
**Criminal Law (2013)**

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# Criminal Law

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Philosophical scholarship on the criminal law explores many questions and this entry deals with just four. First, what is criminal law? Any answer to this question will have something to say about criminal prosecution and punishment. If we are realistic about the damage both of these may do, we must also ask whether we are justified in having criminal law at all. If our answer to this second question does not entail abolition, we must face up to two more. We must ask what scope can permissibly be given to the criminal law, and we must ask which principles should determine whether and when we are criminally responsible for our actions.

## *1. What is criminal law?*

Criminal law is sometimes known as *penal* law. This rebranding captures an important part of the truth: criminal courts are almost always empowered to punish those tried and convicted of crimes. Indeed, some claim that if there is no power to punish the convicted, one does not having anything rightly called a crime (Husak 2008: 100). Unfortunately the rebranding also encourages two simplifications. First, criminal trial is not the only legal route to punishment. In many legal systems punishments can also be inflicted in civil trials (*see* TORTS), or even by administrative agencies without trials. Second, punishment is not the only thing to which criminal trial is a legal route. The

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rebranding may encourage the thought that the goal of criminal prosecution – perhaps of the criminal law as a whole – is to maximise just punishment. Trials which conclude without such punishments then become prosecutorial failures. On a rival view the goals of criminal prosecution are more numerous. They include calling alleged offenders to account for their conduct: having them explain in public what they did and why they did it. A criminal trial that does not result in a conviction, let alone a punishment, can still qualify in this respect as a prosecutorial success (Duff 2007: 175–93; Gardner 2007: 177–94).

As these remarks suggest, crimes are normally prosecuted by public officials. Even where prosecution by ordinary folk is possible, public officials are usually empowered to take over the prosecution and then to discontinue it. This encourages a second characterization of criminal law: perhaps all crimes are 'public wrongs' (Duff and Marshall 1998: 18–22). In fact, two different theses are suggested by this characterization. One is a conceptual thesis: if a legal wrong is not public in the relevant sense it does not count as a criminal wrong. The other is a normative thesis: no action should be made criminal unless it is a public wrong in the relevant sense. The two theses are superficially at odds. If crimes cannot but be public wrongs there is no question of whether crimes should be public wrongs. The two theses can, however, be made consistent by disambiguation. In the conceptual thesis, 'public' means something like 'capable of being brought to trial by officials.' In the normative thesis it means something like 'against us all, not only against a more specific victim.'

The fact that crimes are capable of being brought to trial by officials is sometimes regarded as a reason to think nothing should be a crime unless it is a wrong against us all. Officials exist to represent us in respect of our joint interests, whereas in respect of our several interests we represent ourselves in the civil courts. This dichotomy may be too simplistic (Lamond 2007: 620). There are wrongs the specific victims of which have difficulty

calling wrongdoers to account (the victim, say, is trapped in an abusive relationship with the wrongdoer) and wrongs which have no specific victims to do the calling (the wrong, say, is a botched attempt that would be of interest to nobody if public officials were not paid to take an interest). Subject to further limits introduced below, if making these wrongs crimes will help call the wrongdoers to account it is difficult to see why they also need be wrongs against us all.

As the conceptual thesis reminds us, all crimes are legal wrongs – nothing is a crime if it is not wrongful in the eyes of the law. This reminder may encourage a second, more modest normative thesis: perhaps nothing should be regarded as wrongful by the law if it is not *actually* wrongful. This wrongfulness constraint may seem to entail that the criminal law is properly comprised exclusively of *mala in se* – of wrongs, like rape or kidnapping, which are wrongs irrespective of whether the law regards them as such. Not so. The law's regarding something as wrongful may be a necessary, if insufficient, condition of its actually being wrongful. The wrongfulness constraint can thus also make room for *mala prohibita* – for wrongs, like driving on the incorrect side of the road, which are wrongs *partly because* the law regards them as such. The word 'partly' here is important: *mala prohibita* are genuine *mala* only if the law is morally justified in so regarding them. What provides this justification? Normally that criminalizing a *malum prohibitum* will more effectively avert the commission of some *mala in se* than will criminalizing the *mala in se* alone. Criminalizing driving in excess of a speed limit is thus *prima facie* proper if it helps reduce the incidence or danger of dangerous driving, as compared with a situation in which only dangerous driving itself has been criminalized.

## 2. What justifies criminal law?

The previous section suggested that there is no criminal law without officials empowered to investigate and prosecute suspected wrongdoers, as well as courts empowered to convict and punish those tried for such wrongs. It is all but inevitable that those who use these powers will sometimes miss their targets. Even when they hit them, there is no ignoring the collateral damage done to families and friends of those convicted, to say nothing of the hardships deliberately imposed on those who are criminally punished (*see* PUNISHMENT).

Such reflections raise the question of what justifies having criminal law at all. On one view, we should only persist in classifying actions as legal wrongs (and in empowering officials and courts in the manner just described) if this classification (and empowerment) helps prevent or ameliorate actual wrongs. We can postpone to the next section whether in addition to preventing or ameliorating wrongs, the criminal law must also prevent or ameliorate harms. Whatever our conclusion, this instrumental principle, as we might call it, is far from trivial. Contrary to what is popularly assumed there is no reliable connection between criminalizing an activity and reducing its incidence or evil. Consider pimping and drug-pushing. Let's grant for the sake of argument that these are both *mala in se*, and serious ones at that. Is that the slightest reason to criminalize them? No. Not only might this be unproductive, it might even be counterproductive. The activities in question might be driven underground where their excesses are much harder to detect and control, and where their potential tax-invisible profits increase their attractions to the least scrupulous. If these are the main effects of the law, one clearly has a strong case against its involvement. If this story can be generalised one has a strong case against the criminal law as a whole. But not only that. According to the instrumental principle, one does not even have the start of a case *in favor* of criminalizing anything, for one is yet to point to

anything it will give us by way of prevention or amelioration of wrongs.

Some say that we should persist with the criminal law nonetheless, as a way of expressing public disapproval of immoral activities. But why should we express public disapproval when it does no good to do so? And even if we should, why should we express public disapproval through the law, rather than (say) by advertising it on billboards? And even if through the law, why through the criminal law, rather than through (say) tax law or planning law? Two main ideas are popularly floated. According to one, licensing, taxing, or even just tolerating the offending activities represents a kind of complicity in immorality. We commit extra wrongs on top of those of the pimps and pushers by failing to distance ourselves completely from them, and only by using the criminal law do we achieve the requisite distance. It is not clear, however, how one becomes complicit in an immorality by licensing, taxing, or tolerating it, if a refusal to do so would not prevent or ameliorate it. Are not the true accomplices in such a situation the hard-line criminalizers, who would by hypothesis only facilitate and encourage the wrongdoing of pimps and pushers?

A more promising idea is that we need to express public disapproval in the clarion voice of the criminal law so that the wider population will not become morally desensitized or confused (Gardner 2007: 201–11), or end up taking the law into their own hands (Gardner 2007: 213–38). These are more roundabout or diffuse ways in which the criminal law may impact on the incidence or evil of wrongdoing (beyond the wrongdoing of the pimps and pushers themselves). But precisely because the argument is now that the criminal law is capable of more wide-ranging preventative or ameliorative effects, there is nothing here which presents a challenge to the instrumental principle. So the fact that pimps and pushers are committing the gravest of wrongs is still not, by itself, any reason to criminalize their activities. It is only if the criminalization has a payoff, in

terms of wrongs avoided or ameliorated, that we have the reason we need, and the case for criminalization begins.

Once we open up the instrumental principle to cover a wider range of preventative effects, we can see some new room for disagreement about how to justify the criminal law. Perhaps when a wrong is not prevented by the criminal law (maybe the criminal law is no good at preventing it) a further wrong is committed when that wrong goes unpunished by the criminal law. Assuming that these further wrongs *can* be prevented by the criminal law – assuming, in other words, that the criminal law can at least be effective in punishing those who commit certain wrongs – the criminal law has, some will say, as much effectiveness as it needs to satisfy the instrumental principle (Moore 1997: 639–65). Not true, others will reply. The criminal law's punishments must themselves be justified by their ability to prevent further wrongs committed by others (whether by the punished person or by third parties). So simply ensuring that someone is tried or punished cannot be counted *per se* as contributing to the satisfaction of the instrumental principle (Hart 1968: 1–13). For present purposes the main interest of these debates is that all sides can accept the instrumental principle when it comes to justifying the criminal law. They are debates about what the criminal law should be an instrument *of*.

### *3. The limits of the criminal law*

The wrongfulness constraint and the instrumental principle already impose limits on the criminal law. If an activity is not wrongful, or its criminalization does not prevent wrongs, that activity should not be criminalized. Many defend another candidate limit in the form of the so-called 'harm principle' Some take the view that the harm principle subsumes the wrongfulness constraint: nothing is harmful in the relevant sense if it is not also wrongful (Feinberg 1984: 31–36). The opposing view is also possible: perhaps nothing is wrongful if it ultimately

does no harm. Both views are mistaken. There are harmless wrongs as well as wrongless harms. If, in a market economy, A destroys B's business as a side effect of running a better business herself, A harms B without wronging him. If, on the other hand, A sets out to destroy B's business but fails to do so, A wrongs B without harming him.

This last example might tempt us to think that the harm principle rules out the criminalization of failed attempts, conspiracies and the like. Not being harmful, such wrongs will be ruled out if the harm principle demands that all crimes be harmful wrongs. A more plausible view gives the principle an instrumental interpretation. On this view, the harm principle allows for criminalization of harmless wrongs so long as criminalizing them prevents harm (Raz 1982: 937–8). Criminalizing unsuccessful attempts passes this test if, were unsuccessful (and harmless) attempts not criminalized, there would be more successful (and harmful) attempts. Whether the demands of the principle are met is thus a partly empirical question: it depends on the law's actual and not its intended effects.

If the harm principle does not rule out the criminalization of harmless wrongs, which criminalizations does it rule out? Perhaps few if any are ruled out entirely. What the harm principle does is regulate which good consequences of the criminalization of an action count in favor of its criminalization. The fact that there will be (for example) less offence, pain, discomfort, indignity, or discord once an action is criminalized does not count in favor of its criminalization, except to the extent that these ill-effects would also be harmful. None of them need be. A visit to the dentist may be painful but usually it does one no harm. Being frisked at the airport is usually a harmless indignity, and having to wait in a queue is usually a harmless inconvenience. One may be offended by jokes in bad taste, or insulted by rude remarks, but where's the harm in that (*see* OFFENSE)? One is harmed by an action only if thanks to that action one is worse off than one

would otherwise have been. For instance, one may be driven to morbid despair by insults, rendered incapable of going to the dentist for fear of the pain, or excluded from the life of the workplace by offensive jokes. Then the insult, pain, or offence turns harmful and, according to the harm principle, the criminal law may start to take an interest in what it would otherwise have to tolerate.

The previous paragraph openly took sides in some long-running debates about the scope and force of the harm principle, which naturally call for much closer attention (*see* HARM PRINCIPLE). There are related debates about whether the harm principle is even the right principle to do the job. The criminal law, by common consent, is a blunt instrument that has only relatively destructive measures at its disposal for dealing with wrongdoers. As the previous section briefly mentioned, the criminal law cannot eliminate wrongs without damaging good things too, such as the family relationships and employment prospects of wrongdoers. Wherever it goes it spreads its own harms, not only the intentionally inflicted harms of punishment but many harmful side-effects too. The harm principle requires that it do so only in return for harms avoided. To defend the harm principle as a strict limit on criminalization is thus to defend the proposition that harm takes lexical priority over other ill-effects of wrongdoing, so that no amount of harmless offence or pain or inconvenience can ever warrant an infliction of even very slight harm. Some understandably doubt whether that proposition is defensible. They may therefore embrace the harm principle only as a rule of thumb, or they may argue that another principle that draws a more sustainable line should be substituted for it (Dworkin 1981, Ripstein 2006).

Some abandon the harm principle prematurely, however, because they have inflated expectations of it. Many err by expecting the harm principle to do the work of various other independent limits on criminalization (*see* OVERCRIMINALIZATION). The principles that limit the

intrusion of the criminal law into our intimate relationships, for instance, are sometimes mistakenly folded into the harm principle. It is claimed that the harm principle yields 'a realm of private morality and immorality which is, in brief and crude terms, not the law's business' (Wolfenden 1957: 24). But to the extent that there is any such realm, it is no thanks to the harm principle. The right to a private life, rather, is just one of many moral rights that limit criminalization even when criminalization would amply prevent harms as well as wrongs. There are also the rights to freedom of expression, freedom of association, freedom of assembly, freedom of movement, etc. The point of these rights is precisely that they limit interventions by the law even if they are entirely necessary, and indeed proportionate, to prevent harm.

So much for the harm principle. Another set of constraints on the criminal law, that often requires official tolerance even of harmful wrongs, is the set that belongs to, or is borne of, the ideal of the rule of law. This ideal is the source of the oft-made demand for 'legal certainty': for a criminal law of sharp borders rather than fuzzy edges. In addition, the rule of law requires clarity of communication, prospectivity, and openness from the criminal law. The administration of the law must also take a certain form, with specific cases judged according to general rules, by independent courts, exercising wide supervisory powers over policing and prosecution, and insisting on high standards of procedural propriety as well as competent legal representation for all.

What binds all of this together in one ideal? The rule of law is the ideal that actions should be guided by the law (Raz 1979: 212–14). What these various desiderata have in common is that they help those subject to the law to rely on it for guidance, whether to avoid falling foul of it, or to defend themselves if they are accused of having done so. Of course, perfect guidance is out of the question. Not only are some of the desiderata impossible to carry beyond a certain point (a measure of uncertainty and of

retrospectivity is unavoidable even in principle); even those which could be conformed to more perfectly on their own often cannot be conformed to more perfectly without conflicting with each other (the search for further certainty becomes, at some point, incompatible with generality). Nevertheless, a high degree of conformity with the rule of law is properly expected of legal systems. In no part of the law is the expected degree higher than in the criminal law. Why? Because of the special asymmetry of the criminal law. Unlike in private law, one is up against public officials with special powers (think police officers and prosecutors among others) including special powers to detain, to call to account, and to punish. Unlike in public law, meanwhile, one is up against these officials in the position of accused and not that of accuser.

One special implication of the rule of law for the criminal law is the principle *actus non facit reum nisi mens sit rea* (no guilty act without a guilty mind). This *mens rea* principle, as it is often called, is the principle that crimes should be defined such that those who commit them cannot but be aware, in doing so, of the aspects of what they are doing that take them into criminal territory (*see* STRICT LIABILITY). This is not to say that one should be acquitted of crimes just because one is unaware that the law regards them as crimes. Other principles of the rule of law serve to enable and encourage awareness of the law, and to the extent that these other principles are observed (Husak 2010: 266–71) the law can justifiably say that *ignorantia juris neminem excusat* (ignorance of law is no excuse). However to be aware that one is crossing the line into criminality one also needs to be aware of the facts about what one is doing that bring it under the law. The normal way for the law to secure this is to build the element of awareness into the definition of the crime. Thus some legal systems distinguish a criminal standard of 'recklessness,' which requires awareness that one is taking a risk, from the civil standard of 'negligence,' which includes no such requirement (*see* NEGLIGENCE). We say this is the 'normal way' because there

are various other ways for the law to put people on notice of what they are doing (e.g. by requiring a warning to have been given by a police officer, or a declaration to have been made on a tax form). Sometimes, moreover, one cannot but be aware of what one is doing (barring some more radical problem such as insanity or automatism, dealt with by other legal rules), so the law does not need to make specific provision for *mens rea*. Since a (sane, sober, awake) person can scarcely have sex, enter a building, or sign his name, without realizing that this is what he is doing, the case made for *mens rea* by the rule of law is weaker in these instances.

### *4. Criminal responsibility*

The *mens rea* principle is sometimes called a principle of 'criminal responsibility.' This is not a mistake. The language of responsibility is used in many ways (*see* RESPONSIBILITY). In particular, there is a wide sense of 'responsibility' such that all the conditions of criminal liability could be called conditions of criminal responsibility (Hart 1968: 215–22). But in a narrower sense the conditions of criminal responsibility are contrasted with the conditions of criminal wrongdoing. One question is whether the accused committed the crime; another is the question of her responsibility for having done so. By these lights, the *mens rea* principle is not a principle of criminal responsibility. For *mens rea*, when required by the law at all, is always required as an ingredient of a particular crime. The principles of criminal responsibility, by contrast, include the principles governing the legal treatment of insanity, infancy, and perhaps intoxication, principles which determine whether and when someone, even if she admittedly had *mens rea*, may be held to account by the criminal courts (*see* INSANITY DEFENSE).

How do familiar criminal defences such as self-defence or duress fit into this picture? Are these, like denials of *mens rea*, denials that one committed a criminal wrong? Or are they, like

pleas of insanity, denials that one is criminally responsible? Alternatively, might they be something else entirely? On one view, the answer depends on a further distinction between justifications and excuses. Self-defense, necessity, and consent are examples of justifications (*see* CONSENT; SELF-DEFENSE). Provocation and duress are examples of excuses (*see* COERCION). A common explanation of the contrast, familiar in philosophical ethics as well as in legal thought, is that to plead a justification is to deny wrongdoing, whereas to plead an excuse is to deny responsibility (Austin 1957; Hart 1968: 13–14).

On a rival view this bipartite classification is multiply mistaken. Justifications like self-defence are not denials of wrongdoing. Excuses like duress are not denials of responsibility. This is not because they turn out to fit into the other category. It is rather because there is a third category for which the bipartite picture makes no room. On this view those who plead justifications or excuses concede, at least for the sake of argument, that their actions were wrongful. They thus eschew the move made by one who denies *mens rea*. Nor however do they make the move made by one who pleads insanity. In fact, rather than denying that they are able explain themselves with reasons, those who justify or excuse their actions offer precisely such explanations – they offer reasons which show their admittedly wrongful behavior in a rationally superior light. This is not, of course, to say that the two types of plea are identical. One who justifies his actions provides adequate reasons for doing what he did. One who excuses his actions provides adequate reasons for the disposition on which he acted (e.g. reasons for the beliefs or emotions on the strength of which he acted). The key point is that both defendants *assert*, rather than *deny*, responsibility for their actions, while conceding, rather than denying, that what they did was wrong.

This debate over the nature of criminal defenses may not seem of much consequence. But there are two reasons why such a conclusion would be too quick. First, at least on the view just

discussed, it matters that room is made in the criminal law for excuses like provocation as well as denials of responsibility like insanity. The law does defendants a disservice if it requires them to argue that their predicament left them unable to respond to reasons, rather than enabling them to argue that they responded rightly to at least some of the reasons they had. All other things being equal, one should prefer the latter, more self-respecting plea.

Second, it matters that room is made for justifications and excuses as well as denials of wrongdoing. Here we return to a point with which we began. We began with the thought that one purpose of a criminal trial is to call alleged offenders to account. One way to understand this, or an aspect of it, is as follows: the criminal law is addressed to responsible agents, agents with the capacity for rational self-explanation. When they commit some wrongs, such agents owe us a public explanation of their reasons for having done as they did (i.e. their justifications) or, failing that, of their reasons for having been disposed to do it (their excuses). One key task of the criminal law to create the conditions under which such explanations can be given. The task is carried out by giving legal recognition not only to wrongs, but to justifications and excuses also (Gardner 2007: 177–194, Duff 2007: 297–8).

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