

Are There Any Limits to Substantive Criminal Law?

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What is a crime? Is it what the law -whatever the legislature has passed as law under the correct procedures- says it is? Can any conduct be criminalized in this way, or are there limits as to what conduct the state can criminalize and what it cannot? Are there limits to substantive criminal law?

These questions can be approached from a variety of different theoretical perspectives, but let's focus on the two categories they can be broadly divided into: positivist and non-positivist theory. Where non-positivist theory deals with the issue of "morals"¹ and whether they can legitimately source criminal law, considers ethical principles including individual autonomy, the principle of welfare and the causing of harm; positivist theory merely analyses the law and does not seek ethical justifications for criminalization², in other words, according to positivist theory, "crime is whatever a legislature passes into law under the heading 'criminal'³".

Delving deeper into non-positivist theory, the principle of individual autonomy suggests that individuals should be respected and treated as agents capable of choosing their actions. Liberal theorists such as Hobbes and Locke place great emphasis on the respect of the liberty of individuals and insist that individuals should be left free to choose actions or omissions without any intervention by criminal law unless necessary to prevent the causing of harm to others⁴. The principle of welfare on the other hand is based on Rousseau's "general will" of the community. Deriving from the social contract, the individual's will is contained in the general will and actions which threaten the common interests of society may be criminalized⁵. Finally the

harm principle originates from "On Liberty", where John Stuart Mill famously argues "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"⁶. Deriving from this principle many have argued that self-harming acts, and also acts where one harms a consenting other should not be criminalized⁷. The harm principle directly opposes legal paternalism, which consists of restricting the freedom and choices of individuals in order to protect them from themselves. A distinction has been made between criminal legislation where one is criminally liable of harming one's self and where one is criminally liable for harming a consenting other. The first is named "pure paternalism" where the second is named "impure paternalism"⁸.

While in Anglo-American criminal law the argument revolves around the harm principle, in Continental European legislations liberal criminal law has brought up the concept of a "material wrong". There are many different opinions as to how crime should be dissected into its elements, if one of these opinions is to be adopted for the sake of argument, a crime consists of three elements, the material element, the legal element, and the subjective element. While the material element relates to the external facet of the crime (the commission or omission) and the subjective element is *mens rea*, the legal element embodies the principle of legality⁹. When a crime is committed, two "wrongs" occur in the legal element, one is the "formal wrong", which is the breach of the law; the second is the "material wrong" that gives the crime its peculiar character. "Harm" in the sense of a "material wrong", injures the "value protected by law"¹⁰, the "legally protected interest". This theory suggests that "legally protected interests" precede the making of the law, the law merely protects the interest that was already there to be protected; and therefore criminal legislation should be limited to only when a "material wrong" that will result from the act can be identified. This way, criminal prohibitions would be justified only if made for the purpose of protecting interests worthy of such protection¹¹. Legal positivists on the other hand have claimed that the "legally protected interest" can be anything necessary in the eyes of the legislator for the welfare of society. This means that there cannot be a distinction between a "material wrong" and a "formal

¹ The terms "morals" and "morality" are used in the sense of cultural and religious rules and convictions of society throughout this short article.

² Mouaid Al Qudah, The Moral Foundations of Criminal Liability, International Property Rights Open Access 2:116, 2014, 1.

³ Claire Finkelstein, Positivism and the Notion of an Offense, California Law Review, vol. 88: 335, 336.

⁴ Al Qudah, 4.

⁵ *ibid*, 5.

⁶ Nils Holtung, The Harm Principle, Ethical Theory and Moral Practice, vol. 5:4, 2002, 357.

⁷ Ben Saunders, Reformulating Mill's Harm Principle, *Mind*, Vol. 125:500, 2016, 1005.

⁸ Cristophe Béal, Can Paternalism Be "Soft"? Paternalism and Criminal Justice, *Raisons Politiques*, vol. 4:44, 2011, 43.

⁹ Albin Eser, The Principle of "Harm" in the Concept of Crime: a Comparative Analysis of the Criminally protected Legal Interests, *The Duquesne University Law Review*, 4:3, 1966, 355.

¹⁰ *ibid* 348.

¹¹ *ibid* 351.

wrong”, since the “legally protected interest” is the aim of the legislation itself¹².

Many criminal laws, especially those governing controversial issues such as sexual conduct, reproduction and drug use can be traced back to cultural or religious belief patterns¹³; however, it is not easy to disentangle criminal law from morals entirely, since a “grand theory” for a limiting principle to the legal enforcement of morality is yet to be established^{14 15 16}. An intrinsic notion of criminal law and theory that limits its content, application or reach has not yet been found¹⁷. The justification and the limits of criminal law currently rest in the constitutionality of criminal law; the principle of human dignity and fundamental rights guaranteed by constitutions are expected to prevent the misuse of criminal law¹⁸ since legislatures have broad power to establish what conduct should be criminalized but these decisions can be overturned by constitutional courts when they infringe the limits set by the constitution¹⁹. Constitutional courts however, when intending to verify whether criminal law regulations achieve a balance between the duty of the state to guarantee social order and peace and the rights of those accused of criminal conduct, may resort to sophisticated forms of reasoning that legitimize moral worldviews and social taboos²⁰, perpetuating the problem. The demonstration of the negative human rights impacts of punitive laws and practices may serve to advocate the unconstitutionality of the said laws.

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¹² Zeki Hafizoğulları, Muharrem Özen, *Türk Ceza Hukuku Genel Hükümler*, 2012, 226.

¹³ Veronica Birga, Luisa Cabal, Lucinda O’Hanlon, Christina Zampas, Criminal law and the risk of harm: a commentary on the impact of criminal laws on sexual and reproductive health, sexual conduct and key populations, *Reproductive Health Matters* 26:52, 2018, 33, available at: <https://doi.org/10.1080/09688080.2018.1543991>

¹⁴ Esteban Restrepo Saldarriaga, *Poisoned Gifts: Old Moralities under New Clothes?*, *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*, 2019, 199.

¹⁵ Bernard E. Harcourt, *Mill’s On Liberty and the Modern “Harm to Others” Principle*, *Foundational Texts in Modern Criminal Law*, 2014, 180.

¹⁶ Richard A. Epstein, *The Harm Principle- And How It Grew*, *The University of Toronto Law Journal*, 45: 4, 1995, 416.

¹⁷ Alice M. Miller, Mindy Jane Rosemen, Zain Rizvi, *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*, 2019, 12.

¹⁸ Saldarriaga, 200.

¹⁹ Saldarriaga, 201.

²⁰ Saldarriaga, 204.