Contents

CHAPTER 1

Criminalization

Introduction

What acts should constitute criminal offences? No one would dispute that murder, rape and burglary should be. However, for other kinds of conduct it is not so obvious. Should allowing a dog to foul a park be a criminal offence? Or walking around nude in a public place?[1] Or hunting foxes with dogs?

Such questions are the subject of intense political and academic debate.[2] Yet exploring the principles which should be used in making criminalization decisions (decisions about whether conduct should be criminal) is important. It indicates what the aims of the criminal law are. This can raise some key political debates over the role of the state. Is it the job of the law to make citizens virtuous? Is it to protect people's freedoms? Or is it to promote a fair and just community? In this chapter we shall be considering some of the key debates over criminalization. At the end we shall take, by way of example, the question of whether it should be a criminal offence not to recycle your rubbish. This will show how some of the rather theoretical debates play out when considering a topical issue.

Debate 1

What is the harm principle?

Introduction

Most discussions of criminalization start with 'the harm principle'.[3] This principle is seen as a line between that conduct which is suitable for criminalization and that conduct which is not. John Mill, seen by some as the architect of the harm principle, writes:

[1] *Gough v DPP* [2013] EWHC 3267 (Admin).

[2] For a helpful summary of the history of criminalization debates, see N. Lacey, 'What Constitutes Criminal Law', in R. Duff, L. Farmer, S. Marshall, M. Renzo and V. Tadros (eds), *The Constitution of the Criminal Law* (Oxford University Press, 2013).

[3] The leading works are J. Feinberg, *Harm to Others; Harm to Self*; and *Harmless Wrongdoing* (Oxford University Press, 1984, 1986, 1988).

> '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. 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.'[4]

Joel Feinberg put it this way:

> 'It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.'

This quotation captures the essence of the harm principle. Conduct should not be criminal unless it is harmful to others. Conduct which does not harm others should not be criminalized, however much of that conduct might be thought by other people to be immoral.

The harm principle is seen as playing an important role in protecting individual autonomy. This is the idea that each person should be able to decide for themselves how they will live their lives and what they will spend their time doing. Each person should be able to do that free from outside interference unless what they are doing harms someone else. So I should be able to eat unhealthily; spend my time watching silly television programmes; or write books on law, without the state interfering in my lifestyle choices. As long as I am not harming anyone else I should be free to do these things, even if the government or other people may regard them as immoral or not good for me.

The harm principle opposes moralism. This is the view that it is permissible to render behaviour criminal simply on the ground that it is immoral. Such a view sees the law as having a role in making people virtuous. Steven Wall, promoting moralism, explains it this way:

> 'It is a proper function of the criminal law to promote good character, and to restrain or discourage people from engaging in activities that cause moral harm to themselves or to others. Having and sustaining a good character is part of living well. And the law, including the criminal law, may have a role to play in enabling or assisting those who are subject to it in achieving this good.'[5]

Moralism is highly unpopular these days, and there are few people who believe that simply providing evidence of immorality *per se* is sufficient to justify criminalizing it – not least because criminalization is not a very good way of persuading people to be more moral.

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[4] J. Mill, *On Liberty* (1859).

[5] S. Wall, 'Enforcing Morality' (2013) 7 *Criminal Law and Philosophy* 455.

Lord Devlin[6] has provided one of the more sophisticated versions of moralism. He argued that society's moral values are an indispensable part of its structure. Allowing seriously immoral behaviour could undermine society's social fabric. This would lead to social disintegration. Of course, in those terms his argument in fact becomes justified under the harm principle. His theory has relatively few supporters today. First, there are the difficulties in ascertaining what the moral values are that underpin our multi-cultural, multi-faith society. Second, even if there are certain generally accepted moral principles, it is not clear that the fact they are breached by a few actually harms society. Does anyone really believe that, if the law prohibiting necrophilia were repealed, society would descend into moral anarchy? It seems unlikely. In short, Lord Devlin's argument would have force if the factual premises were correct, but they are not.

There are few people who openly oppose the harm principle. But this is because the exact meaning and role of the harm principle is much debated. We will now consider two areas where there is much disagreement. First, what exactly is meant by harm in this context? Second, what precisely is the role the harm principle plays?

What Does Harm Mean?

As indicated, one of the reasons for the popularity of the harm principle is that the notion of harm is so vague that it is able to cover a wide range of views. You could justify making just about anything illegal, if you took a broad view of what is harm. We shall consider here some of the main disagreements over the meaning of harm in the academic literature. It is important to remember during the following discussion that the standard view is that the harm principle authorizes criminal punishment, but does not require it. Even though the harm principle may permit punishment, there are many other factors that should be considered before it is decided that criminalization is appropriate. So, when considering the meaning of harm we should bear in mind that if conduct is harmful that does not mean it should necessarily be criminal. However, if something is not harmful it should not be criminal. That suggests that harm should be given a broader meaning than is sometimes understood.

Does It Include Harm to Self as Well as Harm to Others?

The harm principle clearly permits criminalization where the conduct harms other people, but what happens where the only person harmed is the actor? To some the harm principle does not extend to harm to self. Indeed Mill's classic

[6] P. Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

formulation, outlined above, refers to 'harms to others'. Yet it is not difficult to find criminal offences which are designed to protect people from their own folly: a law requiring the wearing of seatbelts; the wearing of crash helmets for motorbike riders; the law forbidding assisted suicide. That said, there are plenty of examples of where a person is permitted to do conduct which causes themselves harm, which if they did harming others, would be outlawed. Rock climbing might be one example, as indeed is cutting oneself as an expression of self-harm.[7]

One view is that the harm principle insists on harm to others, but it should be appreciated that harm to oneself can be a harm to others. One obvious example would be that if seatbelts were not worn there would be many more injuries on the roads, placing a greater burden on the National Health Service and ambulance services. All of this will impact on others in the population. Further it might be said that harm to a person is likely to impact on their family and friends. Where the law appears to outlaw harm to self, in fact it may be justified by virtue of the fact that it is protecting others from harm.

That response is all well and good, but it is so broad that in effect nearly all harm to self could be seen as in some way a harm to others. If so, restricting the criminal law to cases involving harm to others is not a significant restriction.

It may be that a better response is to relate back to the principle of autonomy. We have a basic freedom to do as we wish. Generally, as we have seen, the law does not criminalize acts which will only harm the actor. The very rare cases where the law criminalizes behaviour based on harm to self are cases where the interference in liberty is minimal. Having to wear a seatbelt is hardly likely to interfere in an individual's life goals. Prohibiting rock climbing would severely impact on the lifestyle choices of some. So maybe the position is that harm to self can be included within the harm principle, but criminalization is only justified if the interference in individual liberty is minimal.

Are Offence or Anxiety Harms?

Another major source of dispute is whether harm in this context includes the feelings that other people may have about the conduct of an individual. If a person in a public street behaved in a way which caused distress, offence or anxiety to passers-by, would that be a harm so that the harm principle could authorize criminalization? Consider, for example:

[7] The law on self-harm is not quite clear, but it seems unless the injuries amount to an intentional infliction of grievous bodily harm (Offences Against the Person Act 1861, s. 18) it is unlikely an offence is committed. Even there prosecutions do not seem to be brought. Not surprisingly a person who causes themselves serious harm is normally in need of psychiatric help, not a criminal prosecution.

Hypothetical

Albert is sitting on a bench in a public park reading a pornographic magazine. Several passers-by are distressed and offended by his conduct. Can their offence justify criminalization of his conduct? He claims that he is not harming anyone and that one of the main points of the harm principle is to disallow criminalization based on a moral judgment. When people are offended by someone else's conduct this is, on one view, another way of saying they believe the conduct is immoral. The passers-by claim that their offence is a genuine emotion. They may argue that they will feel unable to use the park if they are liable to come across such disgusting behaviour.

As this hypothetical scenario shows, there is a difficulty here. If offence is included then that may open up a slippery slope so that moral dislike of the way a person behaves will be a justification for criminalization. The 'harm principle' may cease to play any effective role as a barrier against moralism. Consider, for example, if in our hypothetical we had two men kissing on the bench. If some people were offended by that, would it justify criminalizing it? Most people would think certainly not. That may lead you to conclude that offence should not be permitted as a harm. But then what if in our example Albert was masturbating? That would not be harming anyone, but would be gravely offensive. If such behaviour were allowed it may deter people from using public spaces. If we did not include offence it would appear that the harm principle would mean such conduct would have to be allowed.

Joel Feinberg, in an influential set of books,[8] has argued that offence can be included as a harm, but only if the offence is a 'serious offence'. He argues that to be a harm a person's interests must be set back. Feeling minor offence or anxiety would not set a person's interests back. Serious offence would. Taking such an approach would lead, probably, to us finding any offence at the kissing to be minor and so insufficient to justify criminalization; but serious offence at the masturbation.

This places weight on the notion of serious offence. That is problematic because it is difficult to measure offence. Feinberg suggests that there needs to be an affront to sensibilities which causes a 'disliked psychological experience', but it might be questioned whether that provides any more certain a test. If someone says they are seriously offended by conduct it is difficult to assess how strong their feelings are.

Feinberg also suggests that a 'reasonable avoidability' test be used. If it is easy for members of the public to avoid the offensive behaviour then it is unlikely for the harm principle to be satisfied. Hence if a 'private' shop stocks pornography behind shaded windows, people who find pornography offensive

[8] J. Feinberg, *Harm to Others; Harm to Self* (Oxford University Press, 1984, 1986).

can avoid seeing it. The fact they may walk past the shop and be upset by knowing of the material that is inside is unlikely to be sufficient. If, however, the shop put displays of pornography clearly visible from the street it might be rather different.

Another distinction that could be drawn is whether the conduct is directed towards the victim or not. So, a defendant who deliberately exposes himself to the victim might be treated differently from a nudist sunbathing in a park. Where the conduct is the nature of an insult (e.g. shouting a racial slur at the victim) is forced on the sense of the victim (e.g. loudly broadcasting swear words) that is particularly likely to be harmful, in part because the defendant appears to being seeking to act partly in order to distress the victim. This approach would suggest the two men kissing are not seeking to insult the victim and so would not be harmful.

Dennis Baker combines these points in a helpful suggestion:

> 'Offending others does not provide a principled justification for criminalization. However, if the umbrage also causes a privacy loss or creates an intolerable social conflict because society is not yet willing to accept a particular kind of behaviour, it may be regulated as long as it does not unreasonably interfere with the rights of the alleged wrongdoer.'[9]

Are Indirect Harms Included?

Does the harm principle include conduct which does not directly harm anyone, but does so indirectly or only harms the 'public interest'? Here I have in mind offences which involve, for example, pollution or the possession of weapons. It might be hard in such cases to point to a particular person who is harmed by the fact there is pollution or by a breach of health and safety legislation, even though it may readily be accepted that, for example, generally pollution harms people.[10]

Most lawyers agree that the criminal law can be used to prohibit conduct which harms the 'public interest', even though an identifiable individual is not harmed. One way of dealing with this is to say that it is a setback to a person's interests if society generally becomes more dangerous or there are greater risks that society may be harmed.

Again, that might justify legislation protecting the public interest, but it leaves the issue of harm rather vague. Legislation designed to promote 'good public order' can easily be justified under such an approach, and that could lead to wide-ranging offences for those who disrupt the peace. Or to take another example, one may legitimately say that adultery causes a range of social harms and injures the public interest.

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[9] D. Baker, *The Right Not to Be Criminalized* (Ashgate, 2011), p. 256.

[10] A. von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation', in A. Simester and A. Smith (eds), *Harm and Culpability* (Oxford University Press, 1996).

Are 'Risky' Activities Harmful?

Can the criminal law be based on prohibiting conduct which does not actually cause harm, but is risky? There is no doubt that the criminal law does. Drink driving is an offence, even if the person manages to drive without causing harm to anyone else. Indeed there are a whole range of offences which prohibit risky conduct.

One way of explaining these offences is to say that exposing others to a risk of harm is to wrong them. Our interests are set back if we are endangered, whether or not we are in fact harmed. That may sound odd, but surely everyone would rather not face a risk of harm than do so. That reveals that we regard being a potential subject of a risk as something undesirable.

Again, however, we have the danger that, if harm includes conduct which does not in fact cause a harm, but causes a risk of harm, then the harm principle is further watered down. All kinds of conduct could be said to constitute a risk of harm.

Hypothetical

Steve visits a prostitute and they have sex, after agreeing a fee.

Could Steve's conduct be criminalized under the harm principle? At first sight not. Assuming the prostitute agreed to have sex, how could this be harmful? One might regard the conduct as immoral, but the harm principle prohibits criminalization on that basis. One might argue that visiting prostitutes harms society, but that may not be in a sufficiently clear way to justify criminalization. Michelle Madden Dempsey[11] has argued that whenever a man visits a prostitute he cannot know whether or not the prostitute is freely engaging in prostitution. She might, for example, be trafficked. She argues that when a man has sex with a prostitute this is a risky activity and criminalization is justified. She argues this in this way (quoting from Andrew von Hirsch[12]):

> 'Abstract endangerment arises where the riskiness of the conduct "depends on the existence of a contingency … [and] it is not known or knowable to the actor ex ante whether that contingency will materialise in the particular situation." SPU [solicitation for prostitute use] can be understood as abstract endangerment because the riskiness of the conduct depends on the existence of a contingency (i.e. whether the prostitute has been forced to engage in prostitution) and the user cannot know whether that contingency will materialise. In other words, the user does not know whether force has been used against the prostitute, and he "does not have any direct insight

[11] M. Madden Dempsey, 'Rethinking Wolfenden: Prostitute Use, Criminal Law and Remote Harm' [2005] *Crim LR* 255.

[12] He, no doubt, would not agree with the way his arguments are used in that article.

into [the prostitute's] mental state …" to determine whether force has rendered her apparent consent non-genuine.'[13]

Not everyone will agree with that. Dennis Baker has claimed that there are dangers in penalizing people for behaviour which in itself is not very harmful but which could lead to harmful conduct by others. Such remote harms, he believes, should not be criminalized.[14]

Who Decides If Something Is a Harm?

One of the difficulties with the harm principle is determining who decides whether something is a harm. If a masochist was whipped by his sadist partner with full consent of both parties, the masochist might find this a highly pleasurable activity and vehemently deny that he had been harmed. This is an issue we will discuss further in Chapter 4. On one view, if we rely on Feinberg's understanding of a harm being a setback of interests, we can argue that a person's interests are what that person regards as being valuable. So whether a person's interests are set back will depend on that person's own understanding of what their interests are. That may well mean that the masochist, in our example, would not have his interests set back and so would not be harmed.

Conclusion

As can be seen from this discussion, although there is widespread agreement that the harm principle is an excellent principle to have, there is little agreement over what the meaning of 'harm' is and yet that is central to it. In a moment, we shall be discussing what role the harm principle should play. Inevitably the role it plays is likely to affect one's response to how 'harm' should be interpreted. So we will leave a conclusion on what harm means until we have decided what the principle is meant to be doing.

Debate 2

What is the function of the harm principle?

As we have seen there is much debate over the meaning of harm. But even if we could agree about that, there is still much debate over the role that the principle should play. The significance of its role tends to be taken for granted. Indeed, it is such that few alternative starting points have been promoted and even when they are, they are commonly presented as 'alternatives to the harm principle'.[15] It appears to have taken pride of place in the lawyer's thinking, and the centrality of its role is rarely challenged.

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[13] von Hirsch, 'Extending the Harm Principle', in Simester and Smith (eds), *Harm and Culpability*.

[14] D. Baker, 'Moral Limits of Criminalizing Remote Harms' (2007) 10 *New Crim L Rev* 370.

[15] A. Ripstein, 'Beyond the Harm Principle' (2006) 34 *Philosophy and Public Affairs* 216.

This is surprising because there is widespread acceptance that Western democracies suffer from 'over-criminalization'.[16] Andrew Ashworth and Lucia Zedner have recently expressed the concern that criminalization has become 'a routine system for management disorder', rather than being regarded as a last resort.[17] It seems whenever politicians face a new crisis they instinctively recommend a new criminal offence.

There are concerns with the vast numbers of criminal offences; the apparently trivial issues which some of them deal with; and the impact of increased criminalization on women and minority groups.[18] Yet, it is rarely acknowledged that most, if not all, of the ever-increasing number of offences can be readily justified under the harm principle. The harm principle, despite its elevated role, seems to do a rather bad job of restricting criminalization. With some justification Bernard Harcourt has argued that

> 'The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate.'[19]

Indeed, the harm principle can have the unfortunate effect of reducing criminalization debates to arguments over whether or not there can be said to be harm, evading a discussion of a host of other important issues which may be relevant to criminalization.[20] This leads to its being manipulated so that advocates argue that something is or is not harmful, not based on a genuine assessment of harm, but on whether or not they believe the issues should be criminalized. For example, the debate on whether use of a prostitute should be a criminal offence is often conducted on the basis of whether or not doing so is harmful. Yet that way of looking at the question closes off a range of other issues and questions which may be very relevant to a proper examination of whether the use of a prostitute should be unlawful. Professor Stephen Smith, for example, accuses liberals of determining things to be harmful or not, according to whether or not they fit into liberal principles.[21]

The prominence of the harm principle as a cardinal principle of criminalization arose at a time when the major concern was that legislation would be enacted that sought to prohibit behaviour on moralistic grounds, in particular in the debate over the criminalization of same-sex sexual activity. Today, however, the government rarely (if ever) seeks to introduce offences to deal with

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[16] Such a claim is then followed by references to one's least favourite statutes. For some reason the Dangerous Dogs Act 1991 seems a favourite to raise the ire of the British criminal theorist.
[17] A. Ashworth and L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime' (2008) 2 *Criminal Law and Philosophy* 21.
[18] N. Cahn, 'Policing Women: Moral Arguments and the Dilemmas of Criminalization' (2000) 49 *De P LR* 817.
[19] B. Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *J Crim LC* 109.
[20] This seems to have sometimes occurred in the pornography debate, for example.
[21] S. Smith, 'Is the Harm Principle Illiberal?' (2006) 51 *Am J Juris* 1.

problems which are not harmful but are regarded as immoral. The harm principle is in danger of appearing to address a danger which is for practical purposes non-existent. Indeed, one commentator has wondered whether there is anyone who does not agree with the harm principle.[22]

The second reason for surprise is that, although the harm principle plays an important role in making 'criminalization' decisions, when it actually comes to debates about criminal responsibility, the principle is rarely mentioned.[23] In fact, of course, the 'criminalization debate' and the 'who is responsible for what' debate are two sides of the same coin. The fact the 'harm principle' appears to have little to add to the responsibility debate indicates that its proper role in the broad question of what the criminal law should consist of is easily exaggerated.

The third reason for surprise at the centrality of the harm principle is that it seems rarely to be acknowledged that there is widespread disagreement over the role the harm principle should play. The debate over the meaning of harm has eclipsed other ambiguities over the test. This is surprising because it is clear there is quite some variation in views on this. Here are some options:

1. Harm Principle as Rule

Surely only the weakest of law students make the fundamental mistake of claiming that under the harm principle if an act is harmful it should be criminalized. Such a view would simply be untenable. There are plenty of examples of activities which are harmful but which are not, and should not on any sensible view, be criminalized: ending a relationship; saying cruel things; being smelly, to name but a few. True, it might be possible to produce a definition of harm which was sufficiently narrow to exclude these matters and make it plausible to claim that all such harms should be criminalized. But that would be likely to leave many acts uncriminalized which currently are and should be.

Nevertheless, such an interpretation of the harm principle can be found in the media. Further, as already mentioned, in some criminalization debates the question of whether or not the activity causes harm has taken over the arguments to such an extent the impression is created that if there is harm it should be criminalized and if it is not harmful it should not.[24] Some have suggested that the debate over pornography has at times taken on this character.[25]

2. The Harm Principle as a Presumption

Some serious academic support can be found for holding that the harm principle operates as a presumption. In other words once it is shown that conduct is harmful it should be unlawful unless there is a good reason otherwise. For example, Andrew von Hirsch argues:

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[22] Ibid.

[23] P. Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *Journal of Ethics* 21.

[24] *City of Erie v Pap's AM* 529 US 277 (2000).

[25] D. Dripps, 'The Liberal Critique of Harm Principle' (1998) 17 *Criminal Justice Ethics* 3.

> 'The Harm Principle holds that prevention of harm to others is a valid prima facie reason for criminalizing conduct.'[26]

In a similar vein, one criminal law textbook tells its readers that the traditional view on criminalization is that if an act is harmful and immoral then prima facie it is suitable for punishment.[27]

3. Harm Principle as the Reason in Favour of Criminalization

Some see the harm principle as being the only justification for criminalization. So, once harm is established, there is no need for any other factors necessary to render the act open for criminalization. For example, Erik Luna's interpretation of the harm principle is that it

> 'provides that the prevention of harm to others is the sole justification for state interference with personal liberty.'[28]

Luna does not explain how much harm, on his interpretation of the principle, is required to justify the criminalization. Notably, if one were to adopt his position, the question of the definition of harm, discussed above, would assume great importance.

4. Harm Principle as a Reason in Favour of Criminalization

Other writers regard the finding that the conduct is harmful as providing a good reason in favour of criminalization. Feinberg argues:

> 'It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and that there is probably no other means that is equally effective at no greater cost to other values.'[29]

The line between regarding the harm principle as creating a presumption in favour of criminalization and as amounting to a reason in favour of criminalization is fine. The distinction, as is clear from Feinberg's quotations, is that the 'reason in favour' view requires additional evidence to create a case for criminalization; whereas the presumption view indicates that satisfying the harm principle alone creates a case for criminalization.

For example, Chris Clarkson has described the harm principle as a minimal but not sufficient condition in the criminalization debate.[30] In Colin Bird's

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[26] A. von Hirsch, 'The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?' (2000) 11 *Kings College Law Journal* 79 at fn 5.
[27] M. Molan, D. Bloy and D. Lanser, *Modern Criminal Law* (Routledge-Cavendish, 2007), p. 4.
[28] E. Luna, 'The Overcriminalization Phenomenon' (2005) 54 *Am U LR* 703.
[29] J. Feinberg, *Harm to Others* (Oxford University Press, 1984), p. 26.
[30] C. Clarkson, *Introducing Criminal Law* (Sweet & Maxwell, 2006), p. 263.

formulation, the harm principle is one of the key elements in justifying criminalization:

> 'To satisfy Mill's standard, we need only establish that
> (a) serious harms would result from failing to enforce a general prohibition on a class of conduct, and
> (b) coercively imposing such a prohibition will not itself cause even greater harm.'[31]

5. The Harm Principle as Gate Keeper

This approach suggests that the harm principle's role is to act as a gate keeper or filter. Conduct which is not harmful should not be considered for criminalization.[32] It is, in effect, a rule against legislation which is designed solely to prohibit conduct on the ground it is immoral or conduct which is harmful only to the individual defendant. Antony Duff explains that the harm principle 'tells us that only wrongs that cause or threaten harm are candidates for criminalization'.[33] Duff and Marshall[34] have suggested that conduct which is harmful is 'apt' for criminalization. On this understanding of the harm principle, the fact the behaviour causes harm is not itself a reason in favour of criminalization; it merely makes it a candidate for criminalization. As Alan Bogg and John Stanton-Ife put it:

> 'The harm principle tells us that the law should not be used to punish harmless activities. But it does not tell us *how* or even *when* harmful activities should be dealt with by the law.'[35]

Summary

I would agree with the last view. The 'harm principle' should be regarded as a test to determine what conduct should not be criminalized, rather than a principle about what should be criminalized. There are a host of complex issues which are involved in the decision over criminalization, and these cannot all be boiled down to the issue of whether or not there is 'harm'. We shall be looking at these later. If this approach is taken, then we can be fairly broad in our definition of harm. Many minor kinds of harm will not be justifiably criminalized under the general principles of criminalization.

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[31] C. Bird, 'Harm versus Sovereignty: A Reply to Ripstein' (2007) 35 *Philosophy and Public Affairs* 179, 182.

[32] Or, as some would add, only in very special circumstances.

[33] R. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Legal Theory Today, 2007).

[34] R. Duff and S. Marshall, 'Criminalization and Sharing Wrongs' (1998) 11 *Can J L Juris* 7.

[35] J. Stanton-Ife and A. Bogg, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies*, 402.

Debate 3

How should the criminalization debate continue once the harm test is satisfied?

Let us assume that we have concluded that a particular behaviour is harmful; what is the next stage in determining whether the behaviour should be criminalized? A key question at that point is the 'burden of proof'. Do we start with some kind of a presumption against conduct being criminalized, and if so, how heavy a presumption is that?

One view is that criminalization should be regarded as a 'last resort'.[36] That is that it should be used only if there is absolutely no alternative to it. Persuasion, education, 'naming and shaming' and all other non-criminal techniques should be attempted first. The label 'last resort' is perhaps a little misleading. Killing perpetrators without trial is a non-criminal alternative, but it cannot be suggested that should be tried before criminalization. So, what is meant is that the other alternatives acceptable in a modern democracy should be used before criminalization is used.

A more moderate view is that criminalization is a 'prima facie wrong'.[37] That is that there needs to be a justification for criminalization. This is slightly different from the last resort view in that, if the criminalization is justified, there is no need to show it is a last resort. John Gardner makes the point in this way:

> '… if it is to maintain an effective legal system … [the state] must commit what would normally count as [prima facie] moral wrongs. In explaining how this can properly be so, however, the last thing we should do is claim that the state is somehow exempt from morality. No: it too needs to justify its coercive activities in moral terms. Satisfying the harm principle and the rule of law are necessary but insufficient conditions of this. The state is also bound, even in its exercises of authority and uses of coercion, by the general principles of morality that bind us all.'[38]

Both of these views indicate that there is something wrong with criminalization. But what is wrong with it? One argument is that it involves the threat of punishment. Punishment is something that involves pain of some kind, and therefore threatening it is wrongful, without good reason. If a citizen were to make the kind of threats which back up the criminal law this would be a prima

[36] For discussion and criticism of this principle, see N. Jareborg, 'Criminalization as Last Resort' (2005) *Ohio St J Crim L* 512 and D. Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford J Legal Stud* 207.

[37] M. Madden Dempsey and J. Herring, 'Rethinking the Criminal Law's Response to Sexual Offences: On Theory and Context', in C. McGlynn and V. Munro, *Rethinking Rape Law* (Routledge, 2009).

[38] J. Gardner, 'Prohibiting Immoralities' (2007) 28 *Cardozo Law Journal* 2613.

facie wrong. There should be no difference that the threats come from the state. Andrew Ashworth says:

> 'To criminalize a certain kind of conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it and to censure those who nevertheless do it. This use of state power calls for justification – justification by reference to democratic principles, and justification in terms of sufficient reasons for involving this coercive and censuring machinery against individual subjects.'[39]

Second, criminalization will lead to an interference in the freedom of a person to decide how to act. The state's interference in personal autonomy is also something wrongful. As Schonsheck puts it:

> '… the enforcing of criminal statutes is the most intrusive and coercive exercise of domestic power by a state. Forcibly preventing people from doing that which they wish to do, forcibly compelling people to do that which they do not wish to do – and wielding force in merely attempting to compel or prevent – these state activities have extraordinarily serious ramifications.'[40]

Joseph Raz, in a similar vein, argues:

> 'A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons. The availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy. Undesirable as those conditions are they may not be curbed by coercion.'[41]

It is suggested that these points are powerful. The use of criminalization is an exercise of power by the state and requires a good reason to justify the use of the criminal law.

Not everyone is persuaded that criminalization should be seen as wrongful. It might be argued that the processes of criminal law are important in providing structures and shape to society. The role they play in shaping society's rules is neutral, although of course the use of the criminal law in a particular context can be wrongful. Peter Cane argues that part of protecting autonomy is protecting the rules of society so that people can choose how to live. He argues:

> 'Human beings are individuals, and being able to express that individuality in one's choices and actions is an essential component of human well-being. Alongside the individuality of human beings, however, their other most

[39] A. Ashworth, *Principles of Criminal Law* (Oxford University Press, 2009), p. 22.
[40] J. Schonsheck, *On Criminalisation* (Kluwer, 1994), p. 1.
[41] J. Raz, *The Morality of Freedom* (Clarendon Press, 1986), p. 418.

> noticeable characteristic is sociability. It is not just that most people choose to live in (larger or smaller) communities or that most people belong to various overlapping and interacting groups. People are also heavily reliant on those communities and groups, and on their relationships with other human beings. If individual freedom is a precondition of human flourishing so, too is membership of communities and groups, and a rich network of social interactions. Indeed, not only is individual freedom of choice and action of greatest value in social contexts; it seems that it would have little value in any other context. Value is a function of scarcity. Just as time would have little or no value if human beings were immortal, so individual freedom would have little or no value in the absence of external constraints. In this light, it seems hard to justify giving the individual's interest in freedom of choice lexical priority over the interest in social cooperation and coordination.'[42]

There is no doubt much force in Cane's argument. Although criminal law is commonly seen as inhibiting freedom, at the same time it does increase it. If there was no criminal law we might predict that rates of harmful behaviour between people might increase, and so far from there being more freedom to live our lives as we wish there may be less.

It is submitted that the correct view is that criminalization is a prima facie wrong which requires a justification. Cane's argument shows that claiming that criminal law is a 'last resort' gives an unnecessarily bleak picture of the role of the criminal law. It has many positive liberty-enhancing features. Still these must be used to justify the criminalization which is otherwise a prima facie wrong.

A useful starting point may, therefore, be to consider what offences the state must criminalize. Surprisingly, this question has received little attention in the literature.

Acts the State Must Criminalize

It is surprising how little is written on what conduct, if any, a state is obliged to criminalize. We will focus here on how the European Convention on Human Rights (ECHR) has been interpreted to impose obligations on the state to create criminal offences. Our aim, in doing this, is not so much to explore precisely what the ECHR obligations are nor to produce a complete analysis of when the state is obliged to criminalize. Rather we seek to indicate the way one may start to develop a theory of when a state is required to criminalize conduct.

The European Court of Human Rights has held that the European Convention on Human Rights not only restricts the actions of the state but it also imposes positive obligations on it.[43] So article 3, which protects the right to be free from torture and inhuman and degrading treatment, requires that the state not only avoid such activities but also has in place an effective set of laws which protect individuals from that harm. This is an understandable stance for

[42] Cane, 'Taking Law Seriously', 21.

[43] *Islam (AP) v Secretary of State for the Home Dept* [1999] 2 All ER 545.

the court to take. A right to protection from torture or inhuman or degrading treatment would be weak if that only meant that individuals had the right not to suffer that conduct at the hands of the state. Hence in *A v UK* the British law which failed to make it an offence for a defendant to administer 'reasonable chastisement' to his child was held to have failed to protect the child's rights under article 3. There is a particular obligation on the state to protect the article 3 rights of vulnerable people, such as children.[44] The state is, therefore, obliged to put in place civil and criminal laws to protect people from conduct which infringes their rights under article 3, and there should be adequate enforcement of those laws and appropriate investigation of alleged breaches.[45]

A similar analysis is used in relation to article 8, which protects the right to a person's private and family life, his or her home and correspondence. Within the right to respect for private life is the right to bodily integrity. But there is more to it than this. The right to private life includes the right to 'psychological integrity ... a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.[46] As with article 3 this has been interpreted to mean that not only must the state not interfere with article 8 rights, but the state must also protect an individual's article 8 rights. However, in this case article 8(2) sets out circumstances in which an individual's rights can be interfered with. So the state can be justified in failing to provide adequate protection through the law from infringements within a person's article 8 rights, if that failure could be justified under article 8(2).

A good example of how these principles operate is *MC v Bulgaria*.[47] In that case a woman complained that the Bulgarian law on rape and the investigation of an alleged sexual assault on her infringed her rights under the ECHR. The court agreed that there were positive obligations on the state to ensure that individuals were protected from acts by other individuals which breached 'fundamental values and essential aspects of private life'.[48] This positive obligation included the enactment of law proscribing 'grave acts such as rape' and adequate investigation and prosecution of those offences. The court was reluctant to be prescriptive over the exact nature of the legal offences required, stating:

> '… [i]n respect of the means to ensure adequate protection against rape States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account.'[49]

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[44] [1998] 3 FCR 597.

[45] For an application of this to cases of elder abuse, see J. Herring, 'Elder Abuse: A Human Rights Agenda for the Future', in I. Doran and A. Soden (eds), *Beyond Elder Law* (Springer, 2012).

[46] *Pretty v UK* (2002) 35 EHRR 1.

[47] *MC v Bulgaria* (no. 39272/98), judgment of 4 December 2003, discussed in J. Conaghan, 'Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria' (2005) 13 *Feminist Legal Studies* 145.

[48] Ibid., [150].

[49] Ibid., [154].

Nevertheless the court went on to find that a requirement of physical resistance by the victim in order for an offence to be committed was inadequate. They added:

> '… member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.'[50]

It is important to appreciate that the obligation on the state is to ensure the legal system offers protection to the victim or potential victim from having their rights interfered with. This does not necessarily require the use of the criminal law. In a concurring judgment Judge Tulkens[51] emphasized that the states should not assume that the criminal law was the most effective way of dealing with harmful conduct and indeed that criminal law should be a last resort. Indeed in some circumstances civil law may offer a victim in danger a more effective protection.[52] Removal of a child from abusive parents is better done through the civil law than the criminal law, for example. In less dramatic cases it may be that civil or other interventionist measures will be as effective a deterrent and hence as effective a way of protecting the rights of the victims. However, it should be remembered that individuals have an absolute right to protection from having their article 3 rights infringed. So if the criminal law is the most effective way of protecting their rights, then any less effective protection may not be justifiable. This should be contrasted with article 8 rights, which can be interfered with in the circumstances listed in paragraph 2. Here the use of the criminal law to protect one party's article 8 rights might interfere with the rights of others (e.g. potential defendants) to such an extent as to make it unjustifiable to use the criminal law.

So to summarize, an approach seeking to establish what acts a state is obliged to criminalize may be as follows. The state must use the law to protect citizens from torture and inhuman or degrading treatment. If the criminal law is the most effective way of offering that protection then it must be used. If the conduct involves conduct which only falls into article 8, involving an interference with a person's private or family life, then again the state is obliged to use the law to protect the individual. This may involve the use of the criminal law. However, it may be found that other state powers are more effective than the criminal law to protect people's rights. Further it may be found that the use of the criminal law will involve an interference with the interests of others or of the state, and these will be need to be balanced by the protection of the victim's rights, under article 8(2).

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[50] Ibid., [166].

[51] Ibid., [2].

[52] E.g. offering the possibility of immediate removal in cases of child abuse.

Acts the State May Criminalize

Moving on to consider what acts the state may criminalize there are a host of different theories as to what may be criminalized and for what ends. One major issue has been the extent to which 'harm prevention' should be regarded as a role in criminal law. The Wolfenden Report suggested the following as the role of the criminal law:

> '[I]ts function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.'[53]

Of course, the criminal law does not purport to prohibit all harm-causing activities; in most cases it is restricted to blameworthy ones. Indeed, some commentators regard the prohibition of moral wrongness as the primary role for the criminal law.[54] Similarly many commentators have emphasized the importance of censure which attaches to a criminal conviction. Hence, generally, conduct which is harmful but not blameworthy is not seen as appropriate for criminal sanction. Although empirical proof cannot, of course, be found I imagine that the vast majority of harmful behaviour is not blameworthy (or not sufficiently blameworthy) for the censure and stigma of the criminal law. Hence, the role of the criminal law as a 'harm reduction' strategy is limited at least.

A second issue which has attracted much debate is the extent to which the wrong needs to have a public element in order to justify the use of the criminal law. The aim of this requirement is to separate out those wrongs which are appropriate for the use of the criminal law because they have a public element and those wrongs which are best left to other areas of the law. So Duff argues:

1. We have reason to criminalize a type of conduct if, and only if, it constitutes a public wrong.
2. A type of conduct constitutes a public wrong if, and only if, it violates the polity's civil order.[55]

To some commentators the issue turns on whether the 'government interest' is affected. Hence Husak claims that

> 'In order to justify a particular offense and the punishment of persons who transgress it, the governmental interest in enacting that law must be substantial, and the offense must directly advance the government's purpose.'[56]

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[53] Departmental Committee on Homosexual Offences and Prostitution, *The Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957).

[54] M. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford University Press, 1997).

[55] R. Duff, *The Realm of the Criminal Law* (OUP, 2018), 233.

[56] D. Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207.

There is a danger of conflating the interests of the government and the interests of the state here. The two are not, of course, identical. I presume Husak really has in mind the interests of the state.

Antony Duff sees that the essential nature of crimes is that they are public wrongs. Hence the distinction is drawn between a private wrong (e.g. when a friend lets us down), which is not the business of the law, and a public wrong. Duff and Marshall write:

> 'If we ask why such wrongs as murder, rape, and theft should be crimes, the natural answer is not that such actions threaten "the social order" or "the public interest": for such answers seem to ignore, and thus to denigrate, what the individual victim has suffered, and to (mis)portray crimes simply as acts of bad citizenship. The answer is, rather, that such wrongs injure important Rechtsgüter: the state has a duty to use the criminal law to promote respect for such significant individual rights. Such a perspective can also ground the demands, which have become more strident in recent years, that victims of crime should be allowed a more prominent, personal role in the criminal process, particularly in sentencing: since the offender's punishment is owed primarily, if not only, to those he has wronged, they should surely have a voice in determining that punishment.'[57]

Grant Lamond, by contrast, sees the criminal law as dealing with wrongs which the community is responsible for punishing.[58] For him it is not a question of whether the wrong is public or private, but rather whether the punishment of the wrong should be seen as the job of the community.

Lamond's position has some attraction. There is a danger with the Duff and Marshall approach (which they themselves acknowledge) that an emphasis on the wrong being public can dwarf the wrong to the victim. A murder has public harms, but its primary harm is, of course, to the victim. In fact, it is frequently impossible to separate out the 'public' and 'private' wrong that is done. Domestic violence offences are good examples of crimes where the public and private elements of the wrongs are interconnected and feed off each other. While the public impact of the wrong done to the victim may play a crucial role in making the decision to criminalize the act, that should not overlook the significance of the harm to the victim. Marshall and Duff explain that criminalization is appropriate for the protection of:

> '… values are (which should be) so central to a community's identity and self-understanding, to its conception of its members' good, that actions which attack or flout those values are not merely individual matters which the individual victim should pursue for herself, but attacks on the community.'

Hence, a racially motivated attack can be seen as being an attack on values to do with racial equality which are central to society's identity. However, as

[57] Duff and Marshall, 'Criminalization and Sharing Wrongs', 7.
[58] G. Lamond, 'What Is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609.

Lamond points out, there are serious crimes which do not seem to challenge the community's identity. A murder, for example, is not obviously or necessarily an attack on the community. Or at least, although the murder may have attacked values we hold dear, the significance of that wrong seems much less than the wrong done to the victim. Further, there may be activities which are far greater attacks on the sense of identity of a community than crimes, but which are not covered by the criminal law. Degradation of institutions or beliefs of the community is often not a crime. Communal practices and institutions may provide a more powerful glue holding together common values than that offered by the law. Further, a particular society may tolerate certain kinds of activity and not recognize them as public wrongs (e.g. domestic violence), but that does not mean that the law should not recognize them as crimes.[59]

Lamond's focus on asking whether the action is one where it is the role of the community to punish through the criminal law also has the benefit of highlighting another important point. That is that for many wrongs responses not involving the criminal law may be more appropriate. For the member of the bowls club found not to be putting their 20p for a cup of tea into the honesty box, censure by the members of club is clearly more appropriate than censure by the community. That seems obvious, but why?

The answer lies in the fact that punishment expresses the censure of the community, that the act done was one which violates a value which is of importance to community. Lamond argues that:

> 'For a liberal society the types of wrongs that will be grave enough for punishment will tend to reflect the great importance attached to individual autonomy. It is those wrongs that infringe physical inviolability, or damage individuals' capacities to engage in valuable activities, or the activities themselves that will be most prominent, as will those wrongs that damage the public institutions and practices underpinning such activities. It is the type of conduct that tends to undermine the possibility of the flourishing of individual life in community that will require and be worth the type of censure of the criminal law.'[60]

While this may be exaggerating the claims that can be made for autonomy, it does point the way towards finding what is special about the wrongs that the state should be seeking to punish.

However, there are concerns with both Duff and Marshall's and Lamond's approaches in their reliance on the public/private divide here. First, there is a notorious use of the public/private divide in the very area of criminalization to downplay harms against women and vulnerable groups. Hence, the classification of domestic violence or marital rape as essentially a private matter has been used to avoid the use of the criminal law. The material exploring and exploding

[59] M. Madden Dempsey, 'Public Wrongs and the "Criminal Law's Business": When Victims Won't Share', in R. Cruft, M. Kramer and M. Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press, 2012).

[60] Lamond, 'What Is Crime?', 609, 610.

such assumptions is well known, and we will not explore that again here. It may, of course, be responded that, although in the past the divide was misused in the criminalization debate, in our 'enlightened' times we can be confident that it will not be so misused. Indeed, now some of the primary values in our society may be combating racism and sexism and so domestic violence and racial attacks can be regarded as particularly serious crimes. Nevertheless, the manifest uses and misuses of criminalization as a tool for exercising power should make us very hesitant about the use of such an opaque distinction as the public/private divide.[61]

Alternatives to Criminalization

As mentioned, in relation to many wrongs or harms other forms of response apart from the criminal law may be more appropriate. These can range from the use of civil law remedies, advertising and education, to licensing relying on social convention.[62] All of these will be less invasive in the freedoms of citizens and therefore, where available as an equally or more effective response to the problem, the use of the criminal law will not be justified.[63] Further, restricting criminal law for use for only those actions for which it is necessary will retain the censure that attaches to a criminal conviction. As Benn and Peters put it:

> 'Punishment is not the sole technique for ensuring that laws are kept. More people obey laws because they respect them than do so because they fear the consequences of breaking them. It is better to create conditions in which there are fewer potential offenders than to keep down the numbers of actual ones by punishing them. As a technique employing deliberate suffering, it [punishment] must be counted, in moral terms, as costly, to be considered rather as a last resort than as the obvious and natural way of maintaining the social order intact.'[64]

One significance of these points is that in some societies there may be sufficient non-legal responses to a particular wrong so that a criminal law response is unnecessary. In other societies there may be a lack of any societal responses meaning the law must step in and criminalize the behaviour.

View of an expert

Andrew Ashworth

Underpinning much of the debate in this chapter is a concern about 'over-criminalization'. In short, that we have too many offences and that the government turns to the use of the criminal law whenever there is a perceived

[61] P. Scraton, *Power, Conflict and Criminalisation* (Routledge, 2007).

[62] See Jareborg, 'Criminalization as Last Resort', 512 for a discussion of this principle.

[63] A. Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio St J Crim L* 407.

[64] S. Benn and R. Peters, *Social Principles and the Democratic State* (Allen & Unwin, 1959), p. 227.

social problem. The previous Labour Government created over three thousand offences during its time in power.[65] Andrew Ashworth has been a persistent critic of over-criminalization.[66] He has noted the broad range of legal alternatives open to a government seeking to address undesirable behaviour, including the use of civil law, licensing and franchising. This is in addition to the non-legal alternatives we mentioned earlier. Ashworth points out that the use of the criminal law carries with it the use of punishment and the special stigma that attaches to a criminal conviction.

Ashworth has outlined three central functions of the criminal law:

A. The declaratory function: the declaration of forms of wrongdoing that are serious enough to justify the public censure inherent in conviction and punishment.
B. The preventive function: the declaration of forms of conduct or omission that are prohibited on the basis of their propensity to lead to significant risk or danger to an interest protected by the law, and which justify the censure inherent in conviction and punishment.
C. The regulatory function: the reinforcement of regulation through the declaration of forms of conduct, often without requiring proof of fault, which amount to non-compliance with a regulatory scheme.[67]

Each of those functions, he claims, requires a restrictive approach to be taken over what should or should not be criminalized. Considering, for example, the declaratory function, Ashworth argues that it is important that offences should ensure that constructive criminal liability (finding a defendant guilty for causing a harm that she did not foresee or intend, on the basis that she foresaw a lesser kind of harm) is not used. Further, he argues the label of a crime (e.g. murder, theft) should only be used when it is an appropriate description of what the defendant has done wrong. When defendants are found guilty of crimes for which they are not fully to blame or where the label of the crime does not match what they have done the criminal law loses its effectiveness. The censure that properly attaches to a criminal conviction loses its force. Ashworth argues that the same is true when minor harms are the subject of criminal prohibition.

Conclusion

The case for saying that English law is currently over-criminalized is overwhelming. There are too many offences covering trivial harms which could be better dealt with by other means. Our politicians and media seem to have developed a mindset that whenever there is a social problem which is

[65] C. Clarkson, 'Why Criminal Law? The Role of Utilitarianism: A Response to Husak' (2008) 2 *Criminal Law and Philosophy* 131.
[66] Ashworth, 'Conceptions of Overcriminalization', 407.
[67] Ibid., 424.

uncovered we need to create a new criminal offence. The laws on anti-social behaviour[68] are arguably a good example of this. A better way to structure the debate would be to start by considering which criminal laws the state must impose and only with reluctance add to these where there is a strong case for doing so.

Debate 4

Should not recycling your rubbish be a criminal offence?

Here we will be applying the principles that we have outlined above to a current issue. Should those who deliberately refuse to recycle their rubbish be guilty of a crime?

The starting point is likely to be the harm principle. Is not recycling a harm? Clearly it is not a direct harm to another person in the way that an assault would be. Nor even is it obviously a financial harm to others. It could be argued that the failure to recycle produces an extra cost to the state, for example by increasing the costs of land fill. However, the amounts of money involved from an individual's failure to recycle are likely to be minute. Similarly there are the harms to the environment, although again it might be thought that the impact of any individual's failure to recycle would be very limited indeed. The immorality of recycling would not of itself justify criminalization under the harm principle.

So, at first sight it appears that there are grave difficulties in justifying criminalizing non-recycling under the harm principle. One response is to say that, although it is not possible to show that a particular defendant will cause a harm of any significance, this behaviour if performed by many people will be harmful, be that in terms of increased financial costs or harm to the environment. In other words non-recycling is a harmful activity and can, therefore, properly be criminalized under the harm principle, even though it cannot be shown that a particular defendant's act is harmful.

If the 'harm principle' requirement were satisfied there would still be a number of other factors to be considered before the criminalization decision could be made. One major issue would be whether there would be preferable ways to discourage the harmful behaviour, rather than criminalization. Those who, for example, regard criminalization as a 'last resort' would require convincing that education, reward, public embarrassment or other means short of criminalization could not be used to deter this conduct. As we have seen, others would be less strict about the requirement that criminal law should be the only way of achieving the goal.

A second issue is simply whether the harm involved in non-recycling is sufficient to justify criminalization. This is particularly difficult in this case because the precise harm in non-recycling is difficult to assess. Even assuming that

[68] Anti-Social Behaviour Act 2003.

climate change is being caused by human beings' behaviour, the extent to which non-recycling in particular plays a role in causing that harm is debatable. It may be useful to, therefore, think of this as an endangerment offence. Non-recycling poses a risk to the environment.

A third issue is the extent to which decisions about recycling are part of the private sphere of life which should be protected from state intrusion, unless there is a particularly good reason. As we have seen above, where the behaviour to be criminalized is central to some people's vision of their good life (e.g. sexual behaviour) the state should be particularly reluctant to criminalize it. Where, however, it is not an issue relating to individuals' intimate lives (e.g. wearing a seatbelt), the state should interfere. It may be thought that non-recycling is closer to wearing a seatbelt than to sex (!) and criminalization of it therefore is more readily justified.

In conclusion, I suspect that, given the alternative ways that we have available to us to encourage recycling and the difficulties in calculating the harm done by not recycling, criminalization is not justified. If, however, other attempts to improve recycling levels fail and there is stronger evidence of the harms of non-recycling, then the case for criminalization would become stronger.

Further Reading

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