Decisions to criminalise

2.1 Introduction

Although it is hard to conceive of a society without criminal law, the existence of coercive rules backed up by punishment is in fact problematic. In this chapter the limits, if any, on the power of the state to coerce our behaviour will be examined. A key concern is to consider what the criminal law does which could not equally well be done by morality, regulation or the civil law.\(^1\) The parameters for discussion have been described in the following question: ‘What are the facts, beliefs and principles which should underpin a political body’s choice to proscribe certain sorts of behaviour by means of the criminal justice system?’\(^2\) As a starting point we will consider some of the basic premises which generate the need for criminal law as opposed to other forms of social control, namely those of autonomy, social welfare and harm prevention.

2.2 Principles and ideas informing decisions to criminalise

A  Autonomy

Underlying the operation of the criminal law is a fundamental, yet challengeable, premise.\(^3\) It is that human beings are characterised by their ability to control their own destiny. Human action is conceived as the product of free, rational choices on the part of the individual.\(^4\) This capacity for free and rational action taking effect in and on the natural and social world designates human beings as autonomous moral agents, that is as bearing responsibility for their actions whether good or bad. It is this same capacity which, in liberal societies, coercive rules exist to support. The premise has, then, direct implications for the relationship of the individual and state because it provides a potential basis by which to justify and evaluate a system of coercive rules and punishment for breach. The coercive rules are justified by the fact that they act to promote human autonomy rather than restrict it. Subjects, as rational, free human beings, have the choice whether to conform or not and are able, using rules as standards, to conduct their lives with the minimum risk of suffering interference. Punishment for breach can then be justified because, by


\(^3\) The challenge is explored in Chapter 8.

offending, the individual (free and rational) is deemed to choose not only to offend but also the punishment ‘price-tag’ attached to his conduct.

The premise also gives us a basis for evaluating the content of the coercive rules. Since the purpose of the rules is to facilitate human autonomy, that is to maximise a person’s life-choices, a rational free individual is taken to consent to coercion only insofar as it is necessary for him to be able to lead an autonomous life consistent with the enjoyment of similar rights for others. Rules which are found wanting in this respect may be criticised as involving an unjustifiably interference with individual autonomy. It has a number of other important consequences which will inform later discussion. Most obviously it limits the scope of the criminal to the activities of human beings and, in theory at least, only then to the extent that they display the fundamental attributes necessary for effective ‘rule-following’, namely free choice and rationality. The principle gives us therefore a blueprint for a system of defences, namely that people should not be the subject of coercion unless they could have acted otherwise.

1 The harm principle
The notion of autonomy currently informing the bulk of criminal law proscriptions issues from J.S. Mill in his essay ‘On Liberty’:\footnote{J.S. Mill, ‘On Liberty’ in J. Gray (ed.) 

The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear . . . because in the opinion of others to do so would be wise or even right.

The harm principle principle has both a negative and a positive thrust. Its negative thrust, which gives it its liberal appeal, is that the State has limited authority to coerce and punish. It may only do so to prevent harm to other people. Beyond this individuals should be allowed to do, say, think what they like. Harm to self is not enough, nor is upholding society’s moral values. They may smoke, or drink themselves to death. They may spend every waking day watching TV or looking at pornography. They may blaspheme, commit suicide, deny the existence of God, engage in any form of consensual sexual unorthodoxy. In short the ‘harm principle’ gives political priority to individual freedom from coercion rather than individual or collective goods such as morality or welfare. Its positive thrust is to identify what justifies State coercion, namely harm prevention. Taken together the principle yields the following equation. Where freedom of action must be restricted in order to maintain the autonomy and security of citizens, it is proper to curtail it. Otherwise freedom takes priority. The crimes of theft and violence express this at its simplest. People who punch or steal from us seek to be authors of our destiny as well as their own. It is right, therefore, to restrict their freedom to do so. The crime of dangerous driving reflects a further dimension. Driving a vehicle is lawful, albeit that it inevitably involves some risk of harm; however, freedom is curtailed to the extent that taking unjustified risks of causing harm while driving is subject to penalty.
2 What is harm?

In a restatement of Mill’s harm principle Joel Feinberg describes it as follows:

(S)tate interference with a citizen’s behaviour tends to be morally justified when it is reasonably necessary ... to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion. 6

Three points should be noted about this quotation. Feinberg talks of both private and public harm. State coercion is thus justified to prevent theft (harm to the individual) and tax evasion (harm to the State). Second, the harm principle covers both harm and the threat of harm. Third, the quotation makes clear that these considerations are ‘a reason for’ criminalisation. It does not make the claim that it necessitates criminalisation.

If harm or the threat of harm provides a reason for criminalisation, how is it to be defined? Does the playing of loud music ‘harm’ those subjected to it? Do fox hunting, public nudity, begging, tax evasion, insider trading, harm anybody? Feinberg distinguishes between harm in the everyday sense of physical damage to persons, institutions, or their property and harm in a legal sense. In a legal sense harms refer to a wrongful set-back to some protected interest. Feinberg describes ‘setting-back’ an interest as invading an interest in such a way as to leave it ‘in a worse condition than it otherwise would have been had the invasion not occurred at all’. 7 This definition is not entirely satisfactory. Does it cover, for example, the illustrations given above? Absent a meaningful definition of harm, the harm principle can be prayed in aid of any conduct which is hurtful, disliked or considered immoral or offensive to others – an anti-liberal conclusion. For this reason, as we shall see, all liberal accounts of criminalisation are informed by a general limiting principle, namely the principle of minimal criminalisation or the principle of restraint. In other words, the State should not criminalise and punish, although it may have reason to, unless it is unavoidable. 8

To ensure ‘harm’ is not too all-embracing. Feinberg refines the harm principle somewhat by distinguishing ‘harm’, ‘hurt’ and offensiveness or ‘offence’. It is against harm that the criminal law is pitched. What is harmful to us is a reason to stop it wherever it takes place. What is offensive to us, however, is not, in itself, reason to stop it since liberal society is committed to tolerating things which do not affect us directly. If we feel disgusted, indignant, ashamed or diminished by knowing what is going on next door, that may be a reason to remonstrate, demonstrate, or move house but is not a reason for State coercion. However, criminalisation of conduct causing offence may be justified, but subject to conditions and for different reasons. If such conduct is seriously offensive, is widely considered unacceptable, and takes place in public this does directly affect us. It affects our sense of well-being, our ability to feel comfortable in a public space, our sense that our values and the way we live our life is respected by others. So while punching someone (harm) is a criminal offence whether it takes place in public or private, homosexual activity or soliciting for sex (no harm) is an offence only if it takes place in public. 9 This begs the

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7 Ibid., 34.
8 ‘the State must not only have good reason to restrict a person’s freedom of action but also good reason to censure and punish people who, rightly or wrongly, reject that reason as a reason to comply with the law.’ (Husak)
9 S 1(1) SOA 1967.
question, of course, as to how to gauge the degree and extent of public offence caused by such activities and whether, in any event, disgust, indignation, anger and affront are a sufficient basis for State coercion.

Noise, graffiti, begging, smoking in public, litter are all examples of ways of reducing our quality of life without individual instances having a sufficient impact to cause a measurable set-back to interests. The problem of course with criminalising activities without a clear and measurable threshold for intervention is that it threatens to undo all the good work which the harm principle is thought to achieve. Significantly, therefore, the harm principle, though its moral and political clout consists of its promise to restrict the occasions when the state may interfere with our liberty, is capable of supporting interference in potentially every area of our lives, save possibly our self-regarding recreational activities. The use of Anti-Social Behaviour Orders, for example, has been criticised for its tendency to suck into the apparatus of state coercion those, particularly the young, who are rowdy, loud, and disruptive without, however, harming in any defined and substantial fashion the interests of others. To address this problem we need to keep at the forefront of our thinking the need for criminalisation to be a technique of last resort and for the offensive conduct to be both wrongful and of a nature to justify state coercion rather than individual or civil action, that is, that it shows gross disrespect for values which we hold in common or if it does not, nevertheless has a profound impact on the quality of life of those who are subjected to it.

3 The harm principle: its influence on criminal doctrine

The harm principle seems to underpin much of the legislative choice regarding criminalisation. Criminalisation is rarely justified on paternalistic grounds, that is to prevent harm to self as opposed to others, and where it does, as with seat-belt laws, serious public interests are at stake and Parliament is invariably the legislator. As we shall see, matters of personal morality, particularly in the field of sexual activity, are also not thought appropriate for the criminal sanction unless again, as in the case of street offences, wider public interests are at stake.

It is to be expected, given the avowed role of judge as defender of freedoms, that an autonomy-led approach defines much of the outer boundaries of judge-made criminal law. Focal crimes such as rape, assault, criminal damage, and so on are constituted only upon proof of absence of consent, since only then will any private interests be wrongfully ‘set back’. Correspondingly, it is no defence to criminal liability that the ‘victim’ of wrongdoing benefited from it if consent was nevertheless absent. As will be appreciated from this discussion, the centrality of ‘harm’ for criminalisation is probably overstated by the harm principle. On the one hand preventing harm or the threat of harm is the central

13 Most obviously health service costs.
14 Feinberg, op. cit. 215, Chapter 1.
justification for that vast body of criminal offences which seek to regulate our day-to-day activities on the roads, in the workplace, in manufacturing and so on. Modern formulations of harm theory make this explicit. Gross, for example, defines harm in a notably broad way, including the following harms within the potential purview of the criminal sanction:

(3) harms consisting in some impairment of collective welfare;
(4) harms consisting in violations of some government interest.  

On the other hand, for core traditional crimes such as rape, assault, murder and so on it is not so much the ‘set-back’ to a person’s interests which supports the criminal sanction but the wrongfulness of the conduct. The moral enormity of the crime of rape does not hinge upon the effect on the victim, which may vary enormously, but upon the fact that our society cherishes autonomy. Again, a doctor will be criminally liable for force-feeding an anorexic patient even if the consequence is the patient’s complete recovery and her eternal gratitude for the doctor’s officious intervention. It is no defence, in other words, to say ‘no harm done’ or ‘the patient’s welfare depended on it’. 

4 Alternative notions of autonomy

Another weakness which has been identified in the harm principle is that it may be too narrow to serve the interests (autonomy/self-fulfilment) which the criminal law acts to defend. In emphasising the morality of minimal state coercion and concentrating upon freedom from interference, it ignores the diverse ways in which individual interests in autonomy can be compromised. A true commitment to autonomy may ‘yield duties which go far beyond the negative duties of non-interference which are the only ones recognised by (the harm principle)’. Consider, for example, a leading harm theorist’s description of primary harms: ‘violations of interest in retaining or maintaining what one is entitled to have. Interests regarding life, liberty, property and physical wellbeing and security are the most general and the most important classes.’

Thus, society criminalises theft because it is a violation of what one is entitled to keep. On the other hand, it does not, say, criminalise a failure to reward an employee in accordance with her value, the reason being that no such violation has occurred. But why not? Consider how individual self-fulfilment may be reduced by financial exploitation. It may produce a sense of inferiority and injustice. It may prevent the individual from finding satisfactory accommodation and enjoying a meaningful social life. It may engender frustration which interferes with the stability of the individual’s home life and the happiness of her family. All these harms may be far more damaging to the individual than the ‘set-back’

15 H. Gross, op. cit. 119–22.
19 Ibid., 408.
caused by the theft of a packet of cigarettes. Restricting the scope of the criminal law to the prevention of direct harm-creating acts, on this argument, is a blueprint for legislation informed by political conservatism, rather than that which might be expected to advance general human flourishing. A society truly committed to the autonomy of its members would, one might suppose, be committed to a more radical set of ‘do’s’ and ‘don’ts’ underwritten by the prospect of state coercion.

B Harm prevention and other welfare values

The Harm Principle is the cornerstone of the liberal state’s approach to criminalisation. Its influence is seen not only with respect to core crimes involving moral wrongs committed against individuals but more obviously in the context of statutory public welfare offences such as traffic/building/food/environmental protection regulation and state security. Such legislation is not designed, as core crimes are, to support the individual’s dominion over his own life choices. It is designed to allow the state to secure its own, and our, welfare interests – obviously a key function in the constitution of a civilised autonomy-respecting society. Public welfare is here deemed so crucial to society’s general purposes that such offences are often constituted in violation of the principle of responsibility. Punishing for speeding and many other traffic offences, for example, does not require proof of fault. Since such offences represent the subjugation of individual autonomy to collective welfare interests it is not coincidental that they issue from politically accountable legislators rather than unaccountable judges. Parliament, rather than judges, is best able to make the ‘complex judgement about the acceptable level of risk of physical and mental harm, taking into account costs of enforcement, utility of traffic circulation . . ., the autonomy of citizens who choose to take certain risks, and so on’.

Even in the context of judge-made crimes there are limits to the moral priority accorded to autonomy. There are limits to what harms can be consented to, for example. The support of collective interests in harm prevention or social welfare must be prayed in aid of such doctrine. So, the principle of the sanctity of life outweighs the principle of autonomy to prevent consent being a defence to murder, at least by positive action. Similar values operate to render the consensual infliction of injury criminal unless, as when they issue from socially approved activities such as contact sports, counterbalancing values and interests can be called upon in support.

The weight accorded these various principles and interests is not fixed. It may well be that at some stage in the future Parliament may wish to partially decriminalise voluntary euthanasia or the infliction of consensual injury. At present, however, it is clear that the principle of autonomy may sometimes be ‘trumped’ by other values, in the public interest. Of particular significance in this respect are those values least directly connected to the private interests of others, namely those connected with personal morality.

22 Lacey (1988), 105.
23 See generally Chapter 11.
1 Enforcing morality

Law and morality have a number of things in common. Most particularly, they both serve to
lay down standards of behaviour (norms) for the observance of society’s members. Criminal
law even tends to reflect the form in which moral injunctions are encountered, namely as
prohibitions or ‘thou shalt nots’. If we go beyond traditional crimes, such as murder and
theft, the actual content of the criminal law is only marginally concerned with upholding
and enforcing community values per se. As we have seen, for example, a large proportion
of criminal law is concerned with protecting people’s welfare interests rather than society’s
moral structure. Thus food and health regulations are put in place to ensure that strict
standards of hygiene are observed in contexts where the public may be put at risk. Coercion
is justified here not because public morality is confounded when food manufacturers and
preparers fall down on their standards – surely implausible – but because society deems it
right to protect the public’s (welfare) interests in this way. The criminal law is a clear,
smart, efficient way of ensuring that people keep up to scratch. A society which supported
only its key moral values through state coercion would leave the interests those values exist
to support largely unprotected. With these considerations in mind, most modern accounts
of the proper scope of the criminal law concentrate upon the interests, both private (phys-
cical integrity, property interests, sexual autonomy, etc.) and public (political security,
public order, etc.) which moral values serve to protect rather than the values themselves.

This leaves open the separate question as to whether serious breaches of morality are
a sufficient basis upon which to criminalise conduct that does not also directly threaten
these latter interests. If, for example, a moral consensus within society finds the practice
of fox-hunting or body-piercing extremely offensive, does this justify prohibiting the
practice? Given that the life choices of a rational person (fox-hunter/body-piercer) are
diminished without being paid for by protecting her own or the autonomy of another
rational person, would it be wrong to criminalise the activities?25 Or is it reasonable for
society to decide that our individual and collective moral welfare (or the welfare of the fox)
may trump individual autonomy? At the level of general principle it seems right that society
should have this power.26 We are all diminished by cruelty to animals, for example. This
does not help us decide, however, how to strike the appropriate balance between individual
freedom and state control where, as in these two examples, criminalisation may seriously
restrict the scope of a person’s cultural and, therefore, ‘self’ identity.

A helpful starting point is the work of the French theorist, Emile Durkheim. He sought
to distinguish between the values which some people may hold, which are consistent with
the continued strength and integrity of a given society, and the values which all people
must hold for that same society to survive. He concluded that only the latter were an
appropriate object of enforcement. Punishment, in Durkheim’s view, was the response of an
outraged community to an infraction of a value it holds dear to its ‘collective conscience’.27
The significance of such an approach is that it offers to say both what aspects of social

25 See generally J. Raz (1986), Chapter 9 for a persuasive account of how all key moral values reduce to a concern
for individual autonomy. The view taken here is less complex. A concern to develop the necessary conditions
for the flourishing of individual autonomy characterises the majority of society’s rules but clearly not all of them.


morality should be enforced through the criminal sanction and also what should not. It is not enough that moral values have been flouted or that individual interests have been damaged or threatened, since morality or the civil law is designed precisely so as to meet such cases. For example, the law of contract is the correct forum for dealing with the problems arising out of promise-breaking. State coercion is reserved for activities which pose a serious threat to the integrity of society, such that it demands a public rather than private response. Less than this and the conduct concerned must fall outside the scope of the criminal law even if, as with fox-hunting or body-piercing, the majority may disapprove of the conduct concerned. In this way collective interests can be reconciled with respect for individual autonomy.

A modern version of this position surfaced in the 1960s when the authority of the state to enforce personal morality was called into question. The new champion was Lord Devlin who argued that the enforcement of morals was as much a proper task of government as the suppression of political subversion, since both threatened to destroy or damage the community; political subversion by threatening political freedom and safety; moral subversion by threatening to topple the building blocks of our social structure. In the context of one of the burning issues of the day, namely homosexuality, he argued that the practice should not be decriminalised, since to do so would be to damage the ‘moral cement’ holding the social structure together. Sexual freedom should give way to the broader claims of community which require key social institutions such as the family to be protected from the potentially subversive effect of a counter-sexual culture. Mirroring the approach of Durkheim, he argued that the sounds of a community at the point of breakdown are the sounds of the community voicing distress, indignation and disgust at minority behaviour deemed unacceptable. In common with the latter, however, he agreed that society may not criminalise an activity simply because the majority do not like it. Society is only entitled to introduce the criminal sanction if the activity offers a serious threat to the social structure, supposedly reflected in the degree of indignation and outrage the practice excites.

2 Liberal objections to the enforcement of morality
The liberal objection to this view was, and remains, that state coercion is only legitimate insofar as it promises to prevent harm, or the risk of harm, to the interests of other people. The state should not intervene, therefore, simply to enforce morality unless perhaps the individual concerned, by virtue of youth or mental incapacity, was in need of paternalist protection. Lord Devlin was also criticised for basing the test for assessing the propriety of criminalisation upon the degree of social disgust and outrage provoked by the activity. Disgust, by itself, is unable to differentiate the good from the bad, the ‘injurious’ from the innocuous. Some people are quite sanguine about the export of powdered baby milk and cigarettes to the developing world, or experiments on animals. Others are disgusted by inter-racial marriage or homosexuality. It seems illogical and dangerous for society’s blueprint of politically acceptable conduct to be drawn by irrational criteria so obviously

28 Cf. Coney (1882) 8 QBD 534, at 549, ‘A man may by consent . . . compromise his own civil rights, but he cannot compromise the public interests’, at 553 per Hawkins J.
29 Lacey (1988) calls this the principle of urgency, 100.
conducive to political oppression. The danger, then, is that we may be left with a society in which an irrational and unprincipled majority is given licence to impose their views of right conduct on a powerless minority.

### 3 Is there a meaningful difference between legislating to enforce morality and legislating to prevent harm?

The House of Lords has affirmed, by a majority, the role of the criminal law in enforcing morality. In *R v Brown* the question to be decided was whether consensual sado-masochism was lawful by virtue of the participant’s consent or unlawful upon the ground that it involved acts of gratuitous violence. 31

The minority took the view that personal autonomy trumped the value of harm prevention for the simple reason that no obvious harm is suffered by society if only the consenting individuals concerned are affected. The criminal law should fulfil a minimalist role, that is, to intervene only if necessary to protect the interests of other members of the public, not simply to satisfy their moral preferences.

The majority took the view that, unlike homosexuality and prostitution and other practices pertaining to sexual autonomy, criminalisation was appropriate because sado-masochism involved inflicting pain and injury. This was not only wrong in itself, but society collectively had a stake in preventing the possible emergence of cults of violence which might over time lead cult members both to proselytise for sado-masochism and abandon the general moral premise that hurting people is wrong. 32 The basic point of distinction between majority and minority reduces to the way that ‘harm’ is conceptualised. The minority would accept that public interests can be harmed by consensual violence but only if they have a direct public impact. Such an impact might result from the fact that they take place in public and cause offence or breach public order. Alternatively, it might result from the fact that the injuries suffered were sufficiently serious to require medical treatment and thus the expenditure of public money. The majority would insist that the public interest is not exhausted by such concerns. ‘Moral harms’ can be committed as well as more direct harms. The only difference between them is that the former take more time to become apparent, by which time it may be too late for the state to do anything about it. Accordingly, the potential ‘moral harm’ to individuals and/or the community involved in consensual sado-masochism for sexual gratification ‘trumped’ the individual’s presumptive right to (sexual) autonomy. 33 The possession of extreme pornography, including images involving material recently made a criminal offence, has more recently been justified in this way. 34

31 [1993] 2 All ER 75.
32 ‘Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised’, p. 84 per Lord Templeman.
34 S 63 Criminal Justice and Immigration Act 2008. Extreme pornography is defined as involving:
(a) an act which threatens a person’s life,
(b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
(c) an act which involves sexual intercourse with a human corpse, or
(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive) and a reasonable person looking at the image would think that any such person or animal was real. See Clare McGlynn and Erika Rackley, ‘Criminalising Extreme Pornography: a Lost Opportunity’ (2009), Criminal Law Review 245.
4 Principled approaches to the enforcement of morals

Contemporary defenders of enforcing morality, accepting the premise that collective welfare interests can be damaged in the absence of direct harm to public or private interests, have tended to emphasise the importance of society exhibiting moral neutrality in the standards it enforces. The problem with Lord Devlin’s approach, on this view, is not that he wishes to enforce morality, but that he wishes to enforce morality preferentially.\(^{35}\) He wants to limit the benefits of living in a free society to people like him. In short, he wants his cake and also to eat it. A just society may favour either autonomy or the enforcement of morals. What it may not justly do is to favour one group with the fruits of autonomy at the expense of other less favoured groups. If, for example, sexual autonomy is thought desirable, all citizens, whether heterosexual or homosexual, should be entitled to it. Significantly, this would allow society to retain the option to proscribe sado-masochism. As long as everyone was subject to the same proscription society would show no disrespect of rights by supporting one moral value (hurting people is wrong) against another (sexual autonomy).\(^{36}\)

Of course, when morality and other welfare values are recognised as a proper basis for restricting autonomy, it is but a short step to advocate further extending the scope of the criminal law so as to actively promote socially beneficial behaviour rather than simply inhibiting bad behaviour.\(^{37}\) A radical proposal along these lines advocates that the state should respond to ‘serious and direct threats to and violations of . . . fundamental interests through behaviour which expresses a rejection of, hostility or total indifference to, the basic framework values which the society acknowledges’.\(^{38}\)

To understand the radicalism of this latter proposal one needs only to compare it with the above morality-led approach which conceives of morality only in terms of a list of (largely sexual) prohibitions rather than prescriptions. The approach under discussion is as alert to the desirability of society demanding positive, good standards of behaviour as demanding moral self-sacrifice for the collective good. A failure to shoulder the responsibilities of good citizenship would, on this view, signify indifference to a basic framework value of most societies, i.e. respect for others. It could be used, for example, to extend the range of punishable omissions, perhaps beyond the realm necessary to ensure that autonomy generally is enhanced.\(^{39}\) It could be used to expand the range of both public welfare and traditional crimes to include sexual harassment, financial exploitation, trading in weapons and other immoral goods, and vivisection. In 2003 it was implicit in the decision to replace the present fault element in rape, namely recklessness as to the victim’s consent, with the more onerous one of negligence.\(^{40}\)

Although both morality-led positions stress the need for ‘thresholds of seriousness’ to be satisfied before criminalisation is appropriate, unless supported by a comprehensive Bill of Rights for the protection of key freedoms, each is capable of legitimating an authoritarian

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36 On this view society still has an obligation to ensure consistency of preference. It would be wrong for example to allow autonomy to defeat welfare in all cases but sexual activity.
39 For example by imposing a general duty of litter removal. See Chapter 3.
system of law; one which not only encourages socially-valued forms of conduct but crucially defines and enforces them. Adapting the words of Joseph Raz, ‘a balanced view of the shortcomings of governments (should) lead to much more extensive freedom from governmental action’ than is entailed by a concern to uphold society’s ‘basic framework values’.41

C Practical criteria underpinning decisions to criminalise:
thresholds of seriousness

1 Grading wrongs
As this last quotation suggests, a central concern for an autonomy-respecting society is to maintain proper thresholds of ‘seriousness’ below which criminalisation is inappropriate. As Joel Feinberg puts it:

The harm principle must be made sufficiently precise to permit the formulation of a criterion of ‘seriousness’, and also, if possible, some way of grading types of harms in terms of their seriousness. Without these further specifications, the harm principle may be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others for better and worse to some degree, and thus would properly be the state’s business.42

Appropriate thresholds, in theory at least, are constituted by the requirement that criminal liability should only attend culpable wrongdoing. All other things being equal, while causing harm is the paradigm of wrongdoing, only where wrongdoing is substantial is the criminal sanction appropriate. The harm/culpability equation allows thresholds of seriousness to vary according to both gravity of harm and fault. So causing death (very) negligently is presently a criminal offence whereas causing minor personal injury negligently is not, but will be if caused intentionally. Again, intention and subjective recklessness is a more culpable state of mind than negligence which therefore affects the seriousness of the actor’s wrongdoing.43 The not uncontroversial assumption is that the more serious the harm/culpability, the greater the wrong. Although the assumption is not controversial, the legislative outcome often is. A prime example is the Crime and Disorder Act 1998 which enacted that crimes of violence, criminal damage and other crimes were more serious when motivated by racial or religious hostility. Much ink has been spilt in argument about how violence motivated by religious or racial hatred is worse than violence motivated by, say, the love of causing pain and suffering for its own sake, or even violence motivated by nothing more than boredom. The jury is still out on this one and has led many to view the legislation as one of a kind with a raft of legislation enacted over the last few years designed to symbolise that Government has its heart in the right place and is tough on anti-social behaviour but otherwise not conforming to the ethics of criminalisation which we have been discussing.

41 J. Raz (1986), 428.
Even if we accept that the criminal law should have a role to play in preventing physical injury, protecting property and conserving society’s general welfare interests, this does not help us to decide when such interests are sufficiently compromised or threatened to justify state coercion. Assessing appropriate thresholds of harm whether for purposes of basic criminalisation or for purposes of grading offences is not straightforward, although at a basic level it is deceptively easy to produce thresholds of seriousness capable of differentiating both criminal and non-criminal wrongs and offences of different grades of seriousness. The seriousness of the ‘set-back’ allows us to account for the majority of core wrongs, for example, murder, theft and criminal damage. Joel Feinberg’s method for assessing seriousness of harm centres upon the victim’s loss of choice or opportunity. Theft justifies criminalisation whereas dishonest borrowing does not, because, ceteris paribus, the latter does not seriously diminish the victim’s range of choices. This goes to explain why dishonest borrowing is criminalised only in the exceptional cases where collective interests are imperilled.  

So also, we are able to account for the fact that murder is treated more seriously by the criminal justice system than criminal damage. In recent years a loss of choice approach has been exploited to justify the criminalisation of stalking. It is obvious that determined psychological harassment can fundamentally restrict the range of life choices available to the victim, even choices as basic as whether to answer the telephone or leave the house to go shopping. It is also obvious that stalking affects the quality of life in a way which bears comparison with crimes, such as assault, involving similar consequences.

Beyond core crimes bearing, as do assault and harassment, a family resemblance, this approach is less helpful. How, for example, does the notion of loss of choice help order in terms of gravity harms as distinct as rape, fraud, and environmental pollution? Andrew von Hirsch and Nils Jareborg have suggested an alternative way of settling thresholds of seriousness appropriate for both determining the level at which criminalisation is first appropriate and, thereafter, as a means of grading different offences for purposes of setting appropriate punishments. The mechanism turns our attention from what the victim loses in terms of choice to what he loses in terms of quality of life. This latter focus is closer to the manner in which, in everyday life, we differentiate crimes. It is why we say that torturing someone or robbing them is worse than stealing from them or smashing their window. Harms, then, are graded according to the effect that they have on a person’s standard of living assessed according to material criteria such as financial resources and shelter and wider aspects of a good quality of life such as health, dignity, physical amenity, privacy and so on. This approach, like Feinberg’s, is possibly unhelpful in fixing appropriate criteria for criminalising quintessentially public wrongs such as revenue offences. On the other hand, unlike Feinberg’s more rough and ready approach, it achieves success in allowing the gravity of wrongs as distinct as crimes of violence and environmental pollution to be assessed according to common criteria, thus ensuring some degree of proportionality in the distribution of punishment.

44 See ss 11 and 12 Theft Act 1968.
2 Remote harms and non-victimising crimes

It will be appreciated that the above analysis is primarily geared towards victimising crimes. We need some other measure of appropriateness for regulatory offences and offences involving remote harms. A remote harm, for this purpose, is a harm at one or more stages removed from a risk-creating activity. The activity does not itself create the risk but it sets in chain causal processes which may do so. Consider, for example, § 58(1) Terrorism Act 2000. This criminalises the possession of documents or records ‘of a kind likely to be useful to a person committing or preparing to commit an act of terrorism’. Notice that there is no requirement that the possessor has any intention to so use the materials nor even that the materials themselves are dangerous. In short, there is scant connection between such provision and traditional ethics of criminalisation. More broadly, crimes of possession such as drugs and weapon possession are typically justified upon the basis that criminalising possession reduces their use, which in turn reduces the risk that they will be used to cause harm to public or private interests. While individual instances of possession may pose no threat to such interests, criminalisation is justified on a cumulative basis. A weapons culture such as that existing in the United States seems to make for greater weapons use in unlawful contexts. If a person has a gun or knife in his pocket he is obviously more likely to shoot or stab someone in anger than if he carries only a pocket handkerchief. In 2009 the possession of extreme pornography was made the subject of a criminal offence. One of the many justifications, similar to that offered in Brown, was that extreme pornography may create a climate in which sexual violence is not taken seriously, with all that that entails.

Feinberg’s mechanism for determining an appropriate threshold for state intervention in the absence of any direct harm-causing activity takes the form of a practical equation weighing the gravity of the harm and the likelihood of its occurrence on the one hand, against the social value of the relevant conduct and the degree of interference with personal liberty on the other. The greater the risk of harm and the greater the magnitude of the harm which would occur if the risk materialised, the greater must be the value of the conduct and the implications for personal liberty to justify criminalisation.

To focus attention on the special problem posed by remote harms it may be useful to rehearse the well-publicised criminalisation debate concerning the possession of small hand-guns. Applied to this case Feinberg’s standard harms analysis is initially quite plausible. An argument can be marshalled to the effect that for reasons both of social value and personal liberty the countervailing risks involved are insufficient to justify criminalisation. This is because, unlike weapons such as Armalite rifles, their mere possession can easily be dissociated from their harm-causing potential. The threat represented by bearing handguns (and most other weapons) begins to crystallise only when removed from the home or

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2.2 Principles and ideas informing decisions to criminalise

Before this occurs they offer no more threat than cricket bats which, like guns, can also kill when used improperly. The ownership and possession of the former cannot be analysed in the same way. Just as the natural disposition of an acorn is to grow into an oak tree, so the natural disposition of Armalite rifles is, in the hands of their owners, to kill other people.

This analysis does not adequately address the basis upon which it is sought to criminalise the possession of hand-guns, however. The argument in favour of criminalisation is not that the defendant’s conduct presents a particular source of danger. This in fact renders the standard harms analysis somewhat otiose. While clearly plausible in connection with activities, such as dangerous driving, which involve an actor who causes a set-back to interests and is culpable in so doing, no such causal link to or moral blame for any future criminal event need be established in the case of remote harms. Rather the argument is the less focused coercive claim that societies in which weapons or other potentially harmful products are freely available are societies in which such products are more likely to be used. By criminalising their possession this offers to shore up a potential slippery slope leading to the routine use of guns in the course of criminal activity, although potential defendants may play no part whatsoever in encouraging such activity. Similar (slippery slope) arguments can be marshalled to justify the criminalisation of other perceived anti-social activities such as drug-taking and consensual sado-masochism. This justification offers to destabilise the accepted basis upon which state coercion is legitimated, namely that criminal liability requires proof of some harmful occurrence attributable to some culpable action of the defendant. It is this ethical premise, after all, which offers to protect the individual from the unfocused rights-defeating claims of utility and legal moralism, and which ultimately lends the harm principle its intrinsic appeal.

3 Practical limiting criteria

Even if we are able to create workable criteria of seriousness of harm, other practical considerations may militate against criminalisation. A statement of these considerations which are widely accepted as limiting criteria is provided by Husak. Like many other theorists Husak’s concern is that liberal society is suffering a crisis of overcriminalisation. If social problems emerge the instinctive response of legislators is to reach for the criminal law. The contrary presumption should define the liberal State, namely, that the criminal law is an evil which should be used only in extremis and if all else fails.

Prominent amongst them is that:

1. Since punishment expresses condemnation, only conduct worthy of condemnation should be criminalised.
2. Criminal laws should not punish innocent conduct.
3. Each criminal law must do more good than harm.

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(4) Conduct should not be criminalised unless the state has a compelling interest in punishing those who engage in it. Non-criminal means must be used if this would be effective.

(5) The criminal law should be narrowly tailored to serve the state’s compelling interest; criminal laws should be neither over-inclusive or under-inclusive.

(6) Each criminal law must be designed to prevent a non-trivial harm or evil.

There is little doubt that such considerations should, and often do, inform criminal policy. For example, it seems clear that conduct which is generally accepted as constituting a social threat is likely to remain uncriminalised if it is condoned. Until very recently this was the political justification for the non-criminalisation of smoking. In the first edition of this book it was suggested that criminalisation was unlikely to occur in the foreseeable future. How times change. After centuries in which neither the health of smokers nor those who are forced to share their company carried sufficient clout to counteract the argument for autonomy, the new question is how long it will be before smoking in private is criminalised. Not, one would assume, in the foreseeable future. What one does in one’s own home is one’s own affair, is it not? But watch this space. This rhetorical question satirises the kind of untheorised values which tend to intrude into decisions to criminalise. Although the support of interests is the criminal law’s prime function, the scheme according to which it supports (or fails to support) those interests is structured by general social morality. Whether it should be is quite a different question, as is how that morality is itself to be constructed. How can the state justify censuring and punishing the possession of a few grams of cannabis for one’s own use, while possessing a cellar full of wine for the consumption of the diners of Hertfordshire risks only the award of the Michelin rosette?

The criminalisation of drug use reflects all the considerations Husak was concerned to identify as in need of consideration. The best estimates suggest that the majority of government spending on responding to illegal drugs is devoted to enforcing drug laws, not prevention or treatment. Commenting on a similar phenomenon in Canada, David Roy makes the following plea:

. . . it is ethically wrong to continue criminalizing approaches to the control of drug use when these strategies fail to achieve the goals for which they were designed; create evils equal to or greater than those they purport to prevent; intensify the marginalization of vulnerable people; and stimulate the rise to power of socially destructive and violent empires . . . ignore the more immediately commanding urgency of reducing the suffering of drug users and assuring their survival, their health, and their growth into liberty and dignity.


55 See N. Lacey (1988), Chapters 5, 8.


By contrast, despite the centrality of the interest threatened, the Parliamentary debates on stalking focused quite properly on the control options available; for example civil injunctions in support of a right to privacy, the existing law of assault, and the possible harmful side-effects, including the risk of false reporting and, in cases involving determined newshounds, false labelling.

In this context, the arguments against criminalisation of hand-guns were pretty comprehensive. Whatever view one takes on the seriousness of the threat offered by the possession of hand-guns, enforcement would be extremely difficult, as it is with any other possession offence where the possessing does not have to take place in public. In any event, the obvious way of dealing with this is to separate out those who are likely to use them unlawfully from those who are not. This can be done most easily by means of regulation. Those who want to use hand-guns for sporting purposes will be little affected in their range of choices if they are required to keep them under lock and key at gun-clubs. Finally, the obvious side-effect of criminalising will be to further develop the infrastructure of organised crime. Criminalising private possession and consumption can be expected to produce rule-avoidance and black markets, along with the various functionaries which staff and support them, and, moreover, encourage ordinary law-abiding people to consider breaking the law.

The examples of hand-guns and dangerous drugs show how it is not always the balance of principle and policy which dictates the scope of our political freedoms. In practice it may be nothing more grand than government’s desire to ratchet up levels of state coercion or make political capital without significant attendant political cost. History confirms that the legislature, which is composed of real people rather than penologists, is regrettably as likely to respond reactively to the instantaneous ‘moral panics’ of voters as to satisfy the ethical and utilitarian restrictions on the use of state coercion for public purposes.

Further reading

LCCP Consultation Paper, Criminal Liability in Regulatory Contexts (CP No 195, TSO, August 2010).


Visit [www.mylawchamber.co.uk/wilsoncriminal](http://www.mylawchamber.co.uk/wilsoncriminal) to access a range of resources to support you in your study including practice exam questions with answer guidance, multiple choice questions, live weblinks and regular updates to the law, plus the Pearson eText version of *Criminal Law* which you can search, highlight and personalise with your own notes and bookmarks.

Use **Case Navigator** to read in full some of the key cases referenced in this chapter with commentary and questions for comprehension:

R v Brown [1993] 2 All ER 75