Criminalising Harmful Conduct
Criminalising Harmful Conduct
The Harm Principle, its Limits and Continental Counterparts
Dr. Nina Peršak’s work addresses the criteria for criminalisation – that is, the criteria that should be employed in determinations whether to prohibit conduct through the criminal law. It is explicitly normative in approach, examining what *should* be the proper basis for criminalisation, rather than what factors legislatures actually tend to consider in adopting criminal prohibitions. Its focus is on the Harm Principle, that has been developed in Anglo-American philosophy of criminal law and on how this principal might illuminate the Continental debate on criminalisation. As such, this is a work on normative criminal law theory. Hitherto, there has existed no extended English-language treatment, comparing Anglo-American and Continental theories of criminalisation.

An important strength of Dr. Peršak’s analysis lies in success in integrating themes from the two bodies of theory, the Anglo-American and the Continental. She begins with the Harm Principle and scrutinises its main criterion: the conduct’s intrusion into the interests of other persons. She undertakes a careful dissection of this criterion: e.g., what constitutes ‘harm’ and what is the scope of ‘others’ (and whether and to what extent the latter includes collective interests). This discussion provides not only a thoughtful analysis of the Harm Principle itself; it also provides her with the basis of her critique, later in the volume, of Continental criminalisation theories.

Much of English and American criminal law doctrines (as continental critics often note) tend to be strongly instrumental and *ad hoc* in character. However, a number of philosophers – and jurists with a background in analytical ethical theory – have written thoughtfully about criminal-law theory. One of the main topics of discussion has been the criteria for criminalisation. The central figure here has been the American legal philosopher, Joel Feinberg. In four influential volumes written in the mid-80s, Feinberg provides an analysis of the Harm Principle and certain alternative grounds for criminalisation, including an Offence Principle. Dr. Peršak’s discussion deals comprehensively and thoughtfully with Feinberg’s discussion of the Harm Principle and that of later commentators on his work.

The Harm Principle permits conduct to be criminalised (subject to certain additional ‘mediating’ constraints) when it sets back, or risks setting back the interests of other persons. The principle, she points out, has the advantage of providing a substantive moral criterion for criminalisation: conduct should be criminalised, only if it intrudes in certain ways upon the interests of others.
What, then, can the Harm Principle teach us? First, as she points out, it requires that the harm be to others. The conduct, in other words, must make other people worse off. This provides an important guarantee of liberty to both offenders and potential victims: the actor will remain free to act as he chooses, as long as he does not intrude upon or place at risk the interests of others; and those others have assurance that they are free to pursue their own interests without interference from the actor. The focus on ‘others’ also permits a distinction to be made between harmful conduct and conduct that is injurious to self. Criminalisation of self-injurious conduct is a species of paternalistic intervention; if it is permissible at all (and Dr. Peršak argues strongly that it should not be) the rationale must substantially differ from that of the Harm Principle, for what is at stake is the self-determination of the actor. Second, the interests of other to be considered under the Harm Principle should primarily be those of other human beings. Collective social interests may be considered in applying the Harm Principle, but only when these can be accounted for through the concerns of the human beings affected. In the absence of such a persons-oriented account, Dr. Peršak argues, the supposed ‘needs’ or ‘interests’ of social institutions (or of ‘society’ per se) are not good reasons for invoking coercive response of the criminal law. Third, the harmful consequences to others must be fairly imputable to the actor’s wrongful choices. If the harm or risk of harm would occur only through a chain of subsequent choices, the conduct of the original actor may be criminalised only if it is of a character that affirms or underwrites those subsequent choices. In other words, the conduct must not only lead to or risk harmful consequences, but those consequences must normatively be connected to the actor’s decisions.

Where contemporary accounts of the Harm Principle remains incomplete, is in their account of what constitutes harm. Harm is said to involve a setback of an interest and (in some writings) an interest is said to be a ‘resource’ over which a person has a normative claim. Dr. Peršak analyses well the points at which such accounts need further elaboration.

Dr. Peršak turns, next, to Continental criminalisation theory. Continental (particularly, German) criminal-law doctrines have been influenced strongly by academic writing and many of those doctrines (particularly, concerning the General Part) reflect an impressive degree of conceptual sophistication. The discussion of criminalisation, however, has been less well developed, from the standpoint of normative analysis. This discussion has depended, in large part, on the concept of the Rechtsgut: that the legislature should criminalise conduct only if it intrudes upon a legally-protected interest (a ‘Rechtsgut’). However, comparatively little progress has been made in developing normative criteria for determining when a legitimate Rechtsgut is present. As a result, the German doctrinal discussions in this area can from a certain circularity of argument – a notable example being the doctrine that prohibition of bigamy protects the Rechtsgut of monogamous marriage. Indeed, a number of German criminal jurists have thus suggested that the idea of the Rechtsgut no longer has much to contribute.
Dr. Peršak explains persuasively why the German Rechtsgutstheorie has not been so satisfactory: namely, its tendency to try to ground Rechtsgüter chiefly in positive law, rather than in more fundamental normative principles concerning what the scope of the criminal law ought to be. Some German commentators respond to this difficulty by seeking to derive Rechtsgüter from constitutional doctrines. However, human rights in national or international constitutional documents protect only certain minimum entitlements that citizens should have. Conceptions of criminalisation, including Rechtsgüter, should instead be drawn from substantive ethical norms: what interests should be protected through the criminal law. If the idea of the Rechtsgut is retained, she thus argues, it would be better to employ criteria drawn from the Harm Principle to help elucidate when legitimate Rechtsgüter are present. This would be facilitated by the structural similarity of the two conceptions – both employ the idea of an interest, good or resource of the person affected.

What are the pitfalls, then, of relying on the Harm Principle to help decide the scope of the criminal law? The principal hazard, Dr. Peršak points out, is the dilution and extension of the idea of harm to include remote, contingent and speculative risks. Minor incivilities, for example, are proscribed because they might possibly contribute to decline of neighbourhoods and consequent increase of street crime. Criminalisation theory, including the Harm-Principle doctrines which she analyses so well in her book, can militate against such unwarranted extensions of ‘harm’. This hazard remains, however; she shows a keen awareness of criminalisation as ultimately a political process. Theory can, under favourable circumstances, help guide this process, but the risks of legislative overreach and populist criminal politics will always be present.

This is a most interesting volume. It helps to synthesise two important traditions of criminalisation theory that long have disregarded each other but have important points of similarity. Dr. Peršak insists throughout her book that criteria of criminalisation should be based on normative and ethical considerations and not merely on existing positive law; and her analysis of the Harm Principle is a fine example of how such a normative analysis should proceed. Likewise salutary is Dr. Peršak’s strongly liberal approach to issues of criminalisation, in an era when criminal policy has been moving in authoritarian and populist directions. I learned much from reading this volume and commend it strongly to readers.

by Andrew von Hirsch
Preface

This book aims to examine, elaborate upon and compare with other ideas (especially those in the Continental tradition), the so-called ‘harm principle’ – “one very simple principle”, to quote J.S. Mill, which turns out not to be so “simple” at all. It is mostly an exercise in criminal legal philosophy, but also in criminology and criminal policy in so far as I advocate the adaptation of this principle within the Continental criminal legal theory.

The publication is a revised and updated doctoral thesis entitled, “Harm Principle and the Continental Criminal Legal System” (defended in July 2004). Various changes have been made to the text so to further clarify relevant points and to omit some aspects that were deemed unnecessary for my argumentation. Several footnotes have been updated as, at the time of my finishing the thesis, the cited articles were sometimes merely drafts of papers, in print or there has been some new material published. Consequently, the pagination if nothing else, but sometimes much more has changed.

In the last two years or so, one could have noticed that Criminalisation as a topic of legal-philosophical discussion has been emerging in its own right on the Continent. Therefore, a part of the chapter on ‘Criminalisation’ (the complaining bit) may (and, hopefully, will), if the trend continues, become, in a few years time obsolete.

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I
Introduction

The enactment of the criminal legislation is from the individual’s standpoint one of the most intrusive and repressive acts of state power, for it not only restricts his freedom of action but also punishes infringements (often with deprivation of the individual’s liberty). In today’s liberal democratic societies, governed by the rule of law, it is presumed that the everyday communication between the individual and the state follows certain prearranged rules of fair play and that the state does not (and should not) have a completely free hand in proscribing conduct of its citizens. Apart from the system of checks and balances (the separation of powers), the concept of ‘civil society’ and the requirement of governmental transparency, which are all types of limitations on the state, the restriction of the state’s power in the sphere of criminalisation should involve requiring legitimate or justifiable reasons, principles for criminalisation. The Anglo-American harm principle, the subject matter of this book, can successfully act as such a restricting mechanism, and for that reason deserves a closer inspection and potentially some form of reception into the Continental criminal legal theory.

The Starting Point and Aim

Every type of criminalisation requires an underlying public moral theory, since it is connected to the values and morality of society. The starting point of this volume, its philosophical/moral foundation, and its ethical outlook on the criminal law is liberal in the sense that it is committed to the individual’s liberty and supports a minimalist approach to criminalisation. As the criminal law is the most intrusive of the institutions of formal social control, with lasting and sweeping implications for the individual, it should be, therefore, kept to the minimum. The individual’s life and values take priority over the community’s or the state’s interests in this book’s approach to criminalisation. However, the individual is not presumed to be an isolated, “free floating atomistic self”¹ but

¹ Digeser, p. 15.
to be more outward-looking and distributive-justice oriented, perhaps more than ever before. Our analysis, therefore, assumes: (1) that the state should operate according to principles of Rechtstaatlichkeit that emphasise individual liberty, (2) that such a system can be made consistent with the Social State, and (3) that there should be parsimony and restraint in the use of criminal sanctions.

The main goal of this book is to, first, explain the concept, the contents, the nature and functions of the harm principle, compare it to other possible principles of justified intervention, locate its possible weak points and propose some solutions. Second, it seeks also to find an appropriate continental-law counterpart to the harm principle or, in the absence of the counterpart, to try to introduce the principle to the Continental criminal legal system, or rather see what it can offer to the Continental criminal legal theory.

The drawing together of the laws of the two major legal systems – the Anglo-American, on one side, and the Continental, on the other – is already occurring; it arises from various international documents and from growing trans-border crime, which demand cooperation in legal matters and certain harmonisation of the systems to efficiently tackle such crime. What is even more important, and hence favourable to different systems getting closer together, however, is that we are dealing with two legal cultures that nevertheless share certain basic values such as the respect for human rights and civil liberties, democracy, tolerance, pluralism etc. and can, therefore, compare their own experiences and, consequently, learn from each other.

This work does not attempt to evaluate the existing legal systems across the globe and divide them into “good” and “bad” ones, or anything of the sort. It merely seeks to analyse an important criminalisation principle, the harm principle, and makes a de lege ferenda appeal to its use, also within Continental legal systems.

The Method

The title of the book indicates the use of comparative legal method. The legal systems (and especially criminal legal theories) compared are the Anglo-American legal system and its criminal law theory, the Continental legal system (the Continental legal system of Germanic legal circle, to be more precise) – within the latter, a reference will often be made to the Slovenian criminal law and its theory. The lines of comparison will thus be: Anglo-American versus the Germanic Continental, the Germanic Continental versus the Slovenian, and sometimes also the Anglo-American versus the Slovenian. No particular national legal system (with the occasional exception of Slovenia) will be discussed in detail. A greater emphasis shall be given to the criminal law theory in the

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2 Not to mention the emergence of the European criminal law, alongside the institutions like the European Prosecutor etc., which is bound to bring at least the UK and the Continent closer together.
various systems, than to its positive, black-letter law. Similarly, my interest
in the Anglo-American criminal theory concerns the theoretical developments
there, which have been largely developed by various liberal academics. The
analysis does not, therefore, commit itself to the actual English or American
penal practice or penal legislation, which has been recently influenced, to a
considerable degree, by penal-populist perspectives.

Within this comparative method, conceptual analysis will be used (the analysis
of legitimate grounds of criminalisation, of the harm principle, of its Continental
counterparts), while the conclusions drawn on the basis of the analytical findings
will, of course, use synthesis and evaluation. I shall try to find Continental
equivalents to the Anglo-American notion of harm primarily with the help of the
linguistic interpretation, whose deficiencies we shall try to overcome by using
the teleological and systemic interpretation, which is necessarily intertwined with
the historical method.

As criminalisation is much more than a mere nomothetical (legislative)
exercise, it is also a formal social and public valuation of (attribution of the value
to) a certain human conduct, a mere descriptive analysis would not suffice. The
study will have a normative emphasis; I will be arguing in favour of some kind
of reception of the harm principle into the Continental criminal legal theory,
which is why a demonstration of why Continental theory ‘ought to’ consider this
option, is necessary.

Though the harm principle itself has been mostly (though not profusely) discussed in the Anglo-American legal literature, I have, for the rest of the thesis,
also drawn on German, Slovenian, Croatian, and partly also on some Finnish,
Swedish, Italian and French literature.

The Structure

Structurally, the thesis is split into four major parts. The first part encompasses
two chapters (Chs. II and III), where, first, the issue of criminalisation and
the state is considered, and second, the Anglo-American as well as the Conti-
nental criminal legal theory is analysed in search for the methods, patterns
and, hopefully, principles of criminalisation. The second major part (Ch. IV)
is entirely dedicated to the Anglo-American harm principle: its definition, the
principle’s various formulations, elements, especially the notion of ‘harm’,
the harm principle’s functions, nature, problems and open questions, and also
its external limiting principles. In the third part (Ch. V), we examine four

3 The mainstream Anglo-American criminal legal theory seems to be more practically oriented, less dogmatic than the Continental, and so it is not surprising that the majority of literature on the harm principle is written by social scientists, philosophers and legal theorists. There is, however, no historical account of how the principle came about, the history of the harm principle (apart from references to Mill and his Principle of Liberty, and Feinberg).
Continental models (elements, concepts, principles) that *prima facie* appear to be possible Continental equivalents of the concept of harm and the harm principle. The last part (Ch. VI and VII) is dedicated to the final synthesis and evaluation of the preceding analytical findings and some wider criminological concluding thoughts.

**The Main Starting Hypotheses**

The following are the main hypotheses of this study, to be examined and evaluated:

The *first* hypothesis asserts that the criminalisation ought to be guided by the criminalisation principles that are consistent with the liberal values and, subsequently, that today, legality is not enough, that the emphasis should be put on moral or ethical legitimacy of laws.

The *second* hypothesis maintains that the harm principle is, in its proper scope of application, the most helpful principle of criminalisation that is now available, for a variety of reasons (e.g. that it does away with paternalistic and moralistic legislation, that it provides a substantive concretisation of the *ultima ratio* principle etc. – to name just a few).

The *third* hypothesis claims that, in the Continental legal system, it is possible to find *prima facie* approximations to ‘harm’ and the ‘harm principle’.

And *fourth*, that, yet, in the light of the harm principle’s functions, counterparts which would completely overlap with the harm principle would be difficult, if not impossible, to find.

If the fourth hypothesis proves to be correct, then *fifth*, the Continental legal system should consider adopting a principle akin to the harm principle (recognising that, at the end of the day, the success and actual usage of such a principle lies in the willingness of the legislator). This proposal will be dealt with carefully, for we are aware of the traps of uncritical transplantation of a concept, originating in one system, into another. Realising that a stretching of the original concept may do more harm than good, we would, in this case, also offer alternative approaches – approaches that would build upon the domestic, i.e. Continental, concepts and strive to develop them further or extend their functions in order to be able to perform roles similar to those of the harm principle.
II
Criminalisation

“Making laws, breaking laws and the reaction to breaking laws”\(^4\) that is, according to Sutherland, a subject matter of the discipline called criminology; a definition of the criminological science in a nutshell. Making the law, in the context of criminology, means, of course, making of the criminal law, i.e. criminalisation. It represents one third of Sutherland’s definition and yet there is comparatively little literature on the subject: there is an apparent disproportionality between the number of books and articles on this topic compared to the literature on each of the other two thirds of his definition. There is an abundance of material on the law-breaking topic (on the whys, the hows, the whos etc), there is much research done on the reaction to the law-breaking, but the literature on criminalisation is restricted to a small number of important articles and a few books. Usually, one finds the word mentioned in a paragraph or two of the first chapter of a textbook on (positive) criminal law or in the introduction of an article dealing with a particular positive-law issue.

A reason for that could be, at least in part, attributed to the inherently “political” nature of criminalisation. Politics has never been popular with the criminal-law academics, especially on the Continent, since it so often denotes the victory of power over law. It is, therefore, largely conceived as something “unclean” and hence not to be meddled with. Criminalisation is, first and foremost, a political process; a process, through which the world of politics via criminal policy penetrates into the world of law – a process that can and should, nevertheless, be guided by legal principles, rules and standards.\(^5\) That it “should”, stems from the fact that the power to criminalise certain human conduct is an

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\(^4\) “Criminology is the body of knowledge regarding crime as a social phenomenon. It includes within its scope the process of making laws, of breaking laws, and of reacting toward the breaking of laws.” [Sutherland, E.H. (1934). Principles of Criminology, 2nd ed., Lippincott, Philadelphia (originally published as Criminology in 1924)].

\(^5\) These principles are, however, essentially moral principles. By using the term ‘legal’, we, therefore, on this point ascribe to the more normative conception of what law is. Even a positivist, however, could argue the same, since “should” means the statement is deontological and, therefore, in no way conflicting with the ontology of ius positum.