arc is profoundly offensive in a way which leads to unjustifiable harm. The second index, ease of avoidance of the display is more easily judged. Clearly, the display is extremely difficult to avoid: in fact, it is designed to confront the viewer and virtually force the viewer to participate in the work. Thus the offense is repetitive as one encounters it daily, or continuous as it sits within one's view. The third index, willing assumption of risk, is contentious in this case. The hearings over the sculpture illuminated the fact that the GSA had not consulted with or polled the population of the area about their preferences or feelings about the installation of a public site-specific artwork. The willingness of the primary participant-viewers to encounter the work of art is unclear, and their unwillingness to allow the work unfortunately became apparent only after its installation.

However, there are good reasons to consider Tilted Arc a symbol of profound offense to shared values -- a sufficiently serious offense to warrant setting aside the value of free expression. It is the type of offense caused by Tilted Arc, I will argue, that makes it a justifiably censored work. I will show that Tilted Arc is a

profoundly offensive symbol of elitist dictation of artistic taste, and a paternal subversion of free expression.

## Chapter IV

In this chapter I will argue that sufficiently offensive, enduring, unavoidable public site-specific art becomes profoundly offensive and harmful insofar as (1) it unjustifiably diminishes privacy autonomy and is an elitist imposition of a particular expression on autonomous individuals; (2) it is a paternalistic imposition of individual preferences on shared public space whose use in a liberal democracy is best determined by consensus or majority; and (3) protection of permanent public site-specific art as an extension of free expression is antithetical to the motivation of liberal protection of free expression. I will conclude that insofar as public site-specific art is both profoundly offensive and harmful on the above grounds, censorship in the form of removal or destruction of the work is justified. I will then consider some implications of my position and objections to those conclusions. I will begin with a summary of the analytical notions I will employ.

### 1. Profound offense, harm and justifiable censorship.

In this section I will show that allowing Tilted Arc to remain in its site is profoundly offensive. In the first

part I will recall the criteria of profound offense set out in the second chapter, before forwarding three arguments in the second section which show how Tilted Arc is profoundly offensive and harmful. The third section will consider some possible objections to my position, before concluding that the state (or citizenry as the ultimate ground of the state in a liberal democracy) is justified in removing or censoring profoundly offensive public site-specific artwork.

#### 1.1 Criteria of profound offense - a recapitulation of the second chapter.

Profound offense differs from what I will call 'simple' offense in two central aspects: first, a profound offense will almost certainly lead to harm if allowed to endure or be repeated; and second, the profound offense is offensive even when one is not immediately confronted by it. There are five criteria of profound offense. (1) The tone of profound offense is distinct from a simple offense. The profound offense attacks fundamental, deeply held values, and the nature of the attack may cause obsessive concern with avoiding the attack or vindicating the attacked values. (2) The very idea of the occurrence of the offense is offensive -- we need not actually witness the offense in order to find it offensive, and we may feel offended long after the event. (3) The profound offense offends us deeply, and not just our lower order sensibilities such as our sense of

yukkiness. (4) The offense is objectionable not simply insofar as it is offensive, but because the action is wrong. In this chapter I will argue that protection of offensive public site-specific art is wrong insofar as the expression is protected by measures which are intended to exclude the sort of expression represented by permanent, unavoidable expression. (5) The profound offense is impersonal insofar as a person is offended by the act as such and not simply on her own behalf.

#### 1.2 Arguments for justifiable limitation of profoundly offensive public site-specific art.

In this section I will advance arguments on three fronts, showing how Tilted Arc is profoundly offensive and may be censored without unduly limiting free expression. In the first argument I will show how allowing Tilted Arc to remain in its site invades privacy autonomy in a way which is both offensive and harmful to those immediately affected by the sculpture. The second argument will show that the paternalism involved in imposing one individual's will regarding use of a public place is unjustifiably elitist in a liberal society predicated on democratic decision making. The third argument will show that Tilted Arc is also offensive mediately to those who are not immediately affected by the work. The distinction between immediate and mediate offense is a simple one. I wish to distinguish between those who are immediately offended by a work by presently

viewing and encountering the offense, and those who are only mediately affected insofar as they read of or hear of the work and are offended by the expression it presents without being physically present at the site of the offensive work. The public may be mediately offended that the liberal protection of free expression is being abused insofar as a permanent, unavoidable, offensive work is foisted on others, and may sympathize with the immediately offended individuals and agree that it is profoundly offensive that anyone need suffer an elitist dictation of taste paternalistically imposed in a public square in which both immediately and mediately affected individuals have an interest. I will argue that imposition of permanent, unavoidable, offensive works in public sites is an attack on shared values which generalizes the offense felt from the immediately affected individuals, to all who share the values attacked by a paternal, elitist imposition of an offensive expression, and may be mediately offended by a particular example of offensive expression. Following these arguments I will show in section 2 how the immediate and mediate offense and harm caused by allowing Tilted Arc to remain satisfies the conditions of profound offense, and conclude that Tilted Arc is justifiably censored.

#### 1.2.1 Immediate offense and harm to privacy-autonomy.

I observed in the second chapter that liberal demo-

cratic societies rely on and protect a number of devices as instruments to best pursuit of social good: free expression and privacy-autonomy are but two examples of these protected instruments. Privacy-autonomy is highly protected as instrumental to pursuit of social good in diverse ways which are likely to better identify good methods of maximizing utility, and to allow us to discard less effective methods.

To allow Tilted Arc to remain in its location offensively ignores privacy-autonomy in two ways. First, the work is invasive of privacy-autonomy in that its confrontational effect is unavoidable by those who must conduct their daily affairs around what even Serra admits is a "startling" visual effect that involves the viewer both "rationally and emotionally" as "the viewer becomes the subject" in a space which has become "a function of the sculpture."<sup>1</sup> Many have found this offensive; and as the testimony cited above indicates, some have felt that nothing has been so disturbing to their working conditions as Tilted Arc. None of those who interact with the work have any choice about encountering the sculpture. They feel not only that their privacy is invaded by the forced interaction with Tilted Arc but also that their capacity and interest in choosing the use of the plaza is ignored. Serra's comment that he is unconcerned with populism and that he has never felt that art needs any justification beyond itself serve to heighten the anger and

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<sup>1</sup> Cited in Chapter 3, s. 2.3.

offense felt at this willful intrusion into the space required by individuals conducting their lives.

The permanence of the sculpture gives rise to a second conflict with privacy autonomy. The offense felt by those who regard the work as little more than a rusting heap of slag could easily become obsessive as the work is continuously in the way of where they wish to walk, and as they are continually faced by the symbol of elitist imposition of what someone else has declared to be "art" which takes precedence over the working conditions of those who must put up with the permanent work. The knowledge that the work is permanent increases the offense felt, since one knows that the offense felt will be repetitive and enduring.

As the permanent, unavoidable offense endures it has a harmful effect best expressed as two related aspects: it is both a harmful invasion of privacy autonomy, and a limitation of liberty. Recall Feinberg's description of privacy autonomy as the right to choose to undergo or avoid a particular experience. Certain standards of public behaviour are maintained for the sake of allowing moral agents with different value theories to interact with the least possible interpersonal conflict and consequent disutility. Liberal political notions exemplified in law (often constitutions) of liberal democratic societies legally protect various forms of privacy-autonomy: choice of religious belief, political affiliations, association with others, and

freedom to autonomously choose the ideas which constitute one's conscience. For example, while it is acceptable to publish vehement attacks and defenses of e.g. the treatment of women within Islam<sup>2</sup>, we consider it inappropriate for those same vehement attacks to be pressed daily upon a person as he or she walks across a public square. Many cities have bylaws allowing protesters in public places to hold placards and information about their cause, while enjoining the protesters against pressing their information on passers by. The same literature considered appropriately expressed in the newspaper is considered inappropriate for expression in a public place except in the very general, minimally invasive method of displaying placards. These legal considerations provide guidance with regard to limiting expression which invades privacy autonomy.

Serra's intentional involvement of unconsenting passers by is inconsistent with the social tendency to compromise the extent or nature of one's actions to make way for other's actions. Such an imposition is considered an invasion of the individual's privacy -- constitutionally phrased as their "security of person." The invasion of privacy autonomy is linked to liberty, insofar as a liberal society requires certain areas of tolerance or restriction

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<sup>2</sup> See, for example, the series of articles in the Vancouver Sun, on July 11, 13, 14, and 18, 1992 by Muslims and non-Muslims exploring the status of Muslim women in Canadian society.

in order to promote minimal friction between individuals or groups. The individual in a liberal democracy can reasonably expect that the liberal ideals of religious and political tolerance embodied legally in the constitution will be maintained in public places. In public places no display is allowed which caters excessively to one minority's interest at the expense of another, and the members of each minority can reasonably expect to be able to conduct their daily affairs without their fundamental values being mocked, or the privacy surrounding the self-regarding aspects of their way of life<sup>3</sup> unjustifiably invaded. Their freedom to conduct their lives and choose to undergo or avoid particular experiences is violated by this permanent expression of a particular view insofar as they cannot avoid Tilted Arc's pervasive effect when they use the square, and cannot avoid the expression without also avoiding a public place which they ought to be able to use without being repeatedly confronted by the same offensive expression.

Tilted Arc can be defended on the grounds that shocking or prima facie offensive free expression bears eventual utility as a spur to consideration of ideas from a new perspective, leading to revision of the previous inadequate understanding of the subject or promotion of new insight into contrasting or analogous subjects. However,

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<sup>3</sup> E.g., their choices to buy prophylactics, use alcohol, or read certain magazines.

permanence of an unavoidable expression is a high price for a liberal democratic society to pay, since liberal democracy grounds its protection of utility creating instruments on the permanent, progressive interests of society. Surely Serra's (or other public site-specific artists') expression is part of a new trend or reaction to themes which have gone before, and will be surpassed and subsumed as artists progress to explore other areas of aesthetic perception and appreciation? To the extent that Tilted Arc is an expression designed for a particular society and location,<sup>4</sup> it would seem that the expression of the sculpture has limited continuing relevance to society. Serra's (and Tilted Arc's) point or argument about space will be made and understood and relevant to a particular social context which will not last permanently.<sup>5</sup> The expression of Tilted Arc will become banal and trite over time as its message is fully appreciated.

Once this saturation point is reached, the fact that a spent expression is left to continually engage us in the

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<sup>4</sup> Serra notes in an interview with Douglas Crimp that "there is no neutral site. Every context has its frame and its ideological overtones. It's a matter of degree. There is one condition I want, which is density of traffic flow." Richard Serra Interviews Etc. 1970-1980 p. 168.

<sup>5</sup> While it is not strictly relevant to my argument, it is interesting that Serra's apparent need for a permanent location is prima facie inconsistent with the aesthetic grounds for the preservation of Tilted Arc. If, as Serra claims, his public site specific art is designed to change the viewer's perception of the space, surely he would want to continually change (rather than preserve) the situation of what Tilted Arc in order to reemphasize his theme of reevaluation of surrounding space in apparently ordinary contexts.

same, well understood argument will become annoying; and eventually by virtue of its repetitiveness and sameness, leads to obsessive preoccupation with the irritation suffered. Though I happily admit that Tilted Arc communicates something important (or, in the terms of my liberal justification of free expression, something 'true') about the way we use and perceive space, it is far from clear that it requires permanence in order to impress this message. Rather, the permanence of Tilted Arc impairs free circulation of ideas about space in the plaza as it continually imposes its own redefinition of space, and turns the plaza into a function of itself. The initial social value of the shock of Tilted Arc's method of forcing examination of space and movement is temporary, and outweighed by the continuing disutility resulting from the continuing invasion of privacy in a way which becomes increasingly irritating and offensive.

The permanence of Tilted Arc becomes profoundly offensive to the extent that the expression continually forced upon those who interact with it is unavoidable. Recall the comments of John Feldman, a Serra supporter at the Tilted Arc hearings: "I would not like to walk by it every day, even though I enjoy its arc."<sup>6</sup>

The immediate invasion of privacy autonomy by Tilted Arc satisfies conditions 2, 3, and 5 of profound offense.

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<sup>6</sup> Jordan, p. 75.

The second condition is met insofar as the very idea of being forced to repeatedly encounter this invasion of privacy is offensive, and those immediately offended may be angered and resentful long after they have negotiated the sculpture during their use of the plaza. Further, it is deeply offensive (the third condition) that one must suffer this continuing offense; and as the offense endures, the resentment increases and offense deepens. The offense is impersonal as well as personal (fifth condition of profound offense); one person immediately offended by the sculpture was further offended by the fact that his staff were continually offended. We may be offended that anyone need suffer this invasion of privacy autonomy. How conditions 1 and 4 of profound offense are satisfied will be discussed in the next section, where I will consider aspects of Tilted Arc's profound offense which affect both those immediately and mediately offended.

#### 1.2.2. Paternalism: elite dictation of taste.

Both those immediately and mediately affected by Tilted Arc can be offended by the perceived dictation of appropriate taste by an elite. I have cited several of Serra's comments indicating his lack of concern with public opinion of his work, and comments by others cautioning against the danger of allowing the public to question the wisdom of people who (ostensibly) know about art. This imposition of a particular view of aesthetic value and of-

fensiveness<sup>7</sup> upon others paternalistically diminishes the autonomy of others. This sort of paternalism might be justified if the artist's or art community's putative expertise in aesthetic value were all that is required to determine the appropriateness of Tilted Arc to its site. However, I have shown that the offense caused by the sculpture must be considered separate from its aesthetic merit. Thus the art community's credentials and ability to distinguish art from non-art, and aesthetically valuable art from kitsch are not at issue. Insofar as offense is felt for a variety of reasons which may not be related to the aesthetic value of the work, offense is not a matter for speculation by artists. Therefore when we encounter paternalistic imposition of tastes, as may be found when we encounter works of art which intentionally "dislocate" the "decorative effects" of a public place, we are justified in questioning the propriety of that imposition.

In the case of imposing a particular view of public site-specific art, paternalism is incompatible with liberal notions of value pluralism and circulation of ideas. In liberal democratic society, value-pluralism is encouraged as conducive to utility-creating change and avoidance of social and political stagnation. Imposition of a permanent artwork

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<sup>7</sup> The claim of Serra and his supporters that Tilted Arc is good art carries the claim that as this sort of good art it is not offensive. Very few Serra supporters, except Feldman cited above, admitted the possibility that the sculpture could be offensive.

is out of keeping with this value pluralism, and explicitly denies the process of public approval or disapproval of public situated work in a publicly owned place. Since it is practically impossible to seek public approval of every adjustment and improvement to public sites, we delegate the job to representative committees and organizations. Yet this system of representation does not divest the citizens of a liberal democracy of their interests in use of public space and publicly accountable decision-making with respect to that space. The participation or non-participation of society at large in each allocation of land or funds does not prevent society from eventually reviewing that use. In the case of Tilted Arc the public is exercising this review function in order to remove what is perceived as an offensive object. This review is justified on the grounds of promotion of circulation of ideas, in contrast to maintenance of a permanent expression which precludes others' use of the area, and as a promotion of tolerance to the extent that none are guaranteed leave to permanently impose their views on others.

Preventing the removal of Tilted Arc contributes in several ways to the profound offense of dictation of taste and propriety to society by the artist and the permanent site-specific work. Dictation of taste smacks of elitist restriction of others' freedom to examine and accept or reject ideas: this dictation is a diminishment of autonomy

guarded by liberalism as instrumental to social good. This variety of elitism is directly opposed to the egalitarian premises of democratic decision making, and takes on a threatening tone (condition one of profound offense) as the seriousness of the attack on the shared value of democratic review of public sites is recognized. The very idea of unjustified denial of individual autonomy is offensive,<sup>8</sup> since liberal democracy is deeply committed to the instrumental value of autonomy in choosing from the marketplace of ideas and finding one's own good in one's own way. One need not be standing in front of Tilted Arc in order to be offended by the dictation of taste it represents. One may be deeply offended by the very idea (condition two) of such an autonomy-denying imposition enduring within the liberal democratic framework. Further, this denial of autonomy may be seen as simply wrong (condition four) within a liberal democratic society, and thus unjustifiable; and the offense is impersonal (condition five) insofar as we are offended by the denial of anyone's autonomy within a liberal democratic society.

1.2.3 Symbolic harm to shared values: mediate offense from paternalism and diminishment of autonomy, and misappropriation of free expression.

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<sup>8</sup> Even if liberal-democratic society does not always or often achieve its goals of maximum individual freedom and opportunity to act autonomously, that empirical evidence does not show that the goals or methods are wrong-headed: other theories may produce far worse results.

I will first discuss how Tilted Arc is mediately offensive before considering how Tilted Arc is a symbol of profoundly offensive subversion of shared values.

The work is mediately offensive when others not immediately affected by the permanence and unavoidability of Tilted Arc recognize that even this single instance of enduring, unavoidable offense is offensive to all who support free expression for its instrumental value as a method of circulating diverse ideas among the citizens who comprise the liberal society. Those who are only mediately affected by Tilted Arc may be offended by the very idea that democratic decision making and interests in review of public spaces is ignored when Tilted Arc is allowed to remain, and may be offended that others' privacy autonomy is invaded by an elitist imposition of a work which is wrongly protected by the liberal respect for the instrumental value of free expression. This mediate offense may become harmful as those offended become obsessed with the idea that the expression is wrongly protected, and obsessively worried that other expression which is increasingly unjustifiably protected by liberal respect for free expression will be protected, to the detriment of society's interest in maintaining diversity in the marketplace of ideas. The profound offense given by Tilted Arc can be described as not only im-

mediately offensive and harmful to those who interact with the sculpture, but also offensive to the individuals whose agreement fosters the social institution of protection of free expression. This offense and harm can be usefully characterized as 'symbolic' or 'second order,' insofar as the symbolic harm is not to an immediately harmed interest x, but an interest y harmed by the harm to x. Tilted Arc's immediate offense and harm as the offense endures is a symbol of further offense and harm to group interests.

First, the paternalism found in denying the privacy autonomy of those who do not wish to be confronted by Tilted Arc) is offensive not just to those individuals, but to all individuals in the liberal democratic society who recognize that paternalism is inconsistent with the liberal tenet that maximum autonomy in satisfying value-choices is the best instrument to social well-being. The offense represented by paternalistic determination of what is 'good for the public' or 'required' by art denies this fundamental tenet. Paternalism contributes to profound offense by offending a deeply held value which we wish to see upheld even when we are not the ones who are immediately offended (condition five of profound offense).

Second, the misappropriation of the protection given free expression to guard Tilted Arc contributes to the profound offense caused by the sculpture. Claiming that the nature of one's free expression requires that expression to

be permanent, and that one's expression ought to be protected by a liberal justification of free expression is offensive not as an action, but insofar as it is wrong (recall condition 4 of profound offense). I have argued above that protection on liberal grounds of Tilted Arc as free expression is inconsistent with those grounds. Since Tilted Arc is not among those things which are protected by the liberal guarantee of free expression, it would be wrong to give it protection on those grounds. And, to the extent that the sculpture is protected, the lack of justification and unprincipled, ad hoc nature of the protection of Tilted Arc contrary to liberal principles is offensive. Willful disregard of the motivation for protection of free expression offends our common commitment as both immediately and mediately affected individuals to free expression as a means of circulating ideas. This disregard is offensive (1) even when we do not immediately observe it, since we recognize that widespread disregard of the motivation for protection of free expression will eventually result in harm for all as the pool of diverse ideas decreases; (2) we are deeply offended by this disregard for the conditions and spirit of protection of free expression; (3) the offense is wrong as an action and not simply because it is found offensive; and (4) this offense is impersonal insofar as it is a blow to a social institution (continued agreed practice) of maintaining utility-creating practices, and does not isolate any in-

dividual as the sufferer of harm.

It may be objected that we cannot make sense of generalized offense without slipping into undesirable legal moralism. However, this line of objection disregards the scope of my concern with generalized offense: I am concerned with offenses which are demonstrably other-regarding and unjustifiably liberty limiting. If my position leads to any sort of legal moralism, it is a variety which maximizes liberty and restrains those who unjustifiably intrude on others' privacy and liberty to pursue their own good in their own way. It is the public nature of the offense given by Serra's sculpture which allows it to become generally offensive. Private display of art, as I will discuss in section three below, removes the grounds for both immediate and mediate offense insofar as there is no invasion of privacy of others when a work is displayed in an easily avoidable location such as a private gallery or home.

## 2. Conclusion

Public site-specific works such as Tilted Arc may be offensive, and this offense is of a peculiar sort: the permanence and unavoidability of the offense contribute to its becoming a profound offense to immediately affected individuals and those who share the immediately affected individuals higher order (fundamental) values. While the simple

offense of Tilted Arc's rustiness, intimidating location and size might not be sufficient to outweigh the high instrumental value of free expression, the situation of public site-specific art in a shared place and the symbolic harm of the work's political context combine to make the work profoundly offensive. I will briefly summarize how Tilted Arc satisfies the criteria of profound offense before considering some implications of my position and possible objections to those conclusions.

First, the mocking tone of Tilted Arc's offense is deeply disconcerting as a rejection and subversion of liberal values. The offense increases as the work's permanence and repeated invasion of privacy-autonomy under the guise of exercise of free expression is found increasingly annoying and eventually harmful as the offended people become obsessively distracted by the irritation experienced, and by the fear that other public site will be similarly planned without regard for those who must daily use the site. Second, Tilted Arc is offensive even when its offense is not immediately present. We need not be immediately present to resent the permanent, repetitive offense to our privacy autonomy or the privacy autonomy of others, and the offense to the group who share the values which protect free expression. Third, Tilted Arc is deeply offensive, since its permanence offends a common commitment to free expression as a method of encouraging circulation of ideas. It further

offends both immediately and mediately affected individuals' shared values of democratic determination and review of use of public sites, and harms their interest in reviewing the use of public sites. Fourth, allowing the sculpture to remain permanently installed despite offense to others without justification is wrong insofar as the work is wrongly sheltered by liberal protection of free expression. Fifth, the offense is impersonal: Tilted Arc is an offensive symbol of an attack on shared values, and we need not be directly offended by the work in order to resent its harmful flouting of social institutions and the consequent disutility as utility creating social institutions are set aside.

To the extent that each individual in society is offended by the various offensive aspects of Tilted Arc discussed above a group right may be found in the aggregate of individual rights against offense and harm. Tilted Arc presents both immediate offense to those who must experience it daily, and mediate offense to those offended by the deliberate flouting of shared symbols and majoritarian methods. Offense and harm are found both separately and conjoined in both immediately and mediately affected individuals. Offense and harm result from both the immediate invasion of privacy autonomy and denial of individual interest in determining the use of the site, and mediate offense and harm are found in the sympathy of those mediately affected

with those immediately affected and the joint offense at having to bear an illegitimate and eventually harmful subversion of liberal values. Given these linked grounds of offense, and the extent of offense given, there is no compelling reason to believe that undue harm to free expression is done by removing Tilted Arc.

Tilted Arc's value as an exercise in free expression fails to outweigh the public group right to maintain an interest in the use of public sites, and to promote circulation of freely expressed ideas. Were Tilted Arc merely offensive, the high instrumental value of free expression might protect it from removal. However, its open subversion of the liberal democratic protection of free expression while claiming that protection as its justification is offensive both immediately and mediately, and becomes profoundly offensive as the offense endures and the public becomes increasingly obsessed with the illegitimacy of the work's protection under the value of free expression. As the profound offense endures, harm ensues as individuals are denied the right to exercise their interest in determining the use of the public space, and the marketplace of ideas is deprived of diversity by the permanent expression found in Tilted Arc.

### 3. Implications and possible objections.

In this section I will discuss the implications of my conclusion, which will best be shown by considering several possible objections.

### 3.1 Cultural change and the martyrdom of the premature.

Even if we determine consensus contra a given public site-specific artwork, how ought we to deal with the problem of "cultural change and the martyrdom of the premature"?<sup>9</sup> I have a three part response to this problem. First, in order to maintain maximum free expression and the coextensive free circulation of ideas, it is clear that some thorough-going protection of free expression must be maintained. Maximum freedom of artistic expression would be best promoted and maintained by allowing nearly unlimited freedom of expression in private places. These private places, as I discussed in the first chapter, would be private insofar as individuals would not be forced to encounter the expression those places contain. Given the sort of limitation of areas of display that I propose -- a reemphasis of the division between public and private spheres -- a greater degree of potential offense can be tolerated in privately displayed art, since its private display would mark it as explicitly self-regarding.

There remains the difficulty of those like Jesse Helms who seek to limit all instances of what they describe

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<sup>9</sup> This is Feinberg's phrase, discussed at p. 47ff, Offense to Others.

as obscene art. However, within a liberal, value pluralistic society, diverse expression is tolerated and encouraged, and private display of offensive works allows those who do not agree with the expression to avoid it. Objectors may object to the very existence of the work, but the efforts made in keeping the expression self-regarding and easily avoidable defuse the amount of offense that might be felt. So long as potentially objectionable works are not foisted on an unwilling audience, the display is avoidable, and criminal restrictions such as avoidance of physical harms to others are respected, the work is self-regarding and not justifiably limited on liberal grounds. This allowance of nearly any expression in a private place would increase the freedom of artists to explore various modes of expression without fear of censorship on grounds of obscenity or offense to community standards.

Second, martyrdom of premature public site-specific artwork might be avoided by a process of public consultation before installing a piece of public site-specific art, together with a trial period in which the public can become acclimatized to the artwork. This process of consultation could be conducted via hearings and a plebiscite of the sort conducted when e.g., a neighborhood pub is opened. This type of consensus politics regarding public artworks is not unheard of. Los Angeles sculptor Carl Cheng constructed a concrete drum weighing fourteen tons, nine feet in diameter

and twelve feet wide, tooled to leave an imprint of "a relief map of a city complete with miniature freeways, houses, sports arenas and traffic jams. A sprawling sand castle metropolis up and down the beach is formed in a few hours. Almost as quickly, the print is erased -- absorbed into the life of the beach."<sup>10</sup> Cheng's work is a product of six years of "give-and-take in the process that required him to map his own way through city hall and a dozen councils on route to having his 'Santa Monica Art Tool' commissioned."<sup>11</sup> Cheng's willingness to explain his purposes and what the art could bring to the public enabled him to bring art out into the public without causing tension between the public and the artistic community -- two groups who often each perceive their own interests as being vastly different from the interests of the other group.

The third part of my response to the danger of martyrdom of the culturally premature follows out of the second. Cheng explained his goals to a variety of councils, involving them in the process of creating a work of art and educating them in the goals of public art. Greater tolerance of provocative public site-specific art requires education about the goals and methods of public site art. While we allow most adults to choose their tastes in art and

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<sup>10</sup> Michael Hall, "Forward in an Aftermath: Public Art Goes Kitsch" in Art In the Public Interest, Arlene Raven ed., Ann Arbor: UMI Research Press, 1989. p. 341.

<sup>11</sup> Ibid., 342.

literature, we attempt in educating children to expose potential full moral agents to a wide variety of choices. The methods and ends of art education are outside the scope of this thesis; however, I will note that art education and exposure to diverse expression seems to be an appropriate way of encouraging understanding and tolerance of cultural and aesthetic diversity. As Mill observed, society has itself to blame if its citizens tend to bizarre or apparently unconscionable habits, since society has the time before the age of majority in which to educate its citizens about value choices.<sup>12</sup> Admittedly, insofar as we encourage diversity of valuing options education is a form of legal moralism. However, nothing in the education about value choices precludes individuals' ability and freedom to opt out of or adopt any value system.

### 3.2 Tyranny of the majority.

A second possible criticism of my conclusion is that it leads to the tyranny of the majority so feared by Mill. This criticism is defused by noting first that I am concerned only with limiting offense, and not expression whose social utility outweighs its offensiveness. Further, my reinforcement of the public/private distinction removes the possibility of majority dictation of banal aesthetic standards by placing innovative artwork into a self-regarding context where majority views about aesthetic value have no

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<sup>12</sup> On Liberty, Gray ed. part 4, p. 91.

binding influence. While my limitation of public display of offensive artworks views artists' desire for protection of art qua art as irrelevant in the public sphere, the importance of maintaining self-regarding free expression gives artists' private expression particular importance and protection as instrumental to free circulation of ideas. It is the distinctly public nature of offensive public site-specific art that is attacked by my argument. I am concerned with the extent of offense engendered by the expression, and not the aesthetic value of the content of the expression.

### 3.3 The susceptibility of Tilted Arc to my arguments if it were temporarily installed.

A third possible charge might question my objection to the permanence of public site-specific art such as Tilted Arc and ask if a temporarily installed public site-specific work is susceptible to the same arguments. My consideration of Tilted Arc argues that its permanence aids in establishing the work's profound offense. This is not to say, however, that simple offense is insufficient warrant for removal of an artwork. In the case of Tilted Arc it simply happens that the sculpture is not just offensive, but profoundly offensive as well. If sufficient offense can be documented by plebiscite or petition, even a temporarily displayed work might justifiably be removed -- particularly

if it gave rise to harm, e.g. its dramatic location caused alarmed motorists to swerve dangerously. However, as the offensive art is increasingly avoidable, temporary, and not spitefully arranged to inconvenience others it is increasingly protected by the value of free expression.

## Conclusion

The tension between public interest in avoiding offense and the purported status of offensive public site specific art as expression protected by liberal respect for free expression in a liberal democracy is resolved by recognizing that offensive, permanent, unavoidable expression can become profoundly offensive and harmful in a way which warrants censorship of the expression. I argued that the free expression of Richard Serra's Tilted Arc is an example of an offensive work of art whose non-removal would result in profound offense and harm. The type of offense given by the work establishes the seriousness of the harm-causing offense: Tilted Arc is a profound offense to shared values of privacy autonomy and democratic decision making, and if the work is not removed, it harms public interest in determining the use of the public space of Federal Plaza, and public interest in maintaining diversity in the marketplace of ideas. If the removal of Tilted Arc results in harm to the author, this harm is acceptable insofar as his expression is not limited in a manner inconsistent with the protection of free expression required by a liberal democracy. My policy regarding display of offensive art reemphasizes the public-private distinction, and promotes

free expression by allowing nearly unfettered display of works so long as they are displayed in a private place where the public might reasonably be expected to avoid them.

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