The Criminal Law of the Free Society:

A Philosophical Exploration of Overcriminalization and the Limits of the Criminal Law

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Abstract

The criminal law is the most coercive institution of social control in the modern liberal state. It criminalizes conduct, prosecutes individuals, and treats offenders in ways that under other circumstance we would consider as serious violations of individuals' rights. At a time when this institution has been described as a lost cause serving immoral ends, it is all the more urgent to provide a normative account of the criminal law's limits and scope of action (ch.1).

A starting point of this thesis is that any successful normative account of the criminal law must ground penal principles and practices in an explicit, and sufficiently delimited, political philosophy. This thesis does just that: it advances an account of the criminal law and criminalization that derive from central premises of classical liberalism. I contend that an account shaped by such liberal values and premises is capable of responding successfully to one of the most urgent predicaments of the criminal law today; that is, the abuse of coercive power by the state through the enactment of criminal statutes. This is the problem of overcriminalization (ch.2).

The argument for such a liberal model of the criminal law proceeds in two general steps. First, I offer a general account of the state institutions of a free society; a free association of individuals committed to basic principles of equal liberty for all. I argue that, insofar as they are genuinely liberal, these institutions should serve the purposive nature of individuals and their basic interest in living their lives as they think fit (chs.3-4). This 'service conception' of the function of state institutions is specified further in terms of the principle of freedom of association – a *sine qua non* of free social coexistence. This is a general principle of political morality that holds that purposive individuals have a liberty-right to enter into associations with others for any purpose and duration in time, compatible with the same liberty for all, and with no constraints whatsoever on the voluntary benefits and obligations that may emerge from this association.

Second, I argue that, within the sphere of the criminal law, our commitment to this general principle of political morality means using the coercive power of the state only to regulate conduct that violates at least one of two basic preconditions of free association. These preconditions are the claim-right to bodily ownership, and – derivatively – the claim-right to ownership in external things (ch.5). These two claim-rights represent the two juridical goods that the criminal law in a free society is to honour and protect and, thus, they constitute the limits of legitimate penal coercion in a free society.

Finally, and in order to show the capacity that this abstract model has to respond to the concrete problem of overcriminalization, the thesis presents the two principles of criminalization that derive from the basic preconditions of free association: the principle of direct violation of bodily ownership and ownership in external things, and the principle of effective reduction of violations. Unlike other influential liberal principles of legitimate penal coercion considered in this work – namely, the harm principle, penal paternalism, penal moralism, and penal consequentialism – I argue that this two-principle model has the capacity to respond successfully to different forms of overcriminalization (chs.6-7).

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Author's Declaration

I hereby declare that, unless stated, all the material contained in this thesis is based on my own ideas and research.

PREAMBLE

The Rationale of the Thesis

In *The Eumenides*, Aeschylus tells us how the Erinyes, the goddesses of retribution, pursued Orestes for matricide. They followed and tormented him until his trial, after which he was liberated from blood-guiltiness. The Erinyes were in charge of exacting punishment for crimes of blood and thus the outcome of the trial did not please them given that Orestes had actually killed his mother Clytemnestra. In order for them to accept the verdict and calm their anger, the gods granted the goddesses a new sanctuary in Athens where they were praised, and received great honours and respectful worship. The gods even renamed them as the Eumenides, the gracious ones.

This comes as quite a surprising outcome, especially when we compare it to the description the Erinyes receive in the rest of Aeschylus' play and in the work of other tragedians. Indeed, in the Ancient Greek literary corpus, the Erinyes stand for feelings of deep offence, bitter displeasure and resentment that arise when what belongs to us – or what is owed to us – is impiously violated. The Erinyes, the followers of the track of blood, are three sisters: Alekto, the relentless, Megaira, the one who holds a grudge, and Tisiphone, the avenger of bloodshed. They are loathsome dark creatures wreathed in snakes, crawling to scent their prey, whining and howling like dogs.

The fact that the gods rename the Erinyes and give them a new sanctuary to be honoured and worshiped points to a duality which, according to a classical scholar, "must be understood to mean that these deities, so mild and benign on the one hand are withal [...] perverted into resentful, destructive deities" (Muller 1835, p.191). They are feared and venerated, cruel yet benign. They are not different sets of goddesses, but one and the same. Thus, Aeschylus concludes *The Eumenides* – the last part of his trilogy *The Oresteia* on the theme of justice – by adding a new layer of meaning to the figure of the goddesses of retribution. By allowing the avenging and tormenting Erinyes also to incarnate the much kinder figure of the Eumenides, the tragedian hints at the complexity of retributive justice.

This complex, slightly paradoxical account of the Greek goddesses of retribution mirrors the most salient of our contemporary retributive institutions, the criminal law. On the one hand, the criminal law is a system of coercive rules that legitimately responds to wrongdoers and contributes to the security and order necessary for social life. On the other

hand, this institution is a source of problematic practices (it coerces, prosecutes, and punishes individuals) and, not infrequently, deep injustices (as when, for example, it coerces illegitimately or punishes unfairly). Like the Greek goddesses of retribution, our modern institution of retributive justice, the criminal law, has a benign and a dark side; one that protects individuals from serious perils and harms, and other that restricts individuals' freedoms and puts their rights at stake.

This thesis deals with this Janus-like nature of the criminal law. The general aim of this work is to provide an account of the criminal law that explains the central importance this institution has for the individual members of society without forgetting the risk it poses. More precisely, I shall defend the importance and adequacy of the criminal law as a response to wrongful conduct within the free society – a society that takes individuals' freedoms as having fundamental value – but I shall also be alert to both the problematic practices the criminal law involves and the unacceptable conditions it may impose upon those who are subject to its rule.

To undertake this task, this thesis focuses to a considerable extent on one of the most pressing problems of the criminal law today: overcriminalization.[1] Studies of overcriminalization – the abuse of coercive power by the state through the criminal law – concentrate almost exclusively on solutions that are internal to the system of law but leave aside the moral and political philosophy that we need in order to give determinacy to these solutions (see Stuntz 2001, Beale 1995, 2005, Husak 2008 *int.al.*). This, I take it, is a mistaken strategy. Indeed, a basic contention of this work is that we cannot get criminalization right if we do not back up our principles of penal prohibition – which are internal to the criminal law – with moral and political principles – which are independent of, and to this extent external to, the criminal law.[2] This thesis tries to do just that and advances a political and moral framework – grounded in a conception of human nature and society influenced by principles of classical liberalism – from which I derive the limits of a liberal system of criminal law that avoids (or, at least, minimises) the pressing problem of overcriminalization.

Thus, this work straddles legal, penal, and political philosophy. It reformulates the limits of a legal institution, the criminal law, by offering an account of the state grounded in basic principles of classical liberalism. So understood, this thesis is an exercise in political

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1 The common spelling in the literature is 'criminalization' and 'overcriminalization' (as opposed to 'criminalisation' and 'overcriminalisation'). I have kept this use.

2 I use the words 'criminal' (and its derivatives) and 'penal' (and its derivatives) interchangeably.

morality that aims to limit in a principled manner the way the state should relate to individuals through the criminal law. It embraces the thought that "the law is the offspring of politics", and that legal theorising requires, if not presupposes, political theorising (Waldron 1999b, p.36. See also Besson 2005). As I take it, without an explicit account of the principles and values shaping our understanding of the state, the specification of the boundaries that should constrain the practices and functions of the criminal law are doomed to fail. Thus, theorising about legal institutions must begin by (or, at least, must not be separated from) theorising about politics.

This intimate connection between the legal and the political is as much about the importance of deliberation in the creation and discussion of the law as it is about the functioning of the law in circumstances of politics. In the words of Jeremy Waldron, these circumstances refer to "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be" (Waldron 1999a, p.102). In modern complex societies, the circumstances of politics *are* characterized by disagreement and conflict. We could go even further and say with Rawls that a diversity of conflicting comprehensive views is, ultimately, "a permanent feature of the public culture of democracy" (Rawls 1993b, p.246).

Independent of the position we adopt about the permanent or contingent nature of conflict and disagreement, what I would like to emphasise here is that conflict and disagreement are characteristic features of the way we actually coexist with others and that any theorising about the criminal law and politics must consider these features as key factors in the shaping of the institutions we should have. If the criminal law is to take individuals seriously – and therefore take their views about the good, justice, values and so on with due respect – it must recognise the fact that people disagree, deeply and fundamentally, about these core issues. In other words, the criminal law we ought to have must reflect the circumstances of politics. This is a premise that runs throughout the different stages of the re-articulation of the criminal law that this thesis proposes.

The urgency of this project – an account of the criminal law grounded in principles of freedom and that takes circumstances of politics seriously – becomes particularly evident when we reflect on an unfortunately widespread view of the role that the criminal law should have in our societies. A telling example is a letter in relation to assisted suicide written by

Professor Nigel Biggar, Director of the McDonald Centre for Theology, Ethics and Public Life at Oxford.

> Sir, [...] Dignitas assisted Sir Edward Downes to kill himself, even though he was not terminally ill. This was entirely in accord with the view of its founder, Ludwig Minelli, that anyone with "mental capacity" should have the right to kill him or herself with assistance — and presumably also without it.
>
> It follows from this that not just the terminally ill, but the chronically ill or disabled, the grievously bereaved, the philosophically miserable and the amorously unsuccessful should have the same right. After all, if the individual is the sole arbiter of the value of his or her own life, and if some adult reckons that living is no longer worth the candle, then who may gainsay them?
>
> It also follows that when someone should volunteer to die in the masochistic ecstasy of being mutilated and eaten – as happened five years ago in Germany in the case of Armin Meiwes – the law should be silent, no crime having been committed.
>
> The problem is that what fends off interference also generates indifference and carelessness. If my life only has the worth that I accord it, then it has no objective value; and if it has no objective value, then why should anyone else care for it? [...] (Biggar 2009).

Independent of the moral position one may favour regarding matters like assisted suicide, euthanasia, and consensual masochism and cannibalism, what is worrying in the view expressed in Biggar's letter is the suggestion that these matters can be (or ought to be) solved by resorting to the criminal law. There is nothing in the forms of conduct he describes, however we appraise them, that suggest that the criminal law is the proper response to them. Yet, we constantly see that the argument for criminalization is reduced to evaluating conduct as inappropriate, morally wrong, revolting and so on, and then there is the assertion of some sort of natural connection between the conduct and a response to it through the criminal law and criminalization. There is, in short, a feeling that 'something must be done' and, all too often, the something demanded is that a criminal law should be passed.

What this thesis offers is an argument against this flawed way of reasoning about the role of the criminal law in society. In addition, it suggests a way to reason about criminalization and the function of the criminal law in a society that takes individuals and

their liberty as having paramount value. If these arguments and suggestions prove to be persuasive we may then begin to look at, and think of, the criminal law in a more careful way, as a crucial institution of our liberal societies, but one that needs to be tightly limited and controlled on pain of becoming (or continuing to be) an instance of illegitimate oppression by the state.

Outline of the Thesis

The thesis is in three parts. Part I, "The Criminal Law: Setting the Scene", is divided into two chapters. Chapter 1 begins by briefly describing the present and regrettable state of the criminal law, characterised by too much punishment and too many criminal prohibitions. The chapter then moves on to consider the three core elements of this institution – the coercive, condemnatory, and public character of the criminal law. These elements, in conjunction, represent what I call the specificity of the criminal law, as opposed to both the specificity of non-criminal branches of the law and non-legal state institutions. By considering its specificity, I argue, we obtain a clear sense of the seriousness of the difficulties that characterise the current condition of the criminal law. The chapter closes with some plausible explanations of why this institution has gone so wrong.

Chapter 2 analyses the pressing problem of overcriminalization. The chapter develops in length the worries involved in the abuse of the coercive power by the state through criminalization. I argue that overcriminalization involves more than the excessive multiplication of penal statutes. Indeed, it is a phenomenon independent of such a multiplication. Thus, we have a strong presumption that a statute is an instance of overcriminalization when it regulates types of conduct that are beyond what ought to be the business of the criminal law; or when it makes liable people who have not acted in a blameful way; or when it criminalizes actions that do not wrong anyone. Given this, it follows that we do not need too many statutes to talk about overcriminalization; we just need one statute imposing the coercive power of the criminal law in an illegitimate manner.

Part II, "The Free Society and the Criminal Law", is divided into three chapters. Chapter 3 argues that rules are a function of social groups. The argument grounds the idea that an account of society, which is a type of social group, is crucial to determine the type of rules that ought to constitute the penal law. The chapter offers an account of social groups understood as joint activities and considers the minimal conditions that constitute any joint

enterprise. In addition, it illustrates the idea that the penal law is a function of our account of society by focusing on some central aspects of Antony Duff's prominent model of society and the criminal law. However, the chapter critically assesses the capacity Duff's account has to minimise or overcome the problem of overcriminalization. The conclusion reached is that, if we want to succeed in attaining an account of the normative limits of the criminal law that may help us to minimise or overcome overcriminalization, a different articulation of society and the state is required.

The task of advancing that articulation of society is undertaken in chapter 4. This chapter offers an account of society from which, I argue, we can derive a general theory of the criminal law that is capable of responding to the problem of overcriminalization. Such model of society is the free society: an association of purposive individuals subject to liberal state institutions. From the premise that these institutions ought to serve the purposive nature of all the members of society, I argue that central to the function of the state of the free society is honouring the principle of freedom of association. My claim is that for individuals *in society* to live life as they think fit, the state must be committed to the protection of the conditions that allow them to freely associate with others. In other words, the exercise of the capacity to associate with others, essential to social coexistence, is only possible because of the state's fidelity to the principle of freedom of association. The institutions of the state, on pain of turning into non-neutral, oppressive, illiberal institutions, should have as a core aim the honouring and protection of this freedom.

From this articulation of the liberal state I then derive in chapter 5 the general aim of the criminal law in the free society, namely, to contribute to individuals' stability of expectations in relation to their capacity to live their lives as they think fit. More precisely, I shall argue that the general function of the criminal law of the free society is to protect no more (and no less) than the preconditions of individuals' capacity to associate with others, which I specify in terms of bodily ownership and ownership in external things. If the criminal law is to live up to the promises of a free society, the limits of this institution must be set in this principled and minimalist manner.

Part III, "Criminalization in the Free Society", moves on into more specifics and considers the question of criminalization in the free society. An answer to this question should count as a response to the problem of overcriminalization. Chapter 6 introduces this issue by both presenting the question of criminalization – what types of conduct and on which grounds may a free society legitimately criminalize? – and reviewing and criticising

different liberal principles and/or motives for criminalization -- the harm principle, penal paternalism, penal moralism, and penal consequentialism. The chapter concludes that these principles or motives for criminalization are, in the face of the problem of overcriminalization and the requirements of the institutions of the free society, either insufficient or flawed.

Building on from the general aim and function of the criminal law defended above, chapter 7 develops an alternative model of criminalization. This model is constituted by two necessary and sufficient filters of criminalization, namely, (i) the filter of direct violation and unacceptable risk to individuals' bodily ownership and ownership in external things, and (ii) the filter of effective reduction of direct violations and unacceptable risks. These filters establish that in a free society there is a strong presumption for the criminalization of a given conduct *C* if and only if (i) *C* represents a violation of an individual's bodily ownership and/or ownership of external things and (ii) by criminalizing *C*, the occurrence of *C* is effectively reduced. When legislatures overlook these filters they contribute to overcriminalizing the system and, thereby, use the coercive power of the state illegitimately. By considering an example drawn from hate-crime legislation, the last part of the chapter puts this minimalist model of criminalization to work. This illustration shows the way in which this model responds to the problem of overcriminalization in a manner that is principled and consistent with the idea of the free society.

PART I

THE CRIMINAL LAW: SETTING THE SCENE

CHAPTER ONE

The Criminal Law: Current Predicaments, Specificity, and Explanations

> It is a mark of the politicization of our times, and of the decline of other institutions that used to support the fabric of how we ought to act, that so many people nowadays see the state as the basis of all human decency and decent society, if not as coextensive with it.
>
> Robert Nozick, *Philosophical Explanations*, p. 503

1. Introduction: Current Predicaments

At the turn of the 21st century, Andrew Ashworth, one of the most thoughtful theorists of the criminal law, suggested that the criminal law is a lost cause (Ashworth 2000). His claim is that it has become unprincipled, chaotic, and subject to the unreflective and populist practices of politicians, practitioners and other social actors. What is worse, within this unpromising framework the criminal law has been adopted as the "natural, or the only appropriate response to a particular event or series of events giving rise to social concern" (Ashworth 2000, p.225). Thus, not only are we experiencing an unprincipled, chaotic and populist criminal law, we are also using it as if it were the main way – or perhaps the only way – by which the state can put its policies into practice.[3]

The results of these developments are well-known: many institutions within society have become bodies of control for the prevention of crime, a mirror of the Brave New World; the media have swamped the public with alarmist stories about the dangers of monstrous criminals walking freely on the streets; people have been bluntly labelled as either law abiding citizens or criminal enemies, and when for some good or bad reason they fall into the latter category, they are, in extreme circumstances, dispensed from basic social, political and moral rights and turned into 'bad bacteria'.[4] As a foreseeable consequence, many prisons have become overpopulated and ended fulfilling a role not very different from dumps of human

3 Consider also the more recent words of Douglas Husak, another prominent theorist of the criminal law: "[C]ontemporary decisions about criminalization conforms to no normative principle whatever. The criminal justice system [...] is used for perverse and immoral ends" (Husak 2008, p.vii).

4 I borrow this expression from Morse 2004.

beings. At the cost of abandoning central commitments of a decent society, the most coercive of the institutions of the state has become omnipresent and oppressive.

To account for this unsettling state of affairs that has made Ashworth aptly describe the criminal law as a lost cause it is illustrative to look at one of the most criminalized societies on earth. At yearend 2009, the United States had 1,613,656 prisoners (Bureau of Justice Statistics 2010, p.1), which is a ratio of around 748 people in prison out of 100,000 (International Centre for Prison Studies 2010).[5] Most strikingly, these numbers are distributed unequally throughout United States society. In 1997, 9% of the black population in the U.S was under some form of correctional supervision compared to 2% of the white population (see U.S. Department of Justice 2000, p.2) and, according to official estimations, 28,5% of black males will enter a United States prison during their lifetime, which contrasts starkly with the estimated 4.4% of white males who will go to prison at some point during the same period (U.S. Department of Justice 1997, p.1).[6]

Arguably, one of the causes of these injustices is the continuous expansion of substantive criminal law. To illustrate, consider the case of England: in the last 11 years over 3.000 new offences have been enacted in this country (Ashworth & Zedner 2008), which is a particularly striking number if we think that in 1980 the total estimated number of offences known to English law was 7.000 (see Ashworth 2000, p.226 fn.2). Thus, in hardly more than two decades the number of offences of the country has grown by more than 40%. In the United States things are not different and the criminal law expands constantly, to the extreme that it ends up covering the most unsuspected matters: in Alabama it is a felony to maim oneself to 'excite sympathy', Kentucky bans the use of reptiles during religious services and Massachusetts punishes those who frighten pigeons from their nests.[7] If the scope of the criminal law is so unexpectedly wide, then citizens cannot be expected to know the law, and cannot plan their lives within the limits that it sets.

As these developments suggest, the criminal law may be aptly described as an institution suffering from serious problems: too many inmates living in unspeakable conditions; legislators using the criminal law for whatever purposes they deem suitable; law abiding citizens turned criminals without even knowing why.

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5 Compare this number with the rates of England (153 prisoners per 100,000 residents) and France (96 prisoners per 100,000 residents).

6 Tonry's *Malign Neglect* offers a general account of the problematic connections between race and crime in the U.S.

7 This requires some qualification. To say that the number of substantive criminal laws is increasing does not necessarily mean that criminalization is increasing. This is so because on many occasions new criminal law refers to further specifications of offences already in existence. Chapter 2 addresses this issue.

However grim this account appears to be, a note of qualification is in order. From the examples presented – drawn exclusively from the U.S. and the U.K. – it is not difficult to portray the criminal law in a dystopian manner. However, such a portrait may not be adequate or precise. It is a portrait that takes a part for the whole and, therefore, is a reductionist picture of a complex reality. This is precisely the criticism advanced to commentators that elevate an explanatory framework specific to a given context into a general explanatory theory (see Zedner 2002 and Lacey 2008). Thus, I am aware that, if read without qualification, the brief picture I have just presented, as well as the explanatory framework I am going to outline in section 3 below, may count as an example of a contentious over-generalisation. In effect, the penal dynamics of the U.S and the U.K. are different from each other, and, in turn, these dynamics taken together are very different from the developments in other European countries – especially Germany and the Scandinavian countries – and the rest of the world.

However, without denying the complexity and variety of penal dynamics existing in different places, or that it is impossible to offer a unitary account of the predicaments of the criminal law in all penal jurisdictions, it is still noteworthy to say that all jurisdictions suffer from at least one of the problems I have just mentioned. Perhaps, overcrowded prisons are more characteristic of, say, Italy and South America than of Germany or Norway, and inhumane punishments are more common in Iran than in France. True as this is, it is also clear that all penal jurisdictions suffer from some of these problems. Thus, in the picture presented above and in the explanatory framework I outline in section 3, I emphasise what these predicaments are, not the extent to which they affect different jurisdictions.

2. The Specificity of the Criminal Law: Coercion, Condemnation, and the Public Dimension

I have suggested that the present condition of the criminal law is worrisome, to say the least, and great efforts should be afforded in order to improve this state of affairs. Before undertaking the tasks of amending and improving this institution we need to be clearer about the peculiarities that give shape to the system of criminal – as against any other kind of – law. These peculiarities are what I call the specificity of the criminal law.

Given that, throughout this thesis, I rethink and rearticulate many central aspects of the criminal law it is important to be clear about the specificity of this institution. Insofar as

these re-articulations are consistent with the specificity of the criminal law, they should count as amendments of, not substitutions for, what we generally understand this institution to be. My analysis will focus on three central elements: the coercive, condemnatory, and public nature of the criminal law. In the absence of any of these elements this institution loses its most distinguishable features and becomes something else. Thus, independent of how radical or conservative the re-articulation of the criminal law offered in this work might be, if my proposal – and any proposal for this matter – is going to be intelligible, it must fit all these three elements.

This analysis will provide not only an account of the most basic structure of the criminal law, but also an answer to the question of what is so special about this institution and its problems that makes them deserve as much (or more) consideration as other state institutions and as other timely socio-political issues affecting people's lives. My interest is not to try to balance other state institutions and their predicaments with those of the criminal law in order to decide which is more worrisome and urgent. Instead, what I want to claim here is that the criminal law deserves careful consideration because, despite the serious perils it involves, it is a core institution of the liberal state and of the free society.

As I put it in the Preamble, like the Greek goddesses of retribution, the criminal law presents a dual nature which, on the one hand, provides us with a sense of security and purposefulness and, on the other, makes us fear its power and the way its practices are put to work today. By focusing on three core elements of the criminal law – coercion, condemnation, and its public dimension – this section makes further sense of this duality and offers an account of the specificity of the criminal law that should be present in any theoretical attempt to amend it.

1.1 *Coercion*

One commentator on criminal justice matters has stated that the practices that constitute the criminal law are located "at the most coercive end of a continuum of institutions of social order" (Zedner 2004, p.3). The claim is not only that under present conditions the criminal law is to be so characterised, but rather that this institution is by virtue of its very nature, and independent of its context, located at that extreme of the continuum of coercive institutions. The point is that practices inherent to any system of penal law, like prosecution by the state, penalties in the form of loss of money, liberty and civil rights, criminal statutes working by

threats, and so on, are intrinsically coercive (even when considered under ideal conditions).

At first sight, this appears to be a problem, particularly if the rationale of this study is to develop a liberal model of the criminal law. The difficulty comes from the thought that coercion does not fit with basic liberal ideas and, in turn, represents a danger to liberal values like freedom and autonomy. In effect, authors with liberal leanings have argued against coercion on these grounds. Joseph Raz, for example, has argued that "[a]ll coercion invades autonomy by subjecting the will of [those that are] coerced" (Raz 1986, p.155), thereby making them unable to be "creators of their own moral world" (ibid, p.154). Others have even articulated their own intellectual projects in terms of the aim of reducing coercion within society. For instance, Friederich Hayek's first line in *The Constitution of Liberty* expresses his primary concern, namely, the "condition of men in which coercion of some by others is reduced as much as is possible in society". This is, Hayek claims, "[t]he task of a policy of freedom" (Hayek 2009, pp.11, 12).

This tension between liberalism and coercion described by such diverse liberal thinkers as Hayek and Raz, has led some to conclude that, when talking about punishment – the culminating practice of the criminal law – liberals must either "not authorize punishment or do so at the expense of their more fundamental principles" (Brubaker 1988, p.821). In the face of the dangers involved in the coercive nature of the criminal law, this thesis is in part an attempt to reject Brubaker's conclusion and defend, instead, the possibility of legitimate coercion by the liberal state through the criminal law. In the rest of this section I offer some general conceptual clarifications about the coercive nature of the criminal law that will prove helpful when evaluating the possibility of legitimate coercion discussed in the chapters that follow.

Robert Nozick has advanced the most influential contemporary account of the concept of coercion. In a groundbreaking article (Nozick 1969), he offers an analysis of what we can call the formal structure of coercion. According to this structure, an individual P coerces an individual Q to not doing A if and only if:

1. P threatens to produce some consequence if Q does A;

2. A, through this threatened consequence, is rendered *substantially* less eligible as a course of action for Q than A was without this threatened consequence;

3. Part of P's reason to produce this consequence is that P believes this consequence worsens Q's alternative of doing A or P believes that Q would believe it does;

4. *Q* does not do *A*;

5. At least a part of *Q*'s reason for not doing *A* is to avoid (or lessen the likelihood of) the consequence which *P* has threatened to produce;

6. *Q* knows that *P* has threatened to produce the consequence mentioned in 1 if he, *Q*, does *A*.[8]

Before referring to what is, for our purposes, the most important aspect of Nozick's account, it is important to consider some aspects of coercion that may not be clear enough in his position.

Some theorists have rightly pointed that the conditions of coercion considered by Nozick are insufficient (e.g., Frankfurt 1988, p.37, Hoekema 1986, pp.27-8). They are not sufficient because we need to say more about the character of the act demanded by *P* and the nature of the consequence that *P* has threatened to produce in case *Q* does *A*. To give an example adapted from Harry Frankfurt: Pamela threatens to break Quentin's thumb if Quentin does not set fire to a hospital, and, for that reason, Quentin sets fire to the hospital. According to Frankfurt, in these circumstances we do not want to say that Quentin has been coerced, even if the 'action' of not setting fire to the hospital has been made substantially less attractive to Quentin given the prospect of a broken thumb. What this example suggests is that correctly to determine whether an instance of coercion has taken place we need more than the simple claim that an undesired consequence has been threatened.

Additionally, it is also important to note that a threat, which, under certain circumstances may constitute a genuine instance of coercion, under other circumstances may not. If Pamela threatens Quentin to take £1 from his wallet unless Quentin goes naked to the middle of Trafalgar Square, we could hardly say that – in case he goes naked to central London – he has been coerced to do so. However, if Quentin needs £1 to buy the medicine that will save his life, and Pamela threatens to take that £1 in circumstances in which there is no way for Quentin either to get that money from a different source or to refuse Pamela, then we can arguably say that Quentin has been coerced (provided that Quentin goes to Trafalgar Square naked *because* of Pamela's threat).

These considerations are important because they establish the contextual nature of

8 Nozick 1969, pp. 441-445. These are necessary conditions to coerce someone to refrain from doing something, but *mutatis mutandis* they also apply to coercion to do something.

our coercive practices.[9] Coercion emerges as a result of a particular combination of the threat posed by the coercer and the action to be performed by the coerced. There needs to be a certain type of proportionality between the two, so that not performing the act by the coerced amounts, in the face of the realisation of the threat, to a serious enough disruption of what the coerced values. Thus, and unless we believe in the existence of objective and undisputable values, what counts as an instance of coercion must consider the circumstances of value in which a possible case of coercion takes place. To continue with the previous example, if Quentin were an exhibitionist looking for requests for showing his bare body in public places, Pamela's threat and Quentin's acceptance of her command would not be an instance of coercion.

Following these clarifications, we should now focus on one of the most relevant aspects of Nozick's account. This aspect links coercion to the rational capacities of the individual coerced such that coercion need not bypass our rationality, but may instead confront it. This is suggested by the combination of (some of) the clauses in conditions 2, 3 and 5, which, in conjunction, establish that an instance of coercion is successful only if the coerced exercises his capacity to act according to his interest given the circumstances of coercion. In different terms, coercion is not *forcing* or *compelling* the coerced to do as one wishes, but it is rather *offering reasons* to the coerced to act as one wishes (but note that this says nothing about the nature of those reasons). This means that coercion is not merely an instance of offering of reasons, but is a *successful* offering of reasons. Nozick's analysis, in effect, makes the coerced and her acquiescence to the reasons offered by the coercer in her threat a necessary condition of coercion. As I understand it, this suggests that the coerced could have done otherwise had he decided to do so, and that, consequently, he could have resisted the threat of the coercer (thus, being coerced to do something is different from being forced to do something).[10] This is a crucial difference between coercion and other instances of infringements upon individual freedom.

To illustrate, imagine that Pamela threatens Quentin with some consequences if

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9 That was certainly not the aim of Harry Frankfurt's objection. He was rather pointing to the fact that Nozick's use of the term differs from his own in that Nozick did not try to establish the conditions under which acting under coercion excludes moral responsibility (Frankfurt 1988, p.37 fn.11).

10 Frankfurt has a different view on this respect. For him, "[c]oercing someone into performing a certain action cannot be, if it is to imply his freedom from moral responsibility, merely a matter of getting him to perform the action by means of a threat. A person who is coerced is *compelled* to do what he does. He has *no choice* but to do it." (Frankfurt 1988, p.36) Frankfurt's argument for this idea is that otherwise, he believes, we could not ground the claim that coercion frees the coerced from moral responsibility. It seems to me that Frankfurt overlooks the fact that there are degrees of coercion. The degree of a token of coercion is obtained by considering different factors, some of them variable some of them constant, all of which contribute to the relative degree of irresistibility of an instance of coercion.

Quentin does *A*, and these consequences make *A* substantially less eligible as an option for Quentin. Now, Quentin suggests that he will do *A* regardless of Pamela's threats, to which Pamela responds with a certain course of action that forces Quentin not to do *A*. In this case what we have is *not* an instance of coercion, as Quentin did not respond to the reasons (good/legitimate or bad/illegitimate) offered by Pamela in her threat. Even though Quentin did as Pamela wished, Quentin was not coerced, but forced to satisfy those wishes.

This example is helpful to draw our attention to two important distinctions. First, there is the distinction between coercive and non-coercive infringements upon individual freedom. Unlike non-coercive infringements, coercive infringements have as a necessary condition that the coerced responds to the reasons provided by the coercer. Thus, Quentin is coerced by Pamela only if he responds to her reasons.

Second, and more importantly, there is the distinction between coercion and *legitimate* coercion. The key to legitimate coercion is in the acquiescence of the threatened person to *certain types* of reasons advanced by the threatening person. An account of the types of reasons that makes coercion legitimate requires a more detailed inquiry that I shall leave for later. For the moment, and given the introductory nature of this first chapter, I shall refer to them in a general fashion by resorting to the idea of an individual's values: what makes coercion an instance of *legitimate* coercion is some degree of conformity between the reasons offered by the coercer and the values held by the individual coerced. If an instance of coercion overlooks, or is simply intended as an act against, a relevant value held by the individual coerced, then we can talk of an instance of coercion but not of legitimate coercion. Thus, a thief who coercively gets his victim's money is, all else equal, performing an act of illegitimate coercion: some values held by the individual victim has been violated (or at least overlooked) by the coercive act rendering this an instance of illegitimate coercion. Conversely, when an instance of coercion aims to keep or protect the values of the individual coerced, then we can talk, all things being equal, of an instance of legitimate coercion.

To illustrate legitimate coercion consider the following two examples. It is plausible to argue that parents may justifiably coerce their child in order for her to succeed in her studies. They may tell her that if she does not prepare for her exams, then she will stop receiving her pocket money. If, given her parents' threat, she decides to revise for her exams, then they have, arguably, justifiably coerced her. Similarly, think of the officers of a publicly funded shelter for unemployed people who have come to realise that the shelter does not have enough resources to help all those in need. They decide to change the shelter's policy

and offer help only to those who are active in looking for a job and who help with the cleaning of the place. If at least one of those helped by the shelter decides to change his behaviour to stay in the shelter, the officers and their policy have been successful in justifiably coercing those who comply with the new orders of the shelter.

What these cases show is that, although any type of coercion supposes some level of intromission in people's lives, there are circumstances in which this infringement is consistent with, and perhaps required by, the respect owed to people. For the purposes of this section we do not need to elaborate further the conditions that make coercion by the state through the criminal law legitimate or illegitimate. This will be discussed in chapters 4 and 5. Instead, having considered the first feature of the specificity of the criminal law, what we need to consider now is the characteristic type of threat that the state poses to others within the coercive structure of the criminal law. Put differently, how does the state coerce through the criminal law?

1.2 *Condemnation*

The culmination of the whole institution of the criminal law is the practice of state punishment. This is the way in which the state both responds to those who commit crimes and makes some courses of action – those actions that are criminalized – less eligible.

In the view I adopt here, what makes the practice of punishment so special is not its hardship but its condemnatory nature. Joel Feinberg, in support of this view, has influentially argued that punishments are not penalties – mere burdensome orders imposed on people – but expressive acts that aim to condemn those who offend (Feinberg 1968). In this sense, throughout this thesis I understand the criminal law as an institution defined in terms of its expressive function, namely, the function of expressing condemnation to those who commit crimes. If we place this understanding of condemnation in the Nozickean structure of coercion revised above the following claims result:

1. The state, through the criminal law, threatens to condemn a potential offender if he or she acts in a way that violates the commands of a penal statute (call that action ϕ).

2. Because of the threat of condemnation, ϕ is rendered substantially less eligible as a course of action than ϕ without the threat of condemnation.

This understanding of condemnation as the threat presented by the state through penal

coercion raises questions about the connection between crimes, condemnation and punishment that we must now consider.

As is familiar from the literature, what explains and/or justifies the connection between a wrongful act and our response to it can generally be presented in two ways depending on the normative position we adopt. Thus, from the point of view of the deontologist, condemnation is the proper response that wrongdoers deserve for their deeds. When thinking of *penal* condemnation, the deontologist makes an analogy between the reactive attitudes present in our moral experience and those that exist in our penal practice (for reactive attitudes see Strawson 1962). Thus, in a way analogous to our condemnatory attitudes directed against those who act wrongly, the criminal law condemns those who violate the criminal law. By contrast, from the point of view of the consequentialist, the condemnation of wrongdoers has less to do with reactive attitudes than with the achievement of desired outcomes. In the penal sphere, these expected consequences have to do, generally speaking, with the modification of future behaviour and the maximization of welfare across the whole society (see ch.6 for a more detailed account of penal consequentialism).

So understood, my articulation of the criminal law as an institution defined in terms of its expressive function fits adequately with the deontologist account and not with the consequentialist one. However, as discussed below, this is not to say that consequentialist considerations have no room in the account I adopt here.

In *Censure and Sanctions*, Andrew von Hirsch has pursued an account of punishment and the criminal law that influences my own proposals on this matter. He says that "punishment should convey blame; and blame gives the offender reason for an appropriate moral response" (von Hirsch 1993, p.77 and ch.2). This conveying of blame and condemnation, however, does not try to induce or elicit a certain internal state in the offender, even though punishment does express disapproval of the action committed by the wrongdoer.[11] Instead, it is left up to the offender to determine how to respond to the message of punishment and the criminal law is not meant to intrude into that sphere. In this sense, von Hirsch's model conceives of the criminal law in a rather unambitious form and portrays

11 Antony Duff has persuasively pursued this alternative line of argument. According to him, blame should be seen as "a kind of moral argument *with* another person" (Duff 1986, p.47). In this account, the adequate purpose of blame is to persuade the blamed in order for him "to see and to accept, not *my* judgment, but the truth about the moral character of his conduct; to engage *with* him in a search for and an attempt to understand that truth, not simply to force my own fallible and imperfect judgment on him" (Duff 1986, p.49). For von Hirsch's discussion of this position, see von Hirsch 1993, ch.8.

the institution as an expressive instance that serves merely as an *opportunity* for the offender to reconsider and provide a response to the wrongness of her past action (see von Hirsch 1993, p.10). Penal condemnation is not meant to influence the moral psychology of the wrongdoer, but simply to serve as a framework in which certain modifications of the wrongdoer's attitude towards his past act may take place.

However, despite the generally retributivist character of this model, consequentialism still has a place within it. Consequentialist considerations are accommodated within von Hirsch's account through a specific and contingent aspect of the practice of punishment: hard treatment. Given the type of flawed and imperfect beings we are – incapable of assuring constant and full abidance to the law or absolute respect for our fellow citizens – hard treatment emerges as an additional reinforcement of the disapproval that condemnation expresses. Including hard treatment in our practices of condemnation aims to provide prudential and supplementary reasons to restrain one's conduct and, thereby, to avoid criminal behaviour. Whereas condemnation is meant to express attitudes of blame towards offenders for their offences, hard treatment is seen as a pragmatic (because more effective) element of the criminal law aimed to provide additional prudential reasons to control individuals' future actions. It is in this limited way that consequentialist considerations enter into the equation of the criminal law and punishment.

To some, this distinction between condemnation and hard treatment may seem surprising or simply mistaken (e.g., Duff 1986 and 2001a, Skillen 1980). In effect, according to the definition of punishment advanced by Flew, Benn and Hart, which can arguably be called the standard definition of punishment, punishment "must involve pain or other consequences normally considered unpleasant" (Hart 1968, p.4). In contrast to what I have suggested above, the standard account establishes that hard treatment is not a contingent aspect of, or a merely prudential addition to, the practice of punishment and the criminal law. To punish someone *is* to inflict hard treatment.

My account is at some distance from this standard account. As I see it, the notion of condemnation, plus some minor contextual additions – additions related to the existence of institutional principles and procedures – captures all the relevant aspects of what the state should do when it punishes. To put it straightforwardly, punishment *is* a form of condemnation. More precisely, punishment is an act of condemnation by the state imposed upon an offender for her offence. In this sense, a core feature distinguishing an act of interpersonal condemnation from an act of punishment is that in the latter the state is

condemning an individual for her past violation of the criminal law. This is all we need to specify the connection and establish the difference between punishment and condemnation *simpliciter*.[12]

On the one hand, this is to say that there is nothing obviously contradictory in thinking of an instance of state punishment that is not an instance of hard treatment. On the other hand, my argument is that we fail to understand punishment if we refer to it as conveying no condemnation whatsoever. In this sense, and returning to the structure of coercion reviewed in the previous section, the fundamental threat that makes actions less eligible is, in my account, condemnation and not hard treatment. Following von Hirsch I decouple condemnation (punishment) and hard treatment (a prudential supplement designed to reduce future instances of criminal wrongdoing). Unlike von Hirsch, though, I believe condemnation (and not hard treatment) is necessary and sufficient for punishment. Thus, in my account, the criminal law threatens people with condemnation if they act in ways prohibited by its statutes.[13] Of course, as it happens, the expression of condemnation is conventionally done through hard treatment, and such hard treatment has an effective deterrence effect. However, and this is my point here, condemnation does *not* need to be expressed by hard treatment, and we can legitimately expect condemnation itself – no matter how convention dictates it is expressed – to have some deterrence effect on persons' willingness to break the law.[14]

1.3 *The Public Dimension*

There are two elements that need to be highlighted for the public dimension of the criminal law to be articulated. To identify the first of these two elements, it is useful to ask the following question: in the name of whom does the state coerce and condemn? In other words, in the name of whom does the criminal law perform its functions? The position I

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12 Thus, I am using the term 'punishment' as shorthand of 'state punishment'. I keep this use for the rest of this thesis.

13 For von Hirsch "[a] condemnatory response to injurious conduct [...] can be expressed either in a purely (or primarily) symbolic mode; or else, in one in which the reprobation is expressed through the visitation of hard treatment. The criminal sanction is a response of the latter kind" (von Hirsch 1993, p.14).

14 In this respect, and to respond to an anti-conventionalist passage by Thomas Scanlon, we could have expressed condemnation with flowers or weeds, but we did not (Scanlon 1988, p.214. See also Matravers 2000, p.257, fn.19). Had we developed a convention according to which the state condemns others for their offences by sending them red roses, we would not wonder how absurd flowery punishments are. Independent of the way in which conventions develop, when conventions become cemented in our social practices it is certainly difficult to think of these practices being otherwise, but that difficulty by no means entails that conventions could not have evolved in very different ways.

adopt here is that the state criminalizes and punishes in the name of its citizens.[15] The central point is that when a criminal offence is committed (because a penal statute has been violated) and an offender prosecuted and convicted, the condemnatory response of the state is performed by an official body in the name of the members of the polity. This means that criminalization and punishment are not something done in the name of the direct or potential victims of the crime, or of some faction within the community, or, as some theorists with Hegelian leanings suggest, something done because it is owed to the offender (see Hegel 1967, §100).[16] Instead, criminal laws are enacted and punishment is undertaken in the name of the members of the polity in which the criminal law operates.

This leads us to the second element of the public dimension of the criminal law. The relevant question here is why coercion and condemnation are performed in the name of all the members of the polity instead of in the name of the direct (would be) victims. The answer to this lies in the idea that crimes – the types of actions that are criminalized and punished -- are public wrongs.[17] A public wrong, as opposed to a private wrong, is a type of wrong that concerns all the members of the polity because it disrupts a good that is relevant to all those who coexist in society (for short, a public good). Thus, the functions of the criminal law (coercion and condemnation) are performed in the name of all the members of the polity because these functions are meant to protect individuals from some form of public wrong. Although this is sufficient to highlight the second element of the public dimension of the criminal law, it must be emphasised that even though crimes are public wrongs, not all public wrongs are (or should be) crimes. In other words, the criminal law is to protect some forms of public goods only.[18]

It is in these two senses – (i) crimes as wrongs that disrupt some relevant form of public good and (ii) crimes as wrongs responded to by the state in the name of the members of the polity – that the criminal law has a public dimension. To articulate this in a more

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15 When I say that the state punishes in the name of its citizens I should also say that the state coerces in the name of the very same group of people. In what follows, and only for stylistic reasons, I leave that last claim aside. It must be clear, however, that my argument is that both elements – coercion and condemnation/punishment – are undertaken in the name of the citizens of the polity.

16 "[P]unishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being" (Hegel 1967, p.71). Dudley Knowles traces this idea back to Beccaria and Rousseau. See Knowles 1999, p.38.

17 The classical statement for the idea that crimes are public wrongs is Blackstone's *Commentaries on the Laws of England*: "private wrongs, or civil injures, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity" (Blackstone 1770, vol.IV, p.5).

18 Examples of public wrongs that are not crimes are all those actions that should be sanctioned by administrative law.

formal way: when an individual *D* acts against an individual *V* by doing ϕ and ϕ is a criminal act, then (ideally) *D* has committed an action that disrupts some form of public good (which does not negate, but is independent of, the fact that *V* is the victim of *D*'s act) *and D*, by ϕ-ing, elicits a response by the state through the criminal law in the name of the members of the polity. Independent of the compensations and/or any other type of legal or non-legal arrangements that need to be provided to *V* (by *D* or by another body) for having suffered from the action ϕ, what matters in the criminal law is that *D* is to be condemned for that public wrong (ϕ) by the state in the name of the members of the polity in which ϕ was committed.[19]

Doubtless, there are a series of questions raised by this account of crimes. One concerns the type of public good that needs to be disrupted in order to justify state action through the criminal law. In other words: what types of public wrongs are to count as crimes? This question correctly supposes that not all types of disruptions of public goods are crimes and that, therefore, the state ought to impose penal condemnation upon only some types of public wrongs. Although the details of the relevant type of disruptions will be presented in chapters 5-7, at this point it is worth anticipating one general aspect of the argument to come.

In *Moral Dimensions*, Thomas Scanlon presents an account of blame based on the distinction between the permissibility and the meaning of an action. Whilst the former is determined by the considerations that count for and against an action, the latter depends on the significance of that action for the individuals involved and for their relationship. According to Scanlon, and to focus on what is relevant for our purposes here, blame is an attitude whose foundations are to be sought not in what determines the permissibility of actions, but rather in the meaning of actions within human relationships. His proposal is that

> to claim that a person is *blameworthy* for an action is to claim that the action shows something about the agent's attitudes toward others that impairs the relationship that others can have with him or her. To *blame* a person is to judge him or her to be blameworthy and to take your relationship with him or her to be modified in a way that this judgment of impaired relations holds to be appropriate (Scanlon, 2008, pp.128-9).

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19 For a more elaborate articulation of crimes along lines similar to what I present here see Marshall & Duff 1998, Duff 2007 and Lamond 2007.

It is Scanlon's focus on the connection between a blameworthy action and a given type of relationship between peoples that I take to be a particularly insightful element of this view in relation to the criminal law. As will be argued in chapter 3, the criminal law is a function of social groups and, more specifically, a function of society. A society is not a mere aggregate of individuals, but rather supposes the existence of a bond that extends across its different members. The claim is then that to be a member of society is to exist with others in a special type of relationship. From this I establish that criminal wrongs are actions that disrupt or impair the relationship that keeps us together as members of one society. This understanding of crimes captures the core of the public dimension of the criminal law.

3. Explaining the Present Condition of the Criminal Law

The previous two sections have stated the regrettable condition of the criminal law and presented the specificity of this institution. No other branch of the state or social institution existing in modern societies has the power to coerce and condemn individuals in the name of the citizens of the polity. It is time now to consider why an institution so characterised has gone so wrong as to be deemed a "lost cause" (Ashworth 2000), "used for perverse and immoral ends" (Husak 2008, p.vii).

There is, of course, no easy or simple answer to offer. As with any social institution, the process of transformation of the criminal law cannot be explained without taking into account an array of different and complex factors linked to historical circumstances and processes, developments in political thought, economics, technology, social psychology and so on.[20]

Reflecting on the importance of this complex and multidisciplinary approach, Nicola Lacey has criticised "the tendency to take punishment [and more generally, the criminal law] as a discrete object of philosophical enquiry". This tendency, she contends, "entails a relative insulation of the debate about the justification of punishment from broader questions of political theory which are integral to a proper analysis of punishment" (Lacey 1999, p.153). She concludes convincingly that "[o]nly if the philosophers can expand their view so as to theorise punishment not as an idea but as a social practice [...] will they be able to meet their ambition of explicating the (possibly limited) potential for making that social order less

20 David Garland's trilogy (1985; 1990; 2001) represents the most comprehensive explanation of contemporary systems of criminal law and control.

unjust" (Lacey 1999, p.163). Normative theories of the criminal law should not be separated from moral and political theory. The answers we provide to questions within moral and political theory are crucial to the ways we respond to questions in the criminal law.

My contribution in this thesis surely falls short of Lacey's ambitions. Still, it does represent an attempt to bridge part of the gap between the *idea* of the criminal law and its *practice*. I do so by offering an account of the criminal law that confronts parts of its present injustices in the context of broader issues in political philosophy. In this section, I present some of the causes or circumstances that theorists have put forward to explain the origin of these injustices. Once these elements have been presented it will become clearer why, as Lacey suggests and as I try to do throughout this thesis, it is important to address the injustices that take place *within* the institution of the criminal law by adopting an approach that questions broader issues in political philosophy.

3.a *Ill-Governance*

Almost 250 years ago, J.J. Rousseau made a claim that sheds light on the causes of the problems affecting the criminal law today. While considering the legitimate limits of the sovereign power and the sovereign's rights to dispose of the life and death of citizens, Rousseau argued that "frequent harsh punishments are always a sign of weakness or laziness in the Government. [...] In a well-governed State there are few punishments, not because many pardons are granted, but because there are few criminals" (Rousseau 1997, p.65).

Rousseau provides insight into the idea that too much criminal law and too much punishment are due, at least to an important extent, to ill-governance. As opposed to what a healthy state is supposed to do, weak and/or inefficient governance abandons the holistic conception of both the function and source of public policies to understand them reductively, as mere instances of penal regulation and control. This is the penal state, a state that takes the functioning of the criminal law as its primary and, perhaps, only role.

Much more recently, Jonathan Simon has provided an account of the current state of the criminal law along lines similar to Rousseau's. In a series of influential publications Simon has coined the term 'governing through crime' (Simon 2002; 2007). This terminology, although originally applied to the particular case and circumstances of the United States, illustrates well part of the concerns shared by Rousseau, Ashworth, and to some extent, Husak. Simon's core idea is that some traditional and rather informal ways of social control

– like those that exist within the family, the education system and workplaces – have been reduced, making their influence less significant within society. As a result, and given the increase of fear of crime and insecurity, the state has expanded its penal coercive power as a way to counterbalance the lack of control in other spheres. As Simon notices, these two trends – an increase in the fear of crime and a reduction in non-criminal social control – feed each other, so,

> [d]eclining levels of informal social control increase fear of crime (and crime itself). The public's increasing fear of crime drives demands for higher levels of order and harsher measures to accomplish them, but such measures become less effective as their anchors in informal social control decline (Simon 2002, p.1415).

As a consequence, Simon claims that the United States has become "less democratic and more racially polarized", all of which is "exhausting [its] social capital and repressing [its] capacity for innovation". As part of this process, the government has reoriented resources toward the criminal justice system, which

> has resulted in a shift aptly described as a transformation from 'welfare state' to 'penal state.' The result has not been less government, but a more authoritarian executive, a more passive legislature, and a more defensive judiciary than even the welfare state itself was accused of producing (Simon 2007, p.6. Footnote omitted).

This way of accommodating power within the state is an example of ill-governance. The executive augments its authoritative power to the detriment of the representative power of the legislatures. In turn, this is accompanied by the increase of more discretionary practices within the judiciary. Doubtless, Simon's analysis needs to be qualified; he himself says that his terminology and what follows from it "is polemical, and perhaps overstated" (2007, p.4). However, Simon's account provides what I take to be a generally sound description of both our current penal situation and (an aspect of) the processes that have led us to it.

Once we take seriously Rousseau's and Simon's accounts it becomes clear that the problems affecting the criminal law are, to an important extent, the result of the ways in which both the function and scope of action of the state and its institutions are articulated and exercised. A weak state, unable to advance social policies without resorting to penal coercion, or a state that tries to amend, or even replace, social spheres traditionally understood as being separate from the criminal law, are good examples of how our account

of the state and its institutions may have a serious impact on the type of criminal law we have. From these reflections one is forced to conclude that an account of the criminal law that aims to provide a successful answer to the present predicaments of this institution must also offer, beyond considerations exclusively confined to the penal law, an account of the state and its institutions.[21]

3.b *From rehabilitation to incapacitation*

An author who has also provided deep insight into the causes of the current state of the criminal law is David Garland. His celebrated trilogy on the history of crime and social control in the 20th century well complements Rousseau's and Simon's accounts. For what matters here, and putting it in very simple terms, Garland shows that the turning point towards the current state of the criminal law occurred during the second half of the 70s, when the criminal law system was transformed from a penal welfare state model into a control state one.

The criminologies of the welfare state (which comprises of the period between the end of the Second World War and the first half of the 70s) understood crime as the result of the conditions of social deprivation suffered by perfectible human beings. By contrast, Garland argues, control theories of crime (which followed the welfare state penal theories and continue today) emerged from a more pessimistic conception of humankind. Rather than responding through assistance and adjustment of social conditions, control theories saw crime as a normal fact of society resulting from the action of self-interested agents. As a result of this normalisation of crime, the criminal law, rather than aiming to correct and rehabilitate – because there is nothing to correct or rehabilitate – became an instance of mere incapacitation. The ultimate goal is to reduce the opportunities for agents to take advantage of their fellows in order to advance their own self-interested purposes.

These different conceptions of the individual naturally brought about their own distinct ways of dealing with crime and criminals. In the period before the mid 70s, the framework of the criminal law system spun around rehabilitation, the promotion of a system of indeterminate sentences and early releases, the reduction of oppressive control, and an

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21 As it is clear from Lacey's analysis above, more than this needs to be offered if we are going to advance a genuinely comprehensive account of the criminal law and its predicaments. However, and as I have indicated, my aim is to bridge part of the gap that Lacey mentions by grounding my account of the criminal law in an explicit account of the state, society and the individual.

emphasis on the rights of suspects and prisoners. The second part of the decade, in turn, saw a stricter enforcement of sentences and the spread of an emphasis on control as a response to the penal welfare model. As a result, a new culture of crime control emerged, one which expanded its scope of action and influence and which, it was believed, was to be taken as the solution to many of the fears and anxieties that came up in the last part of the 20th century.[22]

The idea that crime is an everyday factor of modern society, and thus not something to be overcome, brought about certain uneasiness – a dilemma – with regards to what the state can and needs to do against crime.[23] This uneasiness, however, did not produce a retrieval of the state from criminalizing and punishing criminal behaviour. Far from it: the state, besides recognising its inability to get rid of criminal behaviour, also realised that a withdrawal from the business of social control, criminalization and punishment would be disastrous (socially, but mainly politically). As a result, the state shifted some of its institutional patterns and stopped attempting to correct or reform the offender. Instead, it took the wrongdoer to be someone to control and incapacitate. Consequently, from the mid-70s onwards we have seen the development of two general phenomena. On the one hand, a constant increase in the number of imprisonments. On the other, an increase in the enactment of laws that seek to both reduce the emergence of opportunities for crime and play the role of expressing the outrage of 'us', the victim of crimes, against 'them', the wicked criminals who put at stake our security and way of living. Although these policies may not really deliver security and order, they at least constitute a way to both reduce the opportunity for crime and function as a public catharsis that blames the criminal and reasserts a sense of community. As opposed to the welfare penal policies, the criminal policies advanced by the penal state do not try to cure, rehabilitate or reform, but prevent, incapacitate and protect.

Similar to ill-governance, this explanation based on the movement from rehabilitation to incapacitation reflects a switch that is largely related to the way we conceive of the state and the individuals that constitute society. My claim is not that we should then

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22 I take too much punishment and too much criminalization to be amongst the main outcomes of the control penal state. However, they are by no means the only contestable developments of the post-welfare penal model. Just to mention others, which are more or less contentious and more or less connected to my concerns here: community-based policing and crime prevention, mandatory sentencing (particularly for repeat offenders), community notifications of released offenders, victims movements. The difficulty of finding a common rationale for these diverse policies and measures is evident and, as Garland puts it, they represent a rather "confusing maelstrom of developments" (2001, p.105).

23 Consider the following passage describing the difficulties in which the officials in charge of crime control in the United States found themselves during the transitional time at the end of the 60's and beginning of the 70's: "Government today is caught in a policy dilemma, a dilemma in which constant and continuing demands for government services are matched by a growing recognition of the inefficiency and ineffectiveness of much of what the government does" (Feeley & Sarat 1980, p.11. Quoted in Garland 2001, p.244)

go back to the welfare state and thereby return to the welfare penal policies, but is simply to show the extent to which the current present condition of the criminal law has to do with our models, understandings and commitments with respect to the state and its function within society.

3.c '*Us*', '*Them*' *and Penal Populism*

A last point that I would like briefly to consider here refers to the current emphasis not on the causes, but on the consequences, of crime. Rather than tackling the deeper sources of criminal behaviours, many penal policies focus on addressing the effects that crime has on victims and potential victims. They do so by, first, implementing practices that are designed to diminish the sense of insecurity and fear that the everyday existence of crime produces, and, second, by marking out a stark distinction between victims and offenders. This is an expression of 'us-against-them' rhetoric.

This way of doing things in penal policy is aptly described by the idea of 'populist punitiveness': "the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance" (Bottoms 1995, p.40). In addition to establishing an exclusionary logic of criminal justice in which 'we', the non-criminals, are distinguished from 'them', the criminals, the most obvious result of these policies is the increase in the use of imprisonment from the 70s onwards. This becomes a particularly striking fact when we compare this period with what happened during the post-war welfare penal state. During the latter period, despite the rise in crime rates, imprisonment rates were kept relatively constant. After the 70s the trend was exactly the opposite: crime rate numbers saw a deceleration whilst the number of prisoners increased substantively. To illustrate, in the United States in 1980 there were 12,064,000 property offences known to the police, and the number of prisoners were 315,974. In 2000, there were 10,183,000 property offences known to the police, whilst the numbers of prisoners increased to 1,331,278 (U.S. Census Bureau No HS-23 (2003)).[24]

A different way to illustrate this exclusionary logic – which I have linked to penal populism – is found in the notion of 'enemy penal law', as the German penal theorist Günter Jakobs has coined it (Jakobs 1985; 2003). Jakobs realised that substantive parts of current

24 This may seem misleading as I am contrasting an absolute number of prisoners with property offences only. However, the numbers for other types of offences also reflect this trend.

Western legislation are directed not towards citizens subject to the criminal law but against 'enemies'.[25] According to Jakobs' account, these enemies are potentially dangerous individuals who do not recognise the authority of the legal system and, as a consequence, do not provide the minimum cognitive reassurance characteristic of law-abiding people.

Of particular relevance for my purposes is Jakobs' identification of the characteristics of enemy penal law. The first characteristic is that enemy penal law punishment tends to be applied prospectively hoping to prevent future harms; second, that enemy penal law punishes disproportionately in the name of security; and third, that it represents a serious undermining of procedural rights. As I take it, enemy penal law represents a radical development in the control state model: the first characteristic expresses the idea that the foci of enemy penal law are the potential consequences of an action. Second, the thought behind having harsher convictions is that incapacitation works: that in order to protect society the dangerous enemy should be separated from us, the law-abiding citizens. And third, enemy penal law divides society into citizens and enemies, where the former benefits from all available procedural protections whereas the latter is a mere target that needs to be neutralised to protect us from the consequences of their actions.

In conjunction with the other two accounts (ill-governance and the incapacitation model), this characterisation offers a general explanation of the current state of the criminal law. Enemy penal law supposes a distinction between 'we' and 'them' that allows the state to pursue its own agenda by excluding those who do not fit. Through this exclusivist approach, and shielded by the argument that such an approach aims at protecting citizens from their enemies, the state seeks both to put forward its own particular goals and to gain approval from scared voters. This is penal populism at its worst, where the political body manipulates the public by appealing to the rhetoric of fear and insecurity.

Although brief and general, these three different accounts – ill-governance, the incapacitation model, and penal populism – provide plausible explanations of the current regrettable condition of the criminal law. As mentioned above, these explanations need to be qualified, as they do not apply uniformly to all penal jurisdictions. Some societies are more responsive than others to the problems of populism, and some socio-political structures are more prone than others to ill-governance, enemy penal law, or incapacitation policies. Presenting a more precise explanatory framework of the current predicaments of the criminal law is well beyond the scope of this chapter. Instead, I have presented some plausible

25 On the general application of the enemy criminal law label see Gómez-Jara Díez 2008.

explanations that apply more or less adequately to most penal jurisdictions in modern liberal democracies.[26]

A normative model of the criminal law that wants to succeed in amending this institution must not turn a blind eye to these explanations, and ought to take seriously both the idea that these problems go well beyond the internal structure of the criminal law and that their solution supposes answering general questions about the state, its function and scope of action. Without answering those questions any attempt to amend the problems of the criminal law is doomed to fail.

4. Conclusion

This introductory chapter has done different things. First, it has offered a brief account of the regrettable present condition of the criminal law, marked by too much punishment and too many penal prohibitions. These conditions feed a system characterised by the overpopulation of prisons and the strengthening of the penal state and its policy of fear and control. All this makes evident the need to reform this state institution.

Second, it has introduced the specificity of the criminal law: its coercive, condemnatory, and public nature. Put all these elements together and we obtain a general account of the object of study of this thesis. Any amendment or re-articulation of the criminal law, like the one I shall propose in subsequent chapters, must be consistent with the idea that the criminal law is a set of coercive rules enforced by the state the violation of which requires an act of condemnation by officials in the name of the citizens of the polity.

And third, the chapter has offered three different but complementary explanations of the causes of the criminal law having gone wrong. Although surely incomplete, these explanatory factors – ill-governance, an emphasis on incapacitation, and penal populism – represent plausible and adequate accounts of what has contributed to the present condition of the criminal law. More importantly, each of these explanations suggests that any attempt to reform our penal institutions must focus not only on the internal aspects of the criminal law, but also on our understanding of the state, its functions and spheres of action. This is a central idea justifying most of the second part of this thesis (chs.3-5).

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26 For a good account of many of the different factors that explain the variances in penal dynamics in modern societies, see Lacey 2008.

CHAPTER TWO

Overcriminalization: Definition, Forms and Problems

> [I]njustice is pervasive throughout the criminal domain. [...] Unfortunately, [...] contemporary decisions about criminalization conform to no normative principle whatever. The criminal justice system that many commentators have worked so hard to improve is being used for perverse and immoral ends.
>
> Douglas Husak, *Overcriminalization*, p.vii

The first chapter of this thesis suggested that the criminal law we have must be reconsidered and amended. Each of the problems mentioned and each of the elements contributing to produce these problems deserve serious and careful consideration. In effect, a successful amendment of our criminal law system must approach these realities in a comprehensive way; it is not simply naïve, but mistaken, to think that we can solve any of these difficulties without considering the others. A successful reform of the criminal law system is indeed a complex multifactorial task.

This thesis, however, has a much more modest aim. Rather than offering a comprehensive account of, and response to, the different problems of the criminal law, this work aims to contribute to rethinking the criminal law by re-articulating this institution from the point of view of a moral and political model that takes individuals seriously and that, simultaneously, responds to one specific and central problem of the criminal law today. More concretely, my aim is to re-articulate the criminal law in a way consistent with values and principles of classical liberalism to minimise the predicament of overcriminalization. It is the problem of overcriminalization that draws our attention in this chapter.

Focusing on this specific problem is not arbitrary. It is not the case that overcriminalization is only one among other predicaments faced by our systems of criminal law. As we will see, the problem of overcriminalization is at the base of most of the difficulties faced by these systems; it permits strengthening the penal state by transforming and expanding the way in which criminal statutes are constructed and used. In doing so, the criminal law becomes an almost limitless instance of state coercion that permits the

unprincipled criminalization of conduct. These considerations are enough to make the problem of overcriminalization a central target of any liberal theory of the penal law.

This chapter is divided into four main sections. The first one introduces a preliminary definition of overcriminalization. The second moves on to consider five different forms or instances of overcriminalization. Sections three and four consider a series of problems that these instances of overcriminalization produce and that explain why this phenomenon should be a central target for theorists of the penal law.

1. What is Overcriminalization?

At first glance, the notion of overcriminalization seems to be self-evident: it indicates the unprincipled extension of the practice of criminalizing conduct. Although this understanding is surely correct, when considered more carefully, the term turns out to be more complex than we may think. Indeed, the diversity of issues to which theorists and practitioners attach the label of overcriminalization suggests that the precise meaning and use of the term is more problematic and blurry than it may at first seem.

To illustrate, consider the following two accounts of overcriminalization. Erik Luna has argued that a definition of overcriminalization should include (1) untenable offences, (2) superfluous statutes, (3) doctrines that overextend culpability, (4) crimes without jurisdictional authority, (5) grossly disproportionate punishments, (6) excessive or pretextual enforcement of petty violations (Luna 2005, p.717). From this one can plausibly conclude that the phenomenon of overcriminalization covers most of the different stages of the criminal justice system, including jurisdictional and legislative matters, use of power by the police, proportionality of sentencing, and punishment. Compare now Luna's account with Geraldine S. Moohr's much less ambitious definition: "a law overcriminalizes when the costs of treating conduct as a crime exceed the benefits of the new criminal law" (Moohr 2005, p.785).

What links these two accounts is the fact that both rightly confine the question of overcriminalization to matters primarily related to the system of the criminal law (so, for example, overcriminalization is not about the overexpansion of non-penal coercive systems of control). Moreover, both see overcriminalization as emerging from issues that go well beyond penal statutes themselves to include other stages of the criminal system. Although Luna is more explicit about this last point, Moohr's definition seems to suggest (or at least

does not deny) that the cost/benefit ratio of treating conduct as a crime is to be reckoned by taking into account spheres of law, and spheres perhaps even beyond the law, that are different from mere criminalization. In other words, Moohr (and to some extent Luna) seems to contend that we cannot determine when overcriminalization occurs by looking at statutes only, so a wider outlook is required. In turn, the most evident difference between these two approaches results from the different normative strategies backing each position: whilst Moohr's account leans towards some version of consequentialism – defined in cost/benefit terms – Luna's seems to be keener on defining overcriminalization on grounds of some intrinsic feature of this phenomenon (see Moohr 2005, pp. 785-787 and Luna 2005, pp.712-719).

Independent of the differences and resemblances between these two accounts, what they illustrate is that overcriminalization is a complex multifaceted concept that involves different emphases and considerations. In the absence of a standard and unequivocal understanding of this phenomenon, it is therefore necessary to advance an account of the precise way in which I will use the term throughout this thesis. Without it, the apparent self-evident nature of overcriminalization may make us confused when asking what exactly we ought to address in an attempt to reform a system characterised by overcriminalization.

For our purposes, overcriminalization refers to the abuse of coercive power by the state through the enactment of criminal statutes. Although this is a preliminary definition to be completed through the course of this chapter, it is sufficiently determinate to differentiate my use of overcriminalization from the two accounts briefly presented above. Unlike Luna's and Moohr's, this account establishes that overcriminalization, irrespective of its consequences in other institutional spheres, is a phenomenon primarily and mainly related to the enacting of criminal laws. According to my definition, and independent of the likely effects that overcriminalization may bring about in other spheres of the law, we do not need to look anywhere else but to penal statutes themselves to determine whether or not we are facing overcriminalization. As I see it, overcriminalization is a phenomenon confined specifically to the type of criminal statutes that constitute that system. This is to say that, although a system of the criminal law may be characterized by overcriminalization, this term is ultimately and more adequately predicated of individual statutes only. Put bluntly, overcriminalization is a phenomenon that blocks a decent society from having the type of penal statutes it ought to have.

2. Five Forms of Overcriminalization

In this section I consider five forms of penal statutes that, under certain circumstances, qualify as instances of overcriminalization. The following analysis, then, does not pretend to be an account of the necessary and sufficient conditions of overcriminalization; it merely directs our attention to some penal developments where we might discover overcriminalization.

2.1 *Overlapping Offences*

These offences are a type of statute that criminalizes conduct that has already been criminalized by a different statute within the same jurisdiction. William Stuntz, focusing on the United States, has pointed to this phenomenon by saying that codes "are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions" (Stuntz 2001, p.507). As a matter of fact, this phenomenon is getting more common, since "[l]egislatures regularly add to criminal codes, but rarely substract from them" (ibid).

The United States is especially prone to enacting overlapping offences given the federal nature of its legal structure. As one commentator emphatically puts it:

> Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offense and drug offenses. In many instances, federal law overlaps almost completely with state law, as is the case with drugs offenses (Beale 1995, p.997-8. Footnotes ommitted).

Although this may appear as an obvious violation of basic principles of the rule of law, the fact is that coexistence of state and federal legislatures makes the creation of statutes that focus on the same act likely which, given a 'dual sovereignty doctrine' (see Rudstein 2004, pp.84-92), permits double prosecution without violating double jeopardy prohibitions (e.g., *Heath v. Alabama* (1985) and *United States v. Lara* (2004)).[27]

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27 In *Heath*, the U.S. Supreme Court ruled that the doctrine of the dual sovereignty (sovereignty of the Federation and the states) precludes the double jeopardy clause of the First Amendment from prohibiting one state from prosecuting and punishing an individual for an act of which he had already been convicted and sentenced in

But overlapping offences are not only the result of a peculiar legal structure. They can emerge in different legal contexts and traditions, irrespective of whether the system where they exist is federal. Douglas Husak, for example, ventures that this proliferation sometimes takes place "because legislators appear to be unaware of the prohibitions that already exist in their jurisdictions", so they blindly and constantly recriminalize without resort to preexistent statutes (Husak 2008, p.37). However, and irrespective of this epistemic problem, it seems that overlapping offences are the product of something more than mere ignorance. For example, on many occasions, overlapping offences relate to penal populism (see ch.1, sec.2.c). Governments use criminalization in order to satisfy the demands of the public, particularly after some criminal conduct has received great public attention. Since duplicating statutes generally renders sentences harsher, overlapping offences make the state more popular with those voters who desire tough-on-crime type of policies (see Stuntz 2001, p.509). Moreover, the mere fact that the executive and the legislative are doing something against crime – proposing bills and enacting law – makes them appear as responsive to the expectations of the citizens affected by the wrongs of criminal conduct.

Besides cases of double sovereignty and penal populism, other typical cases of overlapping offences occur due to the further specification of other existing penal statutes (this is common in gender or hate crimes – see chapter 7 for an example). But overlapping offences are not reduced to these specific matters either. To illustrate, consider the Joint Committee for the Draft Bribery Bill Law in the UK. In its first report on the Bill – a bill which the members of the Committee "strongly support" (Joint Committee 2009, p.5) – the Committee explicitly states that "[t]he criminal law includes a wide range of offences that are likely to overlap with the proposed bribery offences under the draft Bill" (ibid, p.23). The Committee, in effect, identifies at least five different sources of law that overlap with the Bill under consideration: the common law offence of misconduct in public office, the Theft and Fraud Acts, the Political Parties, Elections and Referendum Act 2000, the Representation of the People Act 1983 (which explicitly includes the offence of bribery), and the Honours (Prevention of Abuses) Act 1925. Nevertheless, the existence of all these statutes regulating similar conduct did not stop the Committee from showing its strong support for the Bill.

Overlapping offences, we must conclude, have various causes and apply to different contexts and purposes. They are a pervasive source of overcriminalization.

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another state. In *Lara*, the U.S. Supreme Court ruled that both an Indian Native American group and the United States could prosecute an Indian for the same acts that constituted crimes in both jurisdictions.

2.2. *Ancillary Offences*

Ancillary offences represent a second instance of overcriminalization. These offences

> are characterized by group activity or conduct leading up to, or involved generally in, the commission of substantive offenses, or they define as criminal, conduct practiced in the aftermath of a primary harm crime. Because they typically bear some kind of direct or indirect auxiliary relationship to the primary harm offenses, they are described here as *ancillary* crimes (Abrams 1989, p.2).

The main function of ancillary offences is to facilitate the role of the prosecutorial part, especially when the offence of which these offences are ancillary is for some reason difficult to prosecute. Consider the following case. While escaping from the police, an illegal drugs trafficker, *T*, throws a bag with thousands of British pounds into the backyard of his neighbour, *D*. *D* knows that *T* is part of a gang and suspects, but does not know, that this money corresponds to the proceeds of *T*'s illegal activities *and* the money corresponds to *T*'s illegal proceeds.[28] After getting this money, *D* decides to travel to France so *D* exchanges this money into Euros, buys a Eurostar ticket and goes away. *T* succeeds in escaping and the police decide to track the money they knew was in *T*'s house. Their investigation demonstrates that *D* has seized *T*'s money. On his return from France, *D* is charged. According to the Proceeds of Crime Act 2002 (c.29), the mere fact that *D suspects* that this is 'dirty' money makes *D* indictable. According to the Act, *D* could be indicted for concealing, disguising, converting, transferring and removing criminal property from England (Home Office 2002, sec.327 (1.a-1.e)). In addition, *D* could also be indicted for using, and having possession of criminal property (sec.329 (1.b and 1.c)), and for not disclosing his suspicions (sec.330).

In this example, the core offence that the prosecution is interested in – illegal drugs trafficking – cannot be prosecuted and the existence of these ancillary offences in the Act (criminalizing conduct that would otherwise be innocent – e.g., exchanging money, buying a train ticket, going abroad) allows the prosecution to allege some success in tackling the core offence.

Ancillary offences also fulfil other functions. They help to increase sentences, since defendants can be charged, prosecuted and sentenced for more types of offences (see *D*'s

28 In *Regina v. Montila and others* (2004), the House of Lords decided that a person could not be convicted for money laundering if, although believing that his transaction was an act of money laundering because the property dealt was the result of illegal proceedings, the property dealt was actually *not* the result of illegal proceedings.

situation in the case just considered). They are also useful to consolidate plea bargain practices, since a person charged with multiple offences is more likely to plea guilty than if he were charged with only one offence. For various reasons, reasons briefly presented in chapter 1, these developments are judged positively by the penal state and the governing-through-crime strategy. As a consequence, ancillary offences have become a well-cemented instance of overcriminalization in current penal legislation.

2.3 *Inchoate Offences*

Overcriminalization may obtain also in statutes that incorporate inchoate offences. "An offence is inchoate", Douglas Husak has succinctly put it, "if it proscribes conduct that does *not* cause harm on each and every occasion in which it is performed. More precisely, some act-tokens of the act-type proscribed by an inchoate offense do not produce harm or evil" (Husak 2008, p.160).[29] Thus, attempts, conspiracy, posession, reckless behaviour or incitement are conducts generally covered by inchoate offences and that, in some circumstances, may represent an instance of overcriminalization.

Inchoate offences, as Husak's account suggests, do not depend on the commision of the *actus reus* that the statute ultimately aims to avoid; rather, they derive from the notion of a given complete offence, and not from the completed offence itself. For example, under the provisions of a statute that criminalizes attempts to murder, I may be criminally liable if, while waiting on the platform, I try to push someone towards the tube line to kill him, even if I do not kill him and even if I do not actually succeed in pushing him.[30]

This type of offences posits interesting theoretical and practical questions related, for example, to what counts as an attempt. For example, does an impossible attempt count as an attempt if, say, I try to push someone on the platform when it is impossible for me to do so successfully given that he is more than 100 feet away from where I am? Or, does it count as an attempt to try to kill that person by blowing at him or trusting in telepathy in the mistaken belief that these techniques are enough to cause him to fall onto the line? Similarly for incitement: would it count as incitement to express privately racial biases that include the promotion of violence in front of a very suggestable child or adult? In effect, a crucial part of

29 The *Modern Penal Code* has put it less succinctly: Inchoate offences "have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do" (American Law Institute 1985, p.293).

30 I use this case as an illustration of an inchoate offence, not as an illustration of overcriminalization.

what makes these offences instances of overcriminalization (or not) depends on the answers we offer to these queries.[31]

The role these offences have within a system of criminal law varies, but as happens with most cases of overcriminalization, one of their central purposes is to serve the interests of prosecutors in achieving a condemnatory sentence. For example, when offences include inchoate features, prosecutors do not need to demonstrate the completion of the criminalized act, but only intent on part of the defendant. Although the latter may seem more difficult to demonstrate than the former, the underdeterminacy of what counts as relevant intent facilitates the task of the prosecution. In addition, and complementing the previous point, the role of prosecutors is helped by inchoate offences to the point that legislatures may sentence some types of attempts with the same harshness as consummated crimes. Consider, for instance, the Model Penal Code which establishes that "attempt, solicitation and conspiracy [all types of inchoate offence] are crimes of the same degree as the most serious offense that is attempted or solicited or is an object of conspiracy" (American Law Institute 1985, vol.2, p.484).[32]

It has also been argued that the function of inchoate criminal offences is to express repudiation of those who defy the law, even when their defiance does not produce a tangible or substantive harm. George Fletcher has pointed to this idea (which he does not embrace) and explained that, according to it, "[t]he purpose of the criminal law should be to protect the rights of orderly citizens by moving swiftly against those who reveal themselves as enemies of the legal order" (Fletcher 1998, p.179).[33]

A third way to consider the role of inchoate offences is by pointing to the existence of some basic element of human welfare that is not adequately protected by standard penal law (harm-centred penal law that is) and that, consequently, demands the creation of alternative penal devices. This position is defended by Claire Finkelstein. She argues that when someone "inflicts a risk harm on another damages that interest [i.e., the legitimate interest agents have in avoiding unwanted risks], thus lowering the victim's baseline welfare." She contends "that risk harm is a form of harm that is independent of outcome harm, on the grounds that minimising one's risk exposure is an element of an agent's welfare" (Finkelstein

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31 As an illustration of the theoretical complexity involved in inchoate offences, see Antony Duff's taxonomy of endangerment offences (an example of inchoate offences) in Duff 2005. Examples of endangerment offences are careless driving, selling a gunfire to the mentally unstable, causing an explosion that put people's lives at risk, carrying a grenade in a public space.

32 For a position critical to this doctrine in the criminal law see Kadish 1994.

33 Note that this language is reminiscent of penal populism and enemy penal law, as presented in ch.1.

2003, p.966). According to this account, risk-of-harm inchoate offences are necessary to protect what standard harm-centred penal law fails to protect.

Independent of the fact that there is something to Finkelstein's proposal, whether or not laws of risk (or laws of orderly citizen protection, or any other type of inchoate offences) represent an instance of overcriminalization depends on the normative account of the criminal law and its functions. Therefore, before concluding whether a specific inchoate offence *is* an instance of overcriminalization, we need to consider the details of that normative account. That is what I offer in subsequent chapters. In any case, and this is my point here, independent of what our best normative models establish, inchoate offences do represent a fertile ground for the improper expansion of the criminal law.

2.4 *Vicarious Liability Offences*

A fourth type of offence that may count as an instance of overcriminalization is vicarious liability offences. "We speak of vicarious liability when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault" (Fleming 1957, p.353). As John Fleming's definition suggests, vicarious liability offences have strict liability features, so that the prosecutor does not need to demonstrate fault on the side of the defendant, thereby leaving the state of mind of the latter in a secondary, sometimes irrelevant, place.

The origins of vicarious liability are in non-penal areas of the law. Indeed, it is most commonly applied in civil cases (see Leigh 1982, pp.11-26 and Fleming 1957, ch.17). To illustrate with a recent and groundbreaking civil case: in *Majrowski v. Guy's and St Thomas' NHS Trust* (2006), the House of Lords unanimously dismissed an appeal by endorsing vicarious liability principles. According to Lord Nicholls' opinion in the case, "employers are to be held liable for wrongs committed by their employees in the course of their employment" (*Majrowski v Guy's and St Thomas' NHS Trust* (2006) §9). Thus, given its non-penal genealogy and general application, it is helpful to begin an account of penal vicarious liability by resorting to its non-penal rationale. Consider the following passage by Fleming:

> a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise, that the master is better able to compensate the accident victim than the less pecunious employee, and that the rule advances the

> policy of wide distribution of tort losses among that section of the public which benefits from the enterprise, the employer being the most suitable channel for passing on the loss through liability insurance and higher prices (Fleming 1957, p.354).

Thus, the basic rationale of vicarious liability is to facilitate and make fairer the enforcement of some types of civil legislation by permitting an easier transfer of resources in the form of compensations.

Despite its non-penal origin and general application, vicarious liability has found a place in penal statutes. Examples of this are its use in corporate criminal liability[34] and in the English *Education Act* 1996. The latter establishes that "failure to secure regular attendance at school of registered pupil" is an offence (Education Act 1996, s.444), so responsibility is attributed to the defendant for the misconduct of another and independent of fault on the defendant. Whereas in the civil sphere compensation is the aim of vicarious liability, within the criminal sphere this type of offence results in the facilitation of conviction. By leaving fault as a secondary and non-necessary element of liability, vicarious criminal liability offences permit prosecuting and convicting agents simply for their link (loosely understood) with a wrong that is deemed criminal.

This expansion of liability is well illustrated in a United States act of 2003, finally defeated by Congress.[35] The so-called *Clean-Up Act* established that:

> [w]hoever, for a commercial purpose, knowingly promotes any rave, dance, music, or other entertainment event, that takes place under circumstances where the promoter knows or reasonably ought to know that a controlled substance will be used or distributed in violation of Federal law or the law of the place where the event is held, shall be fined under title 18, United States Code, or imprisoned for not more than 9 years (House of Representatives 834 (2003), s.305).

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34 For a general critical analysis of contemporary corporate criminal liability see Khanna 1996. See also *The Queen v. Great North of England Railway Co.* (1846) and *State v. Morris and Essex Railroad Co.* (1852) for landmark cases of prosecutions of private corporations. For the historical development of corporate criminal liability see Bernard 1984.

35 Husak mentions this act in 2008, p.43, but he confuses it with the *Rave Act*.

Thus, according to this act, the organisers of most (if not all!) rave parties should be prosecuted only because they know, or ought to know, that people use drugs during those events.

As these examples show, vicarious criminal liability serves as a handy tool to impose coercive measures even if (a) the relevant causal agent of the wrong is not liable (e.g., children, the mentally ill) or (b) the principal agent in the criminalized action cannot be successfully prosecuted and convicted. As with inchoate offences, whether or not an instance of vicarious criminal liability represents an instance of overcriminalization depends on the function and normative account of the criminal law. However, independent of what that normative model establishes, it is clear that vicarious criminal liability represents a favourable development for the expansion of the criminal law in the form of overcriminalization.

2.5 *Jurisdictionally Mistaken Offences*

The last type of offence I shall consider here is what I call jurisdictionally mistaken offences.[36] This type of offences treats as a criminal offence what should either be a civil offence or not an offence at all. This type of mistake connects neatly with what Jonathan Schonsheck has called a 'topographic error' (Schonsheck 1994). This error, he says, "is committed when one, for example, assumes that showing 'action *a* is not in the Sphere of Individual Liberty' is indeed sufficient to prove 'the state may criminalize (or private citizens interfere with) action *a*'" (Schonsheck 1994, p.16). Part of the troublesomeness of these offences is that they emerge as a result of this ungrounded assumption and support the expansion of the criminal law into areas that should be beyond its jurisdiction.

Examples of this type of offences are statutes that criminalize conduct that, all things equal, we cannot reasonable justify as being part of the business of the criminal law. Consider the hypothetical criminalization of the act of moving the king three spaces while playing chess, the (unfortunately less hypothetical) criminalization of same-sex sexual intercourse, or the criminalization of beliefs. These cases are jurisdictionally mistaken offences because they criminalize conduct that is not part of what the criminal law should criminalize or of what the law should regulate at all. Respectively, these actions pertain to

36 This is a sympathetic label, as it is not clear that these developments are really *mistakes*, but rather intentional strategies within the penal state.

the spheres of the rules of chess, personal morality, and individual conscience, all of which are *prima facie* beyond the proper jurisdiction of the criminal law.[37]

To illustrate jurisdictionally mistaken offences consider Anti-Social Behaviour Orders (ASBOs), civil orders that include a series of features characteristic of the criminal law.[38] One commentator, when referring to these orders, has said that they are "the civil proceedings with the most severe potential consequences for the liberty of the defendant, consequences which will usually have punitive effect" (Ramsay 2006, p.38 fn.42). This claim, suggesting the mingling of the civil and the criminal, can hardly count as an exaggeration. The process for an order can be made on conviction in criminal proceedings (in a magistrates' court or the Crown Court). In those circumstances, "an agency concerned in the case, such as the police, may propose prohibitions or the court may draw them up of its own volition" (Home Office 2006, p.30). The defendant's fate is then left to the will of these agencies, whose prohibitions can include curfews, restriction of movement, restriction of action, and restriction of possession for at least two years (which is the minimum duration of an order).

In addition, the Home Office has argued that agencies should be able to take action "before the anti-social behaviour takes place rather than waiting for a crime to be committed" (Home Office 2006, p.31). Thus,

> If faced with a defendant who causes criminal damage by spraying graffiti, then the order should be aimed at facilitating action to be taken to prevent graffiti spraying by him before it takes place. For example, the prohibition could prevent the offender from being in possession of a can of spray paint in a public space [...]. This makes it clear to the defendant that he has lost the right to carry such a can for the duration of the order (Home Office 2006, p.31).

The consequence of this recommendation by the Home Office is that were the defendant carrying a can on the street within the following two years of the prohibition, he would be committing a criminal offence which is arrestable, recordable and ultimately, punishable. Insofar as they permit the criminalization of trifles, ASBOs, have features that plausibly count as jurisdictional mistakes. Yet, the Home Office advises that these breaches be taken

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37 I am only stipulating these conclusions here by resorting to what I take to be well-grounded intuitions. A principled argument grounding these claims is what I develop in part II of this thesis.

38 These orders were introduced by section 1 of the Crime and Disorder Act 1998.

seriously, so they recommend that "[a]gencies and courts should not treat the breach of an order as just a minor offence" (Home Office 2006, p.48).[39]

What this example ultimately aims to show is how certain type of legislation lead to the intrusion of criminal elements into civil law spheres and of the criminal into areas of behaviour that should have nothing to do with penal commands and procedures. When it takes place, such an intromission represents a case of mistaken jurisdiction and, thereby, an instance of overcriminalization.

It is worth adding some brief remarks in concluding this section. First, this analysis should not be seen as presenting an exhaustive picture of all possible instances of overcriminalization. The five instances considered are certainly the most salient and pervasive forms of overcriminalization in present penal legislation, but we must be alert to other possible developments in the criminal law that could produce new forms of overcriminalization (preventive penal justice comes to my mind as an apt example).

Second, it is worth noting that these types of offences do not necessarily exclude each other, so statutes may be hybrids. For example, according to the English *Knives Act* 1997, it is an offence to market a knife while indicating that it is suitable for combat (s.1.1.a). This offence is certainly an inchoate, ancillary and, under certain circumstances, a vicarious and jurisdictionally mistaken offence. Similar conclusions can be derived from my examples of ASBOs and the *Clean Up Act*.

Finally, I would like to re-emphasise that whether a given offence falls within one or many of the particular labels above is, on many occasions, a contestable matter. In effect, some of the examples and conclusions provided may look too quick (see fn.37 above). Someone may reasonably object, for example, that there are circumstances in which the criminalization of beliefs and/or their expression do form part of the business of the criminal law and that, therefore, a statute criminalizing the expression of certain beliefs does not represent a jurisdictionally mistaken offence (Holocaust denial criminal laws come to mind as an apt example). I do not deny that these are difficult and contestable matters. However, and to make sure that I am not begging any question, I would like to recall that the aim of this section has only been to illustrate the sort of cases that may count as instances of

39 Of course, what is criminalized in this example is not carrying the can of paint, but breaching the Order and, it may plausibly be argued that breaching judicial orders is something that is legitimately to do with the criminal law. I cannot disagree, and that is why my language on this matter is rather qualified. I am not claiming that any ASBO represents an instance of overcriminalization but rather that some elements of these Orders are prone to produce or contribute to overcriminalization.

overcriminalization. Whether the examples are apt and convincing is a different matter that should be resolved in the following chapters. It is only then that an argument is offered about the limits of criminalization.

3. The Problems of Overcriminalization

In presenting five different forms of overcriminalization, the previous section has hinted at some of the elements that make overcriminalization worrisome. This section further expands on these elements by considering a series of problematic consequences that may follow from this phenomenon.[40]

3.1 *Too Much Punishment*

Douglas Husak, in a recent important contribution to the question of overcriminalization, has argued "that overcriminalization is objectionable mainly because it produces too much punishment" (Husak 2008, p.3). He makes a convincing case for the connection between the expansion of the criminal law and the expansion of the infliction of punishment. In order to cement this connection, he argues, one needs to look at the other stages of the criminal law process. Hence, Husak focuses on those bodies "where power *really* is allocated in our criminal justice system today" (Husak 2008, p.21), namely the police and prosecutors. The bottom line is that the powers these bodies enjoy are largely discretionary, and it is this discretion in the use of power which allows too much law to produce too much punishment (see Husak 2008, pp.21-32).

For this argument to have adequate explanatory power one should establish, apart from showing the connection between too much criminal law and too much punishment, why and how the excessive application of punishment is objectionable. This is not something I am going to do here.[41] For our purposes it will suffice to say that punishment is the most coercive practice of social control in the modern state. Under normal conditions – conditions different from those of the imposition of punishment – restricting freedom of movement, taking away civil, political and moral rights, terminating the life of an individual

40 The following analysis – with the exception of the discussion of the normative problem in section 4 – draws heavily on other authors identified in the text.

41 There is a massive literature on punishment and the moral problems it involves that discusses this issue. See for example Duff and Garland 1994, Matravers 2000, Honderich 2006.

(in short, all those things that the state may do to those whom it convicts of criminal offences) represent a serious violation of people's rights and dignity. Then, if the practice of punishment is excessive – beyond the baseline defined by our best normative model – the practice itself becomes deeply objectionable and in need of urgent reform.

3.2 *Unequal Treatment*

A second problem emerging from the phenomenon of overcriminalization is that it may involve unequal treatment for similar cases. If we combine, for example, overlapping offences (each of which has an associated penalty) and the existence of great levels of discretion on the side of the prosecutorial and judicial bodies, the result is, as one commentator has put it, that sentencing becomes "the rough equivalent of a penal lottery, where a few unlucky individuals 'win' a far harsher term than their fellows" (Beale 2005, p.766). Similarly, if we add to the existence of overlapping offences the enforcement of ancillary offences, we may end up with a state of affairs in which offenders can hardly know their fate before the prosecutors and court conclude their business. To a large extent, it is up to these bodies to decide what is the crime that a given defendant has committed, even if that defendant has performed the same type of conduct as a different (and perhaps already punished) defendant.

Consider the *New Jersey Comprehensive Drug Reform Act of 1986*. This Act mandated more severe sentences for those convicted of drug crimes committed within 1,000 feet of school property.[42] Under this Act, Theresa Ogar was convicted with possession with intent to distribute heroin. What it is striking is that the acts for which she was convicted occurred while visiting an inmate at a county jail that happened to be less than 1,000 feet from school property (*State v. Ogar* (1989)). This Act – an example of an inchoate offence – allows unequal treatment because it permits that a different defendant that commits the same type of action as Ogar – intent to distribute drugs – receives a more lenient sentence only because his action did not happen within 1,000 feet of school property.

Unequal treatment for similar cases is an objectionable practice. It is not only that it makes a system of law unpredictable, but that it makes it something seriously different to what the modern institution of law is meant to be. At this point, it may be worth recalling

42 The Assembly Bill No 2762/Senate Bill No 1866, passed in December 2009, amended this Act and established that the court may waive or reduce the minimum mandatory sentences for this type of offence.

the original rationale of the codification of our legal systems. As J.M. Kelly put it, when the French *Code civil* came into force at the very beginning of the XIXth century "[t]he leading idea [was] to exclude uncertainty and arbitrariness in the administration of law, and for that purpose [the French codifiers] wished to reduce as far as possible the interpretative and creative function of judges, which they distrusted" (Kelly 1992, p.312). Predictability, regularity, and clarity are all core features of what we generally understand by and take to be the law. Indeed, they are at the very heart of the principle of 'legality' (see, for example, Fuller 1969). If the criminal law, where individuals are subject to coercion and condemnation by the state, is not characterised by these central features and, instead, we conclude that "the ultimately important influences in the decisions of any judge are the most obscure, and are the least easily discoverable [...]" (Frank 2009, p.123), then it is fair to say that something has gone seriously wrong with this institution.[43]

3.3 *Undermining of the Rule of Law*

Closely connected to this last worry is the idea that overcriminalization undermines the ideal of the rule of law. To this respect, let us focus on two general principles of the rule of law:

1. The state can coerce its members only through the enforcement of known, limited and certain laws.

2. Law should apply equally to all.

Consider the three components of the first principle (the knowledge, limitation, and certainty clauses). On pain of violating the knowledge clause, the rule of law supposes that laws are not to be retrospective. Similarly, laws should respect, and then not interfere in, certain private spheres of people's lives; when the law is permitted to extend itself to cover any sphere of social reality, the limitation clause is infringed. In turn, the certainty clause supposes that what results from following (or not) the law is the possibility of reasonably predicting the way in which the state and others will behave. The object of the law, it has been argued, "is uniformity of action, so that one member of the society may know how, in certain circumstances, another is likely to behave [...]" (Wade 1941, p.185). Uncertain laws do not make reasonable predictability possible and, thereby, violate the certainty clause that ought to shape the law.

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43 Of course, American legal realist *à la* Frank would not find this lack of predictability and certainty as problematic as I suggest here.

Consider now the second principle. In this respect, I believe Friederich Hayek's account is particularly insightful: "The ideal of equality of the law is aimed at equally improving the chances of yet unknown people but incompatible with benefiting or harming known persons in a predictable manner" (Hayek 2009, p. 184). Thus, the central idea of this principle is to limit arbitrariness and partiality and permit the equal enjoyment of the benefits that the law provides. A law that, for example, is designed to favour some individuals and disadvantage others is, thus, a law that clearly contravenes this principle.

Overcriminalization damages these principles in various ways. A system of law that is left to the wishes of certain particular bodies is, as suggested above, one of the most obvious ways in which this damage takes place. But there are others. Consider jurisdictionally mistaken offences, in particular those that borrow elements from criminal standards and procedures to shape other branches of the law. In these cases it looks as if legislators, in order to achieve governmental aims, make use of whatever means are available, regardless of whether this use trespasses on, and blurs, important distinctions between criminal and civil procedures and fails to pay proper attention to the limits of the law. This strategy represents a violation of the limitation clause and, possibly, of the principles of certainty and equality that ought to govern a system of norms guided by the rule of law.

Frederic W. Maitland provides a nice example of these problems when criticising the English *Camera Stellata*. The Star Chamber, Maitland says, "was a court of politicians enforcing a policy, not a court of judges administering the law" (Maitland 1948, p.263). The Chamber, with its secret sessions, abuse of power, and unaccountable procedures, is an example of a court of law dedicated to the interests of a faction and not to the rightful application of the law. Maitland's critique of the Chamber correctly suggests (indirectly reminding us of the dangers of the penal state) that honouring the rule of law involves separating our partial interests from our commitment to the law, where the law is constructed as a principled system of rules.[44]

Furthermore, when legislators create superfluous statutes (either in the form of overlapping offences or statutes that criminalize conduct that should not be the business of the criminal law at all), they contribute to the perception of the law as lacking in importance and dignity. In the face of those who have an obligation to obey the law, this may amount to the weakening of the law's authoritative power. If we consider that the rule of law will only

44 There is much to be unpacked in this last claim, which I cannot do here. Instead, I simply refer to another passage by Hayek that, I think, illuminates this matter: "The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal" (Hayek 2009, p.181).

remain in place if legislators and individuals subject to the law see it as a genuine source of authoritative binding commands, this weakening of the law's authority is a serious problem.

Finally, the overexpansion and unprincipled multiplication of the criminal law overcomplicates the system and makes it look as if it is something to be deciphered, as opposed to something to be clearly grasped. The layman – and the criminal lawyer – may become subject of a criminal law that he does not know (and, even if he did know, could not be sure to understand), with the frightening result that he may become a criminal without even knowing it. The knowledge and the certainty clauses of the rule of law are clearly violated by this aspect of overcriminalization.

3.4 *Waste of Resources*

A last consequence of overcriminalization I shall very briefly mention here relates to the waste of resources it involves. The effective enforcement of the criminal law (overcriminalized or not) requires spending an extraordinary amount of time, money and infrastructure. For example, according to the U.S. Department of Justice, prison expenditure in 2001 was U$ 29,5 billion, and the operating costs of state prisons per inmate averaged U$ 22,650 (U.S. Department of Justice 2004, pp.2-3).

Of course, the state must spend important resources on the criminal law system. However, this does not mean that we should not criticize the fact that an overcriminalized criminal law forces the state to direct to this system more resources than it ought, only because the system cannot cope with its own unprincipled, unfair and unjustified nature. In addition, an overcriminalized system demands not only more resources but also, given circumstances of scarcity, takes resources that could be allocated to other institutions and policies (e.g., health or education). Although discussing the percentage of the state's total resources that should be allocated in the criminal system is an empirical question that goes well beyond my purposes here, it is clear that transferring more resources to a system that faces the serious difficulties we have considered is problematic and must be questioned.

4. The Normative Problem of Overcriminalization

The previous section considered four different worrisome consequences of overcriminalization. In this last section I shall address at length another problem that, unlike

the ones just discussed, inheres within the phenomenon of overcriminalization. This problem, which I dub the normative problem of overcriminalization, distinguishes itself from those considered above in that the wrongness that it represents does not emerge as a *consequence* of overcriminalization, but is rather *inherent* in it.

As a way to illustrate this distinction, consider two examples. First, the idea "that overcriminalization is objectionable mainly because it produces too much punishment" (Husak 2008, p.3). This is to say that, other things equal, were overcriminalization not to produce too much punishment, the case against overcriminalization would be undermined. Although under current circumstances, as is well explained by Husak (Husak 2008, ch.1), it is all too likely that overcriminalization does produce too much punishment, this is nevertheless a contingent claim.

Second, consider the claim that overcriminalization undermines the rule of law. In order for this to happen, overcriminalized statutes have to produce, for example, an unintelligible law, a law that is to be deciphered and whose effects cannot be anticipated by citizens. However, this is another contingent claim, since we can surely think of an instance of overcriminalization that does not undermine the rule of law in the ways here considered. For example, think of a case of overlapping offences in which statutes A and B criminalize ϕ. There is nothing in this fact that requires that the overlapping prohibition of ϕ by both A and B is something unintelligible, undecipherable or unanticipatable. Moreover, there is no conceptual connection either between the fact that A and B criminalize ϕ and the fact that this would suppose treating unequally two persons charged for ϕ. I am not denying that overlapping offences do undermine the rule of law, but rather arguing that it is not necessary that they do so. If this is correct, then the case against overcriminalization is the result of a contextual analysis that considers – and mainly focuses on – what overcriminalization brings about rather than on what overcriminalization is.

This conclusion is problematic. A critique of overcriminalization should not be left grounded only on the regrettable results it may (very likely) produce. These negative consequences are of course important and any explanation of overcriminalization should consider them. However, I think overcriminalization is not wrong or regrettable only for the bad consequences it brings about. There is something inherently wrong about this phenomenon, and it is that wrongness – not fully captured by the difficulties considered in the previous section – that I shall now discuss.

The argument proceeds in different steps and it is important to lay them out from the outset. The first two sections present the two elements that, in combination, explain the normative problem of overcriminalization. Thus section 4.1 establishes that the penal law is a system of norms that provides reasons for action. Following Joseph Raz's influential account, I specify this claim by the idea that the penal law provides exclusionary practical reasons, that is, second-order reasons not to act on the balance of reasons. I then move to section 4.2 to establish the second premise of my argument, that there is a jurisdictional limit that establishes the legitimate use of the criminal law. Once it is defined, this limit represents what I call a penal jurisdiction, as opposed to a non-penal jurisdiction and a non-legal jurisdiction.

The combination of these elements allows me to define in section 4.3 the normative problem of overcriminalization as the abuse of the exclusionary reason-giving power of the state through the criminal law. In other words, overcriminalization leads to the provision of reasons for action by the criminal law where it should not provide them. As I shall argue, the normative problem so described, and unlike the other problems of overcriminalization considered in the previous section, is capable of depicting the wrongness of overcriminalization without resorting to any contingent consequence of this phenomenon. If we are going to make the most powerful case we can against this regrettable current feature of the criminal law, this development ought to count favourably.

4.1 *The Penal Law, Exclusionary Reasons, and the Service Conception*

The following account borrows – and takes for granted – a key claim in the literature on practical reasons and the normativity of law, namely, that the law provides reasons for actions. Although I am going to offer a brief explanation of what I mean by this, I am not going to discuss and defend this claim, and I am going to assume it to be correct. This may come as a surprise, mainly because the debate on the normativity of law, and on this claim in particular, is very much alive. How could one seriously take for granted something that is in the middle of a serious, difficult and widespread controversy? However, as will become clear, my account does not pretend to be an account of the normativity of law, but rather the basis of an explanation of the inherent wrongness of overcriminalization. That said, and if this explanation does not suffice, I would be happy to qualify my argument and formulate my account in conditional terms: *if* the law provides reasons for action, *then* overcriminalization creates the normative problem I present here. Let us begin by explaining the antecedent.

A way to explain the normative power of the law is by resorting to the idea that it provides reasons for actions. This idea supposes that the law is a fact that influences our practical reasoning so, other things equal, a law prohibiting *C* is a reason for – that is, something that counts in favour of – not *C*-ing. Now, there is of course a series of questions to be asked here mainly about what exactly it means to provide practical reasons and how it is possible that practical reasons can be the product of a fact. In other words, a crucial question here is about the normativity of law: how it is that legal rules are norms that bind people.

As I have said, this is not the place to sketch a theory of the normativity of law or of legal and political obligation. Instead, and whatever one's prefered theory on these matters, I shall assume that it is plausible to contend that the law, and more specifically the penal law, provides reasons for actions. The specific details of the origin of this reason-providing capacity, the extent to which these reasons bind people, and the issue of whether the law creates new reasons or simply reactivates reasons that exist independently of the law, are different questions that do not concern us here.

In any case, despite avoiding these questions on the normativity of law, I shall say a bit more about the nature of those reasons that the law provides. I have already suggested that they are practical reasons but, are they practical reasons of a special kind? Consider the following case: after learning that my best friend has become ill, I have acquired a reason for action: my knowledge that my friend has become ill counts in favour of, say, visiting him this afternoon. However, although both the illness of my friend and the law are facts that provide reasons for action, each of these facts surely provide reasons of a different nature. In the account I endorse here, the crucial difference between the reasons that these facts provide lies in the normative role that these reasons serve.

When I get to know the fact that my friend is ill, that fact counts in favour of visiting him. However, although that fact provides a reason, it does not provide a conclusive reason for action. For example, in addition of knowing that my friend is ill, I may come to know other facts, like that his illness is very contagious or that if I visit him I will miss my favourite TV show. These facts count as reasons against visiting my friend. What one does in cases like this is to consider the reasons that may count in favour and against visiting my friend and make a decision on the balance of these reasons. If I act out of reasons, that is, if I act as a rational agent, then my final decision about whether or not to visit my friend will be the result of the balance of these reasons.

The case of the reasons provided by the law is different. Through the pre-emptive thesis, at the core of which is the notion of exclusionary reasons, Joseph Raz has influentially argued that it is not the case that the law is merely one amongst other reasons counting in favour (or against) an action *C*. This thesis establishes that

> the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them (Raz 1986, p.46).

A directive commanded by a legal authority "is not only a reason for behaving as it directs, but also an exclusionary reason, that is, a reason for not following (i.e., not acting for) reasons that conflict with the rule" (Raz 2006, p.1022).[45] An exclusionary reason, as Raz puts it in a different place, "is a second-order reason to refrain from acting for some reason" (Raz 1990, p.39. Italics omitted). Thus, in practical reasoning, the role of the reasons given by the law, unlike the role of the reason given by things like the illness of my friend, is not to add weight to one side of the balance when determining whether or not I should *C*. The law, insofar as it gives exclusionary practical reasons, excludes first-order reasons that count against the directives of the second-order reason and thus render its reasons conclusive for action.[46]

To illustrate this point: Peter may have good reasons to smoke in the cinema – he likes smoking, he prefers watching movies while enjoying a cigarette, and so on – but the existence of a legal command that prohibits smoking in public spaces should preclude Peter from acting on the balance of those reasons. According to the pre-emptive thesis, the existence of a legal directive is a conclusive reason for action that excludes acting on the balance of other reasons.

Of course, there are some conditions that need to be satisfied for these reasons to be both conclusive and legitimate. Raz presents these conditions by resorting to what he calls the service conception of authority, that is, the view that the role and primary normal function of authorities – including the authority of the law – is to serve the governed (see Raz 1986, p.56). The service conception establishes that two theses or conditions need to be met

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45 In some places Raz considers a wider scope of excluded reasons, so that not only reasons that conflict with the rule are excluded, but other first-order reasons that "the authority had power to pronounce" (Raz 1989, p.1194).

46 But note that Raz allows that under certain circumstances these reasons may be defeated. This is the result of his understanding of authority in terms of the service conception and its conformity to the normal justification thesis. See, for example, Raz 1986, p.46-7 and 2009, ch.2. For a different argument explaining the circumstances in which the reasons provided by the criminal law may be defeated, see Horder 2000.

to ground the legitimacy of the law. The first one is "that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not." This is the normal justification thesis. The second condition is "that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority." This is the independence condition (Raz 2006, p.1014).[47]

From all of this it is possible to conclude that between an authority and the subject of that authority there ought to exist a particular relationship. The point of this relationship is to make the subject of the authority likely better to comply with reasons that apply to her independently. A disruption in this relationship means that the law does not serve the individual; this damages the legitimacy of the law and puts its authoritative status at stake. Such is the core of the service conception of authority that I endorse.[48]

4.2 *Penal Jurisdiction*

After having established the exclusionary reason-giving capacity of the law, and before moving on to the normative problem of overcriminalization, it is necessary to consider the existence of a jurisdiction distinguishable from both non-penal and a non-legal jurisdictions. We need to identify the existence of a penal jurisdiction.

The jurisdiction of a branch *X* of a system of law refers to those areas of human conduct, relationships, and fields of action, within which *X* is legitimately to exercise its normative power. The plausibility of the existence of a penal jurisdiction (as opposed to civil and non-penal jurisdictions) becomes evident by simply reflecting on the existence of wrongs that are civil and wrongs that are criminal. The fact that certain wrongs belong to a certain sphere of the law rather than other suggests that the different branches of the law are to be understood as having specific content and procedures different from the content and

47 Raz establishes other conditions that need to be met, like knowability. For the purposes of my argument I am interested in the service conception only and, therefore, I only refer to the normal justification thesis and the independence condition without reference to other principles and conditions.

48 Raz, of course, expands this thesis and builds up from it much more than what I need to do here. If I am right, one can adopt Raz's conception of exlusionary reasons without having to accept, for example, that there is no *prima facie* obligation to obey the law (see Raz 2009, ch.12 *int.al.*). Contrary to Raz's understanding, I believe that there are occassions in which we have an obligation to obey a law ordering X primarily because the order X is commanded by the law. *Inter alia*, Raz objects to this idea in Raz 2006, p. 1022. For our purposes, this simplified explanation of the reason-providing role of the law suffices to make my point regarding the normative problem of overcriminalization.

procedures of other areas of the law: that is, as having a determinate authoritative jurisdiction distinct from other legal jurisdictions. Put bluntly, this points to the truism that civil wrongs are not crimes, and that the criminal law has authority over the latter and not over the former. In other words, the jurisdiction of an institution like the penal law is the sphere in which this institution enjoys the *authority* to regulate courses of actions, practices and other arrangements.

It needs to be noted that my claim here is not about how or why a penal jurisdiction originates (and it is not about whether this jurisdiction is legitimate or justified either). My point is only about the *existence* of this jurisdiction. Indeed, the proper justificatory details of the penal jurisdiction is the central theme of following chapters, and I am not going to refer to them here. Those details are not necessary at this point because what I aim at in this section is simply to assert that the notion of a penal law jurisdiction is intelligible. Independent of the difficulties and uncertainties we may have about the content, limits and origin of these jurisdictions, what matters for our purposes is that the idea of a penal jurisdiction is coherent and its existence has material effects in the way humans conduct themselves and their relationships.

4.3 *The Normative Problem*

We are finally in a position to account for the normative problem. This problem arises from the combination of the two claims considered in the previous sections, that is, that the law provides exclusionary reasons for action (sec.4.1) and that there is a penal jurisdiction (sec.4.2). Constructed this way, the normative problem of overcriminalization can be defined as the provision of penal reasons (that is, exclusionary reasons provided by the criminal law) in jurisdictions in which those reasons should not be provided. In other words, overcriminalization is the provision of wrong or mistaken reasons for action.

The provision of wrong exclusionary reasons may certainly have worrisome consequences, like those considered when looking at the other problems of overcriminalization in section 3. However, my claim is that the value of the normative problem of overcriminalization lies in its capacity to explain why overcriminalization is to be resisted even if none of these pernicious consequences occurs. I shall argue that to provide exclusionary penal reasons for action when and where they should not be provided is

something that agents and institutions ought to avoid, even if no further undesired consequence follows from it.

To illustrate, consider some (more or less) hypothetical cases in which we can intuitively conclude that the criminal law provides the wrong type of reasons for action. Imagine that the final score of the World Cup final were decided by the criminal law, so, on pain of being prosecuted, players had to play in such a way as to satisfy the penal reasons for finishing the game with a specific score; or think of a criminal law that, on pain of prosecution, regulates the appropriate length of citizens' hair or the kind of sexual practices in which individuals may engage. These are cases where the penal law provides wrong or mistaken reasons for action, in the sense that it provides reasons in jurisdictions in which *ex hypothesi* those reasons should not apply.[49]

As I have said, the exclusionary character of the reasons provided by the penal law to officials and the layperson alike makes the normative problem of overcriminalization a serious one. The reasons that the criminal law provides do not simply tip the balance of reasons for action to one or another side; they exclude reasoning on grounds other than those they provide. If to these considerations we add the specificity of the criminal law considered in chapter 1 and become aware that this institution provides reasons to officials to coerce and condemn people in the name of the citizens of the polity, the provision of wrong or mistaken reasons by the penal law gains extraordinary urgency. Given the specificity of the penal law, providing wrong exclusionary practical reasons for action such that, if the agent ignores the reasons then he is liable to be coerced and condemned by others in the name of the members of the polity is not only inadequate, but it should count as a substantive wrong independent of its consequences. Let us consider this claim in some further detail.

The Normative Problem and the Specificity of the Criminal Law

The claim I would like to defend is that, *vis-à-vis* the normative problem, overcriminalization destabilises the criminal law. The normative problem threatens the very existence of this institution by – to use Scanlon's expression quoted in chapter 1[50]– impairing the type of relationship that ought to exist between an authoritative penal institution and its subjects.

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49 This is only a *prima facie* judgement grounded in what I take to be, as I said, well-grounded intuitions about the limits of the criminal law (my case on sexual behaviour may be more debatable). A principled conclusion of the wrongness of these penal reasons is developed in parts II and III. At this point I am not offering the material limits of the criminal law but establishing the existence of these limits and that trespassing them is wrong.

50 And consistent with Raz's account of the service conception of authority presented above.

As I argued in chapter 1, the relationship between the criminal law and those who are bound by its commands is determined by the specificity of this institution (its coercive, condemnatory, and public nature). When this specificity is destabilised, as it happens when there is overcriminalization, the claim to authority of the criminal law is undermined.

The first element of the specificity of the criminal law is its *coercive nature* (see sec. 1.1). Following Nozick's model, we saw that coercion is threatening an individual with some consequences if she does ϕ. This threat, in turn, gives the threatened individual reasons to not-ϕ. In the light of the normative problem, overcriminalization is the provision of wrong exclusionary reasons within a scheme of coercion. Ultimately, this amounts to illegitimate coercion. Threatening someone with consequences that do not rightly relate to the action commanded represents an impairment of the type of relationship that ought to exist between a coercive authoritative reason-providing institution and its subjects.[51] Under these circumstances, the criminal law moves away from the 'service' role that it ought to perform: in circumstances of overcriminalization, the subject of the law does not comply better with reasons that apply to him independently of the law (see sec.4.1 above). When the criminal law falls short of serving the individual, the relationship that ought to exist between the two is impaired because the law becomes a bare system of oppression. Overcriminalization, thus considered, undermines the law's claim to be an authoritative institution, as well as the respect the individual should have towards the law.

Overcriminalization also represents a serious normative problem from the point of view of the *condemnatory nature* of the criminal law (see ch.1 sec.1.2). Acts of legitimate penal condemnation – the expression of condemnatory attitudes from the state to the offender in the name of the whole polity – are the result of a certain type of relationship between a past wrong and a present act of condemnation. The past wrong gives the prosecution and courts – and, ultimately, the members of the whole polity – reasons to condemn those who violate the criminal law. In the face of the normative problem, people are condemned for actions that do not warrant condemnation as a response by the state. In other words, overcriminalization means that the criminal law claims to provide reasons to condemn people when, and/or in circumstances in which penal condemnation is not the adequate response. When an instance of overcriminalization takes place, the criminal law becomes a system of unprincipled imposition of condemnatory power over the individual.

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51 This relationship, as considered in section 4.1, is articulated by the two different theses constituting Raz's service conception of authority (the normal justification thesis and the independence condition).

Finally, overcriminalization destabilises the *public dimension* of the criminal law. In chapter 1 section 1.3, I argued that the different stages of the criminal process are undertaken in the name of the whole polity. This claim is grounded in the idea that crimes are a type of public wrong that disrupt a public good of the relevant type. Under circumstances of overcriminalization, the criminal law provides reasons that either represent the interests of only a faction of society (so the penal law does not protect a public good) or address a public good of a non-relevant type (so the penal law protects a type of good not relevant to the penal law). By providing exclusionary reasons when it ought not to do so, the overcriminalization impaires the relationship that ought to exist between individuals and the criminal law.

The wrongness that inheres in the phenomenon of overcriminalization negatively effects each of the three elements of specificity that constitutes the criminal law. If this is correct, overcriminalization, by providing reasons when it should not do so, puts at stake the very nature of the penal law even when the lamentable consequences that are likely to follow from this phenomenon do not take place. This inappropriate use of reasons may be a less compelling argument for reforming the penal law than the idea that overlapping offences may be too costly or may impose too much punishment upon individuals (cf. sec.2.1). However, my argument here has not been about the most shocking consequence of overcriminalization, but about what is problematic with overcriminalization itself.

5. Conclusion

This chapter has developed at length the problem of overcriminalization – the abuse of the coercive power of the state through the enactment of criminal statutes – one of the most serious difficulties currently experienced by the criminal law. As discussed in section 2, it adopts a variety of forms each of which is problematic. In order to illustrate these problems, section 3 considered different worries generally associated with the phenomenon of overcriminalization. Without denying that these difficulties emerge as a result of this phenomenon, I moved to present in section 4 what I called the normative problem of overcriminalization. I take this to be a necessary step in making a stronger case against overcriminalization. Unlike the other difficulties considered, the normative problem explains why overcriminalization is to be resisted even if none of its pernicious consequences follow.

This chapter concludes the first part of the thesis. Chapters 1 and 2 have set the scene of our object of study and presented in some detail the difficulties that the criminal law

faces today, with special emphasis on the problem of overcriminalization. Up to this point, the analysis of the difficulties to be amended in the penal law system has appealed, in general, to what I take to be broadly shared intuitions. When referring to the limits of the penal law, I have also appealed to these intuitions as if they were the touchstone of the criminal law we ought to have. In order to ground an account of the criminal law that is capable of minimising the problem of overcriminalization we need to leave these intuitions and direct our analysis towards a different and more controversial arena, one in which an account of the free society and the basic interests of individuals coexisting in that society is presented and defended. From these elements, the normative limits of a liberal criminal law will emerge. That is a central aim of the second part of this work.

PART II

THE FREE SOCIETY AND THE CRIMINAL LAW

CHAPTER THREE

Society and the Criminal Law

In the words of Tony Honoré, "[t]he first question in descriptive legal theory is [...] not 'What is a rule?' but 'What is a group?'" (Honoré 1987, p.33). This complements H.L.A. Hart's influential understanding of the rules that concern the law as *social* rules ultimately grounded in social facts and conventions (Hart 1961). Behind these reflections is the thought that the existence of a social group is a necessary and perhaps sufficient condition for the existence of rules, and that rules emerge, exist and command only within groups.[52] A corollary of this idea is that to be part of a group is to be bound by certain rules that constitute that group. Indeed, a glance at any group we may belong to shows that a characteristic aspect of what it is to be a full member of that group is to be committed to the rules held by that group.

These thoughts are important for the task of this chapter because they shed light on a central claim advanced in chapter 1, that is, that reforming the criminal law system demands reconsidering not only the penal law itself, but also, and perhaps more fundamentally, our understanding of society, the state, and the institutions in which this system exists. Consequently, and as I mentioned in the conclusion of chapter 2, to adequately ground the normative limits of the penal law we need an account of society and the state from which the function and limits of the criminal law will emerge in a precise and principled manner. If all this is correct, then, before engaging in the task of presenting a model of the criminal law that may overcome or minimise the present predicaments of that system we must advance an account of society and the state from which we can derive a normatively defensible account of the criminal law. This chapter begins this task.

The chapter is divided into three parts. The first addresses and elaborates on the idea that a social group is an association of two or more individuals engaged in a common activity and that rules are a function of these associations. This analysis prepares the ground for my account of the state and its institutions in chapter 4. The second part illustrates the general idea that rules are a function of social groups through a discussion of Antony Duff's prominent model of the criminal law; a model in which the connection between rules and social groups is particularly visible. The last part of the chapter raises doubts about Duff's

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52 Of course, in saying this I am not considering the laws of nature or the laws of the gods.

model and suggests that, if we are going to succeed in minimising overcriminalization, a different account of society is needed.

1. Social Groups

1.1 *Social Groups: A General Account*

The introduction to this chapter suggested that the penal law is a function of social groups. My reference to the notion of social group needs some preliminary clarification. In part, this is because there are endless varieties of groups. In a sense, we could make groups out of anything, simply by stipulating that such and such set of entities form a group. For example, I could say that all the things on my desk, regardless of how different they are from one another, form a group; namely, the group of things on my desk. But I could also stretch the understanding of groups further by saying that the lamp on my desk, the book I left this morning in the library and the car parked right now outside on my street form a group, namely, the groups of things I have right now in my mind. There is nothing that makes this group nonsensical. However, the groups that concern us here are of a more specific type, they are *social* groups. What differentiates a group like the group of things on my desk from a social group is that the former lacks the specific type of relationship that the latter has. I shall call this characteristic relationship a social relationship.

A chess society is an example of a social group, as is an academic department in a university, a family, the British Army, or an entire society. All these are social groups insofar as the individuals who constitute these groups are linked or related to each other by some type of bond. Although interconnectedness is necessary to characterise any group, it is not sufficient to characterise a *social* group. If Peter goes to drink coffee at the local coffee house and he sits next to a stranger so that both Peter and the stranger are in a situation in which they are somehow connected (both are in the local coffee shop drinking coffee), it would be inadequate to say that by virtue of being in the local coffee shop they form a social group. Instead, and according to the understanding of social groups that I endorse here, Peter and the stranger would form a social group if (i) they are in a coffee shop to, for example, participate in a literary group, and it is common knowledge between them that (ii) they are in the coffee shop to participate in a literary group and that (iii) they know what it is to participate in the literary group of that coffee shop. More formally, social groups entail:

(i) A shared enterprise;

(ii) The common knowledge of this enterprise (Peter knows that the stranger knows what the enterprise is and vice versa *and* both know that they share this knowledge).

And

(iii) The common knowledge of the means and procedures to pursue the ends of the enterprise (Peter knows that the stranger knows how things are to take place within the practice of the reading group and vice versa *and* both know that they share this knowledge).

Some things need to be noted in relation to this specification of social groups. My condition (i) requires that a social group entails a shared enterprise. This is a fairly undemanding condition that only refers to the existence of a shared practice, (such as attending a literary group). Thus, a shared enterprise does not involve sharing ends or reasons for engaging in the common enterprise, but only sharing the practices and procedures characteristic of the enterprise under consideration. For example, Peter may take part in the reading group as a means to the end of socialising, whereas the stranger may do the same in order to achieve the end of learning about literature. In the absence of other conditions, there is nothing in this example that should make us conclude that Peter and the stranger do not satisfy condition (i), even if their reasons for engaging in the practice differ.

It is also worth noting that these criteria of social groups do not have an absolute character. They are rather present in any social group as a matter of degree, and the cohesiveness of the social group is contingent on the degree to which these factors hold. This qualification undermines the plausible worry that the epistemic demands of my account (ii and iii) are excessive. Thus, we may have closely tight groups where shared understandings and knowledge of the appropriate means to pursue the communal purpose are so clear that there is hardly any need of further discussion about how to do things within the group (perhaps an experienced orchestra of classical music is an example of this type of group). And we may also have groups that are rather disunited so, for example, under certain circumstances it is not clear what the purposes of the group as a whole are and, consequently, there is uncertainty about the appropriate means available to the group (think of the members of a group facing the consequences of an unforeseen catastrophe: should they help each other? Should they save their leaders first? Should they comply with their ordinary obligations or adopt a state of emergency?). What this tells us is that although a collection of individuals is a social group if and only if they satisfy some factual and epistemic condition,

the depth and realisation of these factors may vary without necessarily affecting the social character of the group.

Finally, it is important to note that for our purposes the three features considered above are the necessary and sufficient conditions of a minimally plausible social group. This characterisation of social groups may seem striking, mainly because it allows the inclusion of a very large number of entities under the 'social group' label. Indeed, I have already given the examples of a literary group and a chess club, and mentioned cases as varied as a family, an army and a whole society. However, I do not take this to be problematic or misleading. Because the purpose of this section is to consider the elements that make an aggregate of individuals a social group, my account does not depend on the size of the aggregate of individuals, the importance this aggregate may have, or how transient it is. Those are not elements that I take to be necessary to a general understanding of social groups. Instead, I have emphasised the idea that a common enterprise plus certain epistemic factors are necessary and sufficient for constituting a social group.

In what follows, and drawing from the work of the social philosopher Margaret Gilbert, I shall further articulate this account by translating it into the idea that the mark of any social group is that those individuals that constitute it are engaged in a joint activity: to take part in a social group is to do something with others.

1.2 *Social Groups as Doing Things Together*

Margaret Gilbert has contributed to our understanding of social groups by developing the idea of social groups as a form of collective action in pursuit of a shared goal. She illustrates this understanding of social groups by considering the following example: James and Paula go out for a stroll between their house and a park. Their going *together* means that "it is 'common knowledge' between them that they are out on a walk together" (Gilbert 2006, p.103 fn.14). Shared knowledge, and not spatial proximity or the number of participants engaged in the activity, is the first necessary condition of doing something together.[53]

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53 It is true that going together for a walk in the park is an activity that supposes spatial proximity. However, this is different from asserting that a condition of any social group is spatial proximity. In the example, proximity is necessary because of the nature of *walking* together, not because of the nature of doing something together. If we decided to emphasise proximity as the mark of doing something together, we could not explain many joint enterprises that do not involve spatial proximity. For example, how could we explain that the parents of a family are doing something together when she goes to work abroad in order to assure the well-being of their children while he is at home looking after the children? Or how could we make sense of the idea of a Christian community

Their walking *together* also means that both Paula and James have a special standing with respect to one another so that Paula can make demands on James and rebuke him if he fails, and vice versa. This is the second necessary condition of joint activities. If James walks fast and outpaces Paula, then she has the standing to ask him to walk more slowly. If Paula suddenly changes direction and instead of heading to the park heads to the library, then James has the standing to question Paula's behaviour. Both know that they can make demands and/or rebuke each other because they both know that they are walking *together*. The standing of the participants of a joint activity (i.e., the standing of the members of a social group) is a function of doing something together, so the standing that emerges from walking together is both specific to those taking part in the walk (to Paula and James and not to those who are walking to the park in proximity to James and Paula) and distinctive of the specific circumstances of the joint activity (the circumstances under which Paula and James have gone out for a walk).

Let us consider in further detail some central aspects of this account. First, the common description reached *ex ante* by the participants of the joint activity is crucial in determining what exactly they are doing together and, therefore, in determining the standing participants have within the joint activity. To illustrate this point, imagine that when James invites Paula to go out for a walk she responds: 'yeah, I want to go, although I know I was supposed to be somewhere else today. I just cannot remember'. To this James replies, 'no problem, if on the way you remember what it is, you can just go'. Under those circumstances, the joint activity of walking together should be specified including the clause that Paula may have to leave without further ado. Both know that they are walking together in circumstances in which Paula may have to end the joint activity without further explanations and both know that each has agreed to accept that Paula may put an end to the activity in case she remembers what she has to do.

Second, in examining the conditions of joint activities and social groups, Gilbert's central aim is to offer ground to her account of associative political obligations. Thus, it is natural that her account ends up suggesting that joint activities and the standing they create in its participants give us reasons to believe that doing things together creates some kind of rights and obligations (2006, p.105). I do not want to make much more of that claim here, but the central point seems clear: to do something together, as we do as members of a social

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working together in one and all encompassing *opus* all over the world? Irrespective of the lack of spatial proximity, these are examples of people doing something together, namely, looking after the well-being of their children or working for the kingdom of god on earth.

group, gives rise to a particular standing in each member of the group that establishes the extent to which each of them can legitimately demand and rebuke other members of the group for what they do – insofar as what they do relates to the relevant joint activity. This posits the idea that joint activities are common enterprises constituted by normative relationships among the participant individuals.[54]

Third, an important feature of the standing held by the individuals that participate in a joint activity is the concurrence condition. According to this condition, no one within a joint activity is in a position to decide unilaterally on the specific forms and details of the undertaken activity (Gilbert 2006, pp.106-15). The other parties need to concur in order to settle these details. Thus, if James wants to take a shortcut on the way to the park by walking through the parking lot *and* James and Paula are walking together, then Paula's agreement is necessary. Were Paula not to concur to James' suggestion, and he carries on with his new plan, they would not be walking together any more, all else being equal. The details of the concurrence condition are the results of the specific standing acquired by those participating in a joint activity. This, in turn, is a function of the common description of the joint activity. Gilbert puts it clearly: "Absent special background understandings, any given party, A, has an obligation to any other party, B, to obtain B's concurrence in any new determination of the details of the joint activity" (Gilbert 2006, p.114). Thus, joint activities give each participant some standing to concur, demand and rebuke each other's determinations (determinations that are relevant to the joint activity), constrained by the existence of background understandings (i.e., shared understandings that specify the procedures accepted within the activity). The legitimacy of any determination within a joint activity depends on the extent to which this structure is respected.

Drawing from these different aspects of Gilbert's account here considered, we are now in a position to specify further the three necessary and sufficient elements of social groups presented in the previous section.

A social group is:

(i) A joint activity undertaken by two or more individuals;

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54 I must emphasise that I am using Margaret Gilbert's account of social groups for specific purposes. Thus, it should not be assumed that my account is committed to associative political obligations. I borrow from her account because I find it suggestive of what is a correct description of social groups, but not (necessarily) of political obligations. In effect, and as it will become clear, some elements of my own proposal are importantly different from what a supporter of associative political obligations would accept (in chapter 4 I will take more explicit distance from Gilbert's model, particularly on the way I understand the concurrence on exit condition, a corollary of the concurrence condition considered in this paragraph).

(ii) Who have common knowledge of both (a) the common description of the activity and (b) the fact that, absent background understandings, no one is in a position to decide the details and more specific practices of the activity unilaterally.

And (i) and (ii), in turn, gives rise to:

(iii) A specific standing among the participants of the joint activity so that each of them can demand and rebuke other members according to the common description of the joint activity;

(iv) The common knowledge of this standing.

At the outset of the chapter, following Honoré and Hart, I said that rules are a function of groups. The subsequent analysis has explained this claim by establishing the features of social groups and the way in which a certain standing among participants originate within social groups. Following Gilbert, I have claimed that the standing among the members of a joint activity involves obligations and entitlements against others about the way things are to be done within the joint activity. These obligations amount to a rule that exists within the group and that is to be respected by members of that group. Put simply, rules are prescriptions that emerge within a joint activity, things that we ought to do and are expected to do when we relate to others in a social group. They are a function of social groups.

2. Criminal Law and Society

My intention in this chapter is not simply to focus on the general relationship between social groups and rules, but on the more specific type of connection that exist between society – a social group made up of a multitude of individuals – and the law (more specifically, the *criminal* law). Influential recent philosophical accounts of the criminal law explicitly reflect this connection between rules and social groups. These accounts not only describe the criminal law – a type of rule – as a function of society – a type of social group – but they go further and ground their normative claims in considerations of what a society is and should be. In what follows I focus on some aspects of the work of Antony Duff in order to provide a telling illustration of the way in which this connection between the criminal law and society has been considered.

2.1 *Antony Duff and Liberal-Communitarianism*

Since the publication of *Trials & Punishments* in 1986, Antony Duff has become, for good reasons, one of the most influential philosophers of the criminal law today. The scope of his work is large and varied, and includes deep and original insight on matters covering most of the spectrum of the criminal law; from the nature of the criminal act, responsibility and liability to the very function of most of the different stages of the penal system. For the purposes of this section, I focus on his understanding of community and its role in the construction of a theory of the criminal law.

From the outset I should emphasise that, as opposed to a comprehensive analysis and assessment of his work, my aim is to establish how a given conception of society drives the analysis to some specific conclusions about the type of criminal law we should have. In this sense, the present section does not try to be a critical account of what Duff has to say about society, but rather an illustration of how particular constructions of society commit us to specific conclusions about the criminal institutions we should have.

One of the opening chapters of *Punishment, Communication, and Community* is devoted to articulating the conception of state and society that underpins Duff's theory of punishment and, ultimately, of the criminal law (Duff 2001a, ch.2). This account appeals to a particular conception of the political, which draws elements and values from both liberal and communitarian political theories. Thus, given this overlapping of perspectives, Duff dubs the political account upon which his theory of the criminal law rests a version of liberal-communitarianism.

The position he advances is *liberal* to the extent that it insists on the moral standing and rights of individual agents. The values of autonomy and privacy and a commitment to support the capacity of individuals to choose and pursue their good life also have a central place in the theory. Besides, the state must be committed to neutrality, so that the individual is not coerced into a specific conception of the good. In effect, this state accepts a plurality of values and goods, and although it may encourage certain types of lives (an autonomous life, for example), it must leave people free to determine their beliefs and ways of living.

But Duff's position is also *communitarian*. This becomes clear in his suggestion that members of the normative community, despite the existence of plurality, take the value of autonomy, freedom and privacy as shared goods, which amounts to saying that "they count as goods only insofar as they are shared" (Duff 2001a, p.54). If we are to understand and

exercise autonomy we must understand it as something that we conceive and exercise in society and with our fellow members of the community. The claim is not that I may have to surrender my individual interests and values in favour of the social good or the good of others. Rather, the claim is that I cannot conceive of these values in purely individualistic terms; they are, in so far as they are values of a liberal community, communal values that we all share and understand as *our* values.

This is a normative ideal community that is required to assess and criticise our existing communities and institutions. Of course, the distance between 'is' and 'ought' cannot be such as to make our current communities and institutions unrecognisable, but it cannot be null either, as if our present condition fits neatly with our normative aspirations. In this sense, what Duff is accounting for is a normative and recognisable ideal towards which our own social condition should hopefully progress through time. In effect, Duff illustrates this ideal by means of a community that, most probably, is very familiar to the reader: an academic community (Duff 2001a, pp.42-8). According to him this community – and any community for this matter – should satisfy at least two basic conditions.[55]

First, it should involve a shared commitment of the members of this community to certain values. For example, in the case of the academic community we can perhaps summarise these as the pursuit and dissemination of knowledge and understanding (Duff 2001a, p.43). Let us call this element the shared values condition. These shared values shape the community and establish its goals and goods: the good of pursuing and achieving knowledge and understanding. Although members of the community can understand both goods and values as instruments serving something external to the academic community, they cannot be seen uniquely in those terms. They must also be taken as intrinsic goods internal to academia and endorsed by the members of the community *qua* members of the academic community. They are shared goods that contribute to the shared internal aims of the community.

Second, those who belong to the academic community must have a regard for one another as fellow members that is structured by the community's defining values. Let us call this element the integrity condition. According to it, the members of the community must be committed to the shared values of academia and finding their own good in the pursuit and

55 As a matter of terminological clarification: social groups are a sub-class of groups, whereas a society, a community, or any joint activity that falls under the account I have offered in section 1, is a sub-class of social groups. Thus, in my account, when Duff talks about a community, he is talking about a social group. Although it will become more important in the next chapter, the difference between a society and a community makes no difference for my purposes here.

achievement of those values (Duff 2001a, p.43). A corollary of this requirement is that people within the community must not only *regard* each other in a given manner, but *treat* each other in ways consistent with those defining values of the community. If the pursuit of knowledge is an aim internal to the academic practice, then I must not hinder others from pursuing that very end, and, instead, I must be ready to facilitate and encourage them to gain the good of knowledge.

Duff's conditions of an appropriate community overlap neatly with most of the conditions considered in my account of social group and joint activity above. There is a particularly telling line in this respect: "members of a liberal polity constitute a community insofar as they aspire, and know that they aspire, to share the defining values of the community and to hold an appropriate regard for one another in the light of those values" (Duff 2001a, p.68). Where Duff refers to shared values that determine the goals and goods of the community, I refer to common understandings of what we are doing together. Where Duff points to the idea that within a community members must both regard each other as fellows and treat each other in accordance with the values that define the community, I point to both the standing of the participants in a joint activity and the concurrence condition that derives from that particular standing.

I shall now illustrate how this understanding of community determines, at least to a significant extent, Duff's normative theory of the criminal law. To do so I shall focus on some of Duff's preconditions of liability.

2.2 *Duff on Preconditions of Criminal Liability*

Let me begin with a couple of preliminaries. First, the *conditions* of a given practice establish the justification of an instance of the practice. Thus, a condition of the practice of inflicting state punishment is the violation of a criminal statute and/or the culpability of the offender. Hence, if someone is going to be subject of state punishment, she must, all else equal, have violated a criminal statute and/or be a culpable offender. Besides these conditions, Duff identifies other types of conditions required to have a practice. These are what Duff calls *preconditions*, which are "conditions of engaging in the practice at all [...] [and] which must be met if the [practice] is to be possible, or legitimate" (Duff 2001a, p.68. See also pp.179-97 and Duff 2003, p.246). Whereas the conditions of punishment are to be

satisfied in order to justify a token of the practice, the preconditions of punishment are to be satisfied to justify the system of punishment itself.[56]

Second, my decision to focus on some of the preconditions of criminal liability may require some brief justification.[57] The main motivation behind this choice is that criminal liability should count as the most basic element of the whole criminal law system. Markus Dubber has put this point clearly in saying that "[t]he criminal law [...] comes down to a single, basic, question: who is liable for what?" (Dubber 2002, p.5). In accepting Dubber's claim we must conclude that – on pain of not taking seriously what preconditions are – if we do not satisfy the preconditions of criminal liability we cancel the possibility of legitimate trials, sentences and punishment, and make normatively inconsequential prosecutions, criminal procedures and ultimately the substantive criminal law itself (why would we want to pass criminal law – with all its associated costs – if we are not going to be held liable for our actions?).

A last preliminary: as Duff puts it, the preconditions of criminal liability that I will consider below "reflect the conception of political community on which [his] account of criminal punishment depends" (Duff, 2001a, p.181). Thus, if a jurisdiction *X* is going to have authority over Peter, and therefore, if Peter is going to be criminally liable to jurisdiction *X*, then, "some idea of [Duff's ideal normative] community might figure in this context. For one account of the moral conditions of the obligation to obey the law, and of being answerable through the courts, is expressed in terms of community" (Duff 1998a, p.197). For Duff, this means that Peter

> is obligated to obey the law in virtue of his membership of a community whose law it is; and he is answerable through the courts to his fellow members of the community for his alleged breaches of that law. On this account, our questions are questions about the conditions for the existence, and for membership, of a community of the appropriate kind (Duff 1998a, p.197).

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56 It is clear that there is room for debate about where to draw the line separating a condition from a precondition. Duff himself is well aware of this and suggests that the consequences of this distinction and the manner in which we make it will depend on the context in which it is to be drawn. However, this issue should not stop us from inquiring a bit further on the preconditions of the criminal law in the way Duff considers it. See generally Duff 1998a, and also Duff 2001a, p.220 fn.5.

57 As I say, these are only *some* of the preconditions of criminal liability that Duff considers throughout his work. Other significant examples are the precondition of the responsible citizen and the precondition of mental fitness. The latter supposes that the defendant has the "capacities necessary to answer the charge that he faces or to understand and respond appropriately to conviction and punishment" (Duff, 2001a, p.181). Whereas the former includes the fitness precondition, it is not reduced to it. It also supposes that the defendant has an obligation to obey the law and the two other preconditions considered in the following paragraphs.

We must then note that, according to Duff, not only is the existence of the community a precondition for the legitimate functioning of the criminal law, but also, the existence of a community of the appropriate type. When these requirements are not in place, the very possibility of the criminal law is undermined.

Bearing these preliminaries in mind, I now turn to two of Duff's preconditions of criminal liability.

The Standing Precondition

One of the preconditions of criminal liability to which Duff devotes some time is the standing precondition. According to this precondition the law and the courts that call someone to trial "must have the standing to call her to answer" (Duff 1998a, pp.195-6. See also Duff 2001a, p. 184). This precondition raises a series of questions concerning the institutions to which the defendant is supposed to answer and what characteristics these institutions must have when she is put on trial. However, the main and most serious challenge it poses is to the possibility of criminal justice in an unjust society.[58]

In the way Duff describes it, the standing precondition appears to be a cluster of preconditions. Indeed, when one closely considers Duff's work, one notices that he does not offer a unitary account of what this precondition involves. At a minimum, this precondition of criminal liability requires authority *and* moral standing on the part of both penal institutions and those whom these institutions represent: "the court which tries the defendant must have the authority to call her to account [...] [and it must also have the] conditions [that] must be satisfied for a court, and those in whose name it speaks, to have the moral standing to call such a person to account" (Duff 1998a, p.196). Thus, the justice and legitimacy of penal practices is a function of the justice and legitimacy of the penal system and, in turn, the justice and legitimacy of this system depends on the moral standing of the members of society in which that system operates.

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58 Theorists have coined the term 'rotten social background' (RSB) defence to make a point similar to Duff's. Consider, for example, the analysis of Richard Delgado who defends the RSB defence and also claims "that society may lack the warrant to punish" defendants coming from deprived backgrounds (Delgado 1985, p.68). "Evidence of a rotten social background [...] is relevant in criminal trials because with this evidence, society can acknowledge blamelesness where appropriate, and avoid punishing those it does not have the right to punish" (ibid, pp.74-5). An evident and not minor difference between Duff and Delgado is that, for the latter, the social injustices that have caused, determined or simply influenced criminal behaviour are not preconditions of criminal liability but rather bars to convictions or excuses. For Duff, in turn, the lack of moral standing is a bar to trial. For a good collection of articles addressing this issue see Heffernan, W., & Kleinig, J. (Eds.) 2000.

A rather unproblematic way to illustrate (an aspect of) the standing precondition is to consider the following case: an English court calls Ruth – a Chilean national – to account for her having stolen a bicycle in Chile 20 years ago. All things being equal, the English court lacks the standing to demand an answer from Ruth, and Ruth has no obligation to answer for her conduct to this English court. As Duff clearly puts it, "[t]he defendant is obligated to obey the law in virtue of [her] membership of a community whose law it is; and [she] is answerable through the courts to [her] fellow members of the community for [her] alleged breaches of that law" (Duff 1998a, p.197). As a consequence, Ruth has nothing to answer to the English court because *that* court does not have the required standing to call *Ruth* to account (whether she has anything to answer to a Chilean court is, of course, a different matter).

The importance of an account of the required standing of criminal courts must be granted. Duff is right in pointing to this matter and considering the consequences that follow from it. Since in the third part of this chapter I dwell longer on this precondition (at least on a particular aspect of this precondition, namely, the moral standing precondition), I shall simply underline how fundamental the conception of social group is in establishing the legitimacy of the penal practice: without a community that embraces and acts upon the particular requirements of the standing precondition the possibility of a just system of criminal law becomes unstable. The justice and legitimacy of the criminal law is a function of the justice and legitimacy of society, its practices and broader institutions.

Common Language Precondition

A second precondition of liability is "that there be an appropriate language in which the defendant is called to answer" (Duff 1998a, p.197). This precondition is particularly important within Duff's project. Without it we can meet neither the shared values nor the integrity condition, and we cannot make sense of Duff's communicative approach (see Duff 1986, 2001, *int.al.*). For Duff, a common language is needed to treat others as members of the community, to know that one is being treated as such, and ultimately to fulfil the required communicative role of the criminal law (see Duff 2001a, pp.188-93).[59] To the question of which and whose is this language, Duff says that it is the language of the law as practised by

59 For a dramatic example of lack of common language, see *United States ex rel. Negron v. State of New York* (1970).

legal professionals. As far as possible, this language must also be accessible to those who without being legal professionals are still involved in the penal process and its institutions. The language of the law, therefore, is a language whose meaning ought to be accessible to all responsible members of the community (see Duff 1998a, p.198 and 2001, p.189).

At first sight, this does not look like a very demanding precondition. To speak roughly the same language should not be that difficult. After all, lawyers and judges communicate to the lay public and the public do more or less get the message. However, when we enquire into the type of understanding demanded by this precondition the matter becomes more problematic. According to Duff's account, the required understanding goes beyond the comprehension of facts to a more fully normative understanding:

> the defendant must not merely be able to understand that she is said to have acted in some factually specifiable way, which the law defines as criminal. She must be able to understand the claim that the alleged conduct constituted criminal *wrongdoing*. She must therefore be able to understand the values in the light of which her conduct allegedly counts as wrong (Duff 1998a, p.198).

Thus, this precondition appeals both to the existence of a common understanding of the wrongness of certain types of conduct and to the recognition of that wrongness in the conduct prosecuted by the penal law.

On top of this requirement, Duff says that the defendant must be able to speak the language of the law in a non-detached manner, "to speak it in an authentically first person voice"; it must be possible for her to make "first personal, committed normative statements which express her own acceptance of the law and its values" (Duff 1998a, pp.198-9). In a word, the language of the law – which in turn is a language embedded in the legal and political institutions of the community – must be her own language, a language with which she identifies herself and that, to a large extent, speaks in her name.

As with the standing precondition, the language precondition depends on, and is determined by, a very specific conception of community. To speak a normative language in a non-detached manner *and* share that language and manner of speaking it with others supposes a background of rich communal cohesiveness that is well depicted by the aspirational community that Duff offers. In other words, the normative model of community considered by Duff demands these preconditions in order to justify the penal practice itself.

If that is the social group we should have, then these are (some) of the preconditions of criminal liability that the criminal law ought to satisfy.

3. Raising Doubts: The Case of the Moral Standing Precondition

The first part of this chapter argued that the type of rules we (ought to) have derives from the way we understand and articulate social groups. The second part illustrated this claim by considering how important our understanding of society is in the determination of the criminal law we (ought to) have. I did so by considering Antony Duff's conception of community and the way it determines the preconditions of criminal liability. In this third part I want to move to a more critical terrain and cast doubts on the extent to which a model like Duff's can help us overcome or minimise the present regrettable features of the criminal law considered in chapters 1 and 2.

Although I recognise the importance of Duff's discussion of the preconditions of criminal liability, as well as the coherence of his account, my intention is to engage in this critical analysis to establish further the importance of the search for an alternative account of society and the state that responds more adequately to the present condition of the criminal law. This account – which I present in chapters 4 and 5 – is not only at odds with the model of community defended by Duff, but also has the capacity to minimise the problem of overcriminalization faced by the penal institutions; something that, I will argue, Duff's model is not likely to do.

3.1 *The Moral Standing Precondition*

To undertake this critical task I shall focus on an aspect of the preconditions of criminal liability considered above; the moral standing precondition. Before proceeding, a brief elaboration of this precondition is in order. This precondition is a condition of social and political justice, which is undermined by the "extent to which people are excluded – politically, materially, normatively – from the community whose law it is, since they can be bound by the law only insofar as they are, and are treated as, members of that community" (Duff 2001a, p.183).

What backs this precondition is the moral idea that "one's prior conduct towards another person can undercut one's right to make what would otherwise have been a

legitimate demand on them, or to enforce duties that are nonetheless still binding on them" (Duff 2003, p.251). When we translate this moral ideal into the sphere of the criminal law we can conclude that, according to Duff, the moral standing of the institutions upon which the criminal law depends determines, to an important extent, the legitimacy of the functioning of the system of criminal law itself. The thought is that if these institutions fare badly in how they address or have addressed the members of the jurisdiction – that is, if they treat or have treated its members in a morally inappropriate manner – then they lack legitimacy to undertake their practices. When the state acts in morally pernicious ways, it loses its moral standing and, thus, lacks one of the preconditions for calling people to account for their actions.

As I have suggested, the claim that I will defend is that we should reject moral standing as a precondition of the criminal law. To some this may seem an extreme move. It may be objected that to raise doubts about, or to undermine, the moral requirements implied by this precondition would mean that any court, at any time, under any circumstances, may have what is needed legitimately to call someone to answer for her criminal conduct. Thus, it may be argued, my position makes legitimate the orders commanded by a court of a wicked state, even though the state policies have not minimally respected either those who the court holds answerable or the values that the law banning the conduct in question is supposed to defend. Given that this seems to go too far, it is important to be precise in my claim.

We must notice, first, that I am referring only to intra jurisdictional standing. That is, to the moral standing of a jurisdiction to call to account those who are members of that jurisdiction. Thus, extra jurisdictional cases like the example of Ruth being called to account for her conduct to a foreign court are not part of my analysis here. And second, my analysis refers to circumstances different from those of a society short of a state of nature, moral horror and/or 'catastrophic exceptions' (see Nozick 1974, p.30, and Husak 1987, p.72 fn.5. On 'catastrophe exceptions' see Dworkin 1977, p.191 and Husak 1979, p.127). There is little to argue in favour of the standing to call to account people of a state that produces or embodies moral horror. Similarly, if the political circumstances of a state develop in such a way as to make it incapable of minimally assuring the survival of society and its individuals – something that would amount to the return to a state of nature – it seems implausible to maintain that there is a standing institution to which people owe obedience and to which they should answer for their conduct. Under those circumstances one may sensibly claim – and perhaps one should claim – that individuals are not bound to the laws of the jurisdiction and that consequently they are not liable to *that* jurisdiction. Paraphrasing Hart, in circumstances

short of a state of nature, or under circumstances of moral horror, one may *be obliged* to obey the criminal law and/or respond to a criminal court, but one does not *have an obligation* to do so (Hart 1994, pp.22, 82). Since I do not see how genuine obligations would emerge from circumstances of complete normative dislocation in which people are merely obliged to act, I have nothing to argue against Duff's position under any of these circumstances.

Instead, I want to consider those circumstances in which we do have a general obligation to obey the laws of the state and its institutions but where certain unmet conditions (for example, some degree of social or political exclusion and injustice) may suggest that the standing of penal institutions has been undermined to the point that we do not have an obligation to account to those institutions for our criminal wrongs. It is in this context (which is surely a familiar one) that I want to cast doubts on Duff's account of the moral standing precondition of criminal liability.

3.2 *Against Moral Standing as a Precondition of Criminal Liability*

In what follows I argue that we should not embrace the moral standing of our penal institutions as a precondition of calling people to account for their alleged criminal acts. I defend this stance for two different reasons, and I consider them separately by referring to what I call the Non-Workability and the Moral Demandingness problems.

1. The Non-Workability Problem: if we accept Duff's account of the moral standing precondition of liability one may plausibly conclude that under certain circumstances either no one is properly held to answer for their alleged criminal liability – because injustices affect everyone – or we do not know with respect to whom the courts lack standing – because we do not know enough about the effects and impacts of current injustices. In short, at least on occasions, this precondition seems to be unworkable. This, in effect, would be the conclusion that may emerge under present circumstances where social and political injustices are widespread and where most members of society are affected by some type of these injustices.[60]

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60 For a similar conclusion see Jeffrie Murphy's "Marxism and Retribution". He claims: "the only morally defensible theory of punishment [namely retribution] is largely inapplicable in modern societies. The consequence: modern societies largely lack the moral right to punish. [...] Institutions of punishment constitute what Bernard Harrison has called structural injustices and are, in the absence of a major social change, to be resisted by all who take human rights to be morally serious-i.e., regard them as genuine action guides and not merely as rhetorical devices which allow people to morally sanctify institutions which in fact can only be defended on grounds of social expediency" (Murphy 1973, pp.221-2).

This connects to an argument developed by Matt Matravers, which focuses on Duff's moral standing precondition of criminal liability and asks who is still standing to meet this precondition. Matravers' conclusion is that the institutional standing precondition is an all or nothing matter that – contrary to what Duff seems to suggest – does and should remain in place in current social and political circumstances (i.e., the standing of institutions should be granted in circumstances with more or less widespread serious social and political injustice). His answer lies importantly in two ideas: first, that we need to distinguish clearly individual from institutional standing (Matravers 2006, p.325), and second, that under normal circumstances the moral standing of institutions can be compartmentalised, as it were, so that losing some standing in one area of the institution does not entail losing it in another (Matravers 2006, p.325-6).[61] Thus, with respect to the first idea, a judge may well be a flawed human being in many ways, but that fact *per se* does not entail that the institution he represents does not have what it needs to call people to account. And regarding the second point: the injustices that may be committed within, say, the distributive sphere do not entail that our penal institutions are equally tinted. Retributive injustice does not necessarily derive from the fact of distributive injustice.[62]

Matravers' main critique is of the application or workability of Duff's precondition. As he sees it, the point is not about the validity of the moral standing precondition itself, but about the way in which we can establish the limits of application of that precondition. In other words, Duff's specifications of what it is to lose moral standing are too loose. In this sense, making the moral standing precondition workable depends on the possibility of drawing a clearer line that establishes what is sufficiently just from what is not. Only then, when that line is established, can we attain workable criteria of application for what counts as a satisfactory moral standing.

I think Matravers is right in pointing to these difficulties. If the workability of the precondition is unstable, certain undesired things will follow in the area of criminalization and punishment. These consequences have to do with the instability that would affect the criminal law, which ultimately represents a strong presumption against the application of the moral standing precondition in criminal liability. The problem of workability is serious because it supposes that whether or not the preconditions are met is left undetermined and

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61 Duff considers this criticism but, in my opinion, he simply bypasses it by claiming that "we must ask how far the political community and its institutions have respected these values [those values in which the community may still have a standing] in their dealings with this person or the group or community to which he belongs" (Duff 2001, p.187).

62 For an illustration of this idea see Morse 2000.

open to partial – that is, non-neutral – interpretations. In turn, this indeterminacy permits discretionary use of the criminal law which, as was seen in chapter 1 and 2, is a characteristic feature of a criminal law prone to the abuse of its coercive power. The ultimate expression of this abuse is the emergence of instances of under and/or overcriminalization, as well as excessive and lenient punishments. These are undesired possible outcomes of taking the moral standing as a criterion of legitimacy of the criminal law. Consequently, given this uncertain workability, the moral standing criterion must be resisted.

2. The Moral Demandingness Problem: although I endorse Matravers' analysis, I believe the argument needs to be pushed a bit further to cast doubt not only on the workability of Duff's construction and application of the precondition, but on the moral standing precondition itself. In other terms, I not only want to contest the use of the precondition, but also and more importantly, the idea that the moral standing of a given jurisdiction (and more generally, the values and commitments of the jurisdiction) should be a criterion to consider at all when establishing the preconditions of the criminal law.

As I insisted in the first part of this chapter, the criminal law is a function of social groups. In this respect, Duff's model is not an exception. In his account, the lack of standing of the criminal law to call to account members of the community is explained by an institutional and/or social break with the shared values that (should) characterise the community and its institutions. This conception of community is characterised by the cohesion between the values and goods of the members of the community and its institutions. On the one hand, this amounts to the requirement that there is a deeply unified community, where individuals embrace similar values and understand them in a fairly homogenous manner. On the other hand, it amounts to demanding that the institutions of the community embrace those very values and transfer them into public policies in a way that reflects the understanding members of the community have of those same values (see the common language precondition above). As I have suggested, this way of putting things is problematic. In what follows I will argue that this is the case because a theory that relies on *that* conception of community falls short of adequately amending the criminal law *vis-à-vis* the problem of overcriminalization and, what it is worse, makes this institution prone to the abuse of its own coercive power.

As we have seen, when the basic requirements of morality are met, Duff contends that penal institutions have, all else equal, what they need to call people to account. If we accept this, then the question we need to answer is whose morality is the morality that is in

place? Whose are those moral standards that would in principle permit the practice of calling people to account for their conduct? Duff suggests an answer in different steps. The first step is that to be answerable is to be answerable *to* someone or something, and in turn, I am answerable to that someone or something *only if* she/it has the standing to call me to account. The second step is then to establish that in criminal matters we are generally answerable to a court, and that "[t]he law and the courts speak and act in the name of the political community. They call a defendant to answer to the community for an offence against its public values as expressed, interpreted, and applied by its law" (Duff, 2001, p.186). Thus, the values that need to be in place are the public values of the community. If my reading of Duff is correct, then his answer to our question is that it is the morality of the community that needs to be in place for people to be legitimately called to account for their conduct.

I take this to be an unsatisfactory answer for different reasons. Let me begin with a familiar objection and combine it with a further problem that follows from it. What we realise when looking out into our societies – as opposed to looking into an idealised society – is that communities are far from having the levels of cohesion suggested in the previous paragraph: members of these communities disagree about values, conceptions of the good, morality, principles of justice, and so on.[63] Since modern societies are made up of a large cluster of views about how things should go, we must conclude that disagreement about what should count as the appropriate standing of the criminal law, and what should count as criminal law at all, is inevitable. Furthermore, this is not to be taken as a circumstantial aspect of a free society, but as an integral part of it: diversity and disagreement are inherent aspects of the modern societies in which the criminal law exists. Thus, to say that the moral standing is constituted and established by the morality of the community does not bring us far.

A possible consequence of taking seriously the combination of the fact of diversity and disagreement and the existence of genuine obligations to obey the law is that *some* members of the political community may not be bound to the criminal law, even if we treat them as if they were bound to these laws. This is the case because, according to Duff, the criminal law is the criminal law of the community and of its members in whose name the law speaks (recall the shared values and the integrity conditions above). This means that the

63 Nicola Lacey expresses similar concerns when she says that "[i]n the context of pluralistic modern societies, contemporary theories of punishment which seek to strengthen the moral case for punishment by emphasising its role as a form of communication among members of a political society [...] raise intractable questions about who or what constitutes the body with the authority to punish" (Lacey 1999, p.153).

criminal law is to reflect – in its practices and institutions – the values of the individuals that make up the community and that are bound to its laws. By extension, individuals are supposed to speak the normative language of the criminal law in "first-person, committed normative statements that express their own acceptance of the law and its values" (Duff 2001a, p.190). However, given circumstances of diversity and disagreement, some people – those who cannot speak in that first-person normative language – are surely going to be left at some point, to some extent, and with more or less intensity, out of the legitimate scope of the criminal law.

My worry on this point lies, first, in the idea that to expect the criminal law to speak with the voice of the people and, in turn, expect people to embrace the criminal law in a 'first person' manner is extremely demanding, especially (but not uniquely) in circumstances of freedom and diversity where at least some will remain reasonably unconvinced by the conception of morality that shapes the criminal law. This is problematic because those who are not committed to that conception of morality may still be taken as subjects of the criminal law. Under those circumstances they would become passive recipients of a pre-existing morality (the morality that is in place and that satisfies the moral standing requirement), and the criminal law, rather than acting with genuine authority, would become a tool serving the values and moral commitments of only some of the members of the community.

Second, this model cannot appropriately deal with those individuals who do not fit with what is presumed to be the moral core of the community. Since membership of the community supposes the recognition and acceptance of the obligations emanating from the communal life, those who do not satisfy this requirement of membership (for example, those who do not and perhaps cannot recognise or accept the communal obligations for reasons of conscience) might be seen as lawless aliens not liable under the proper protection of the criminal law. When this condition obtains two things may happen. On the one hand, these individuals may become criminally lawless, which means that they are not liable to the criminal law. The outcome of this is that these individuals either ought to be expelled from the community (which represents an unjustifiable oppressive policy) or their actions, whatever they are, cannot be deemed criminal (leaving the criminal system incapable of fulfilling its expected function within the community). On the other hand, these individuals may be left outside of the procedural protections of the criminal law. Consequently, when any of these criminally lawless individuals commits what under normal circumstances is a

crime, the limits and nature of the response to the 'offender' is left up to the will of the 'punisher'.[64] These are not acceptable conclusions of a principled model of the criminal law.

So, what are the alternatives? In order to avoid the exclusion that derives from the prior analysis we can maintain – with Duff – that the criminal law has to deal with disagreement by persuading those who are reasonably at odds with the principles of morality that guide or constitute the penal practices. Thus, the criminal law will speak to the reasonable dissident with a different 'tone'. It may portray the wrongfulness of the dissident's action as derived from the circumstances of the community[65] and contend that even he ought to obey the law as a matter of his duty as a citizen (see Duff 2001a, pp.121-5).

This response, although more plausible, workable and appropriate than simply excluding dissenters from the boundaries of the criminal law, brings us to my last critical point. If we adopt this strategy, and contend that the criminal law ought to be enforced despite the existence of deep disagreement about what morality requires, we will not get any closer to minimising the present problematic condition of this institution. A criminal law that is linked in this way to the demands of morality makes criminalization contingent on the moral beliefs of the members of the community. This may or may not have pernicious effects depending on the type of community we are considering. However, whatever the community, the worry remains since criminalization becomes a function of morality, and the principles *and* content of the criminal law as a whole turn out to be contingent on the requirements of the dominant morality of the community.

This conclusion is objectionable. It renders the criminal law a mere mechanism of support of the moral doctrine of the community or, in a worse scenario, a method of indoctrination. Instead, we should seek a model of the criminal law that depends not on people's specific moral beliefs, but that rather addresses any member of society *qua* member of society, independent of the comprehensive moral commitments individuals may have. If a common penal law – the basis of any legitimate penal law – is possible at all, it needs to be consistent with the deep commitments of all those who are bound to the law (not only a faction of them). To do otherwise is to pretend, mistakenly, that we can build up a criminal

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64 Famously, John Locke expressed similar concerns in his *Second Treatise*: "[...] it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow [...]" (Locke, 2003, p.105).

65 Duff presents this idea in a subtler more sophisticated way. The law now portrays the wrongfulness of the reasonable dissenter to that offender "more like a *mala prohibitum* than a straightforward *malum in se*" (Duff 2001a, p.122). The central point, however, remains the same.

system from an Archimedean point by the use of reasons that are not genuinely appealing to, at least, some members of society. This construction and application of the criminal law should count as an instance of illegitimate coercion.

Moreover, as it stands, this model remains too indeterminate to satisfy the demand for specific limits of the criminal law's scope of action (see ch.1). Thus, even if we succeeded in establishing uncontroversial and generally accepted principles of morality, the problem of scope would remain. On the one hand, if morality determines the limits of what it is to be criminalized we may end up with a system of criminal law that leaves unaddressed types of conduct that, although morally irrelevant, we reasonably think should be tackled by the criminal law. On the other hand, if morality suggests the criminalization of Φ, this model would criminalize it even if we reasonably believe that Φ is none of the criminal law's business.

Duff may respond to this last undesirable possibility by showing his liberal credentials, which preclude his model from allowing an unlimited intrusion of the state in matters that we generally consider beyond its business. I am sympathetic to the spirit of this response, in the sense that I do believe that (some) liberal principles should guide our principles of criminalization. However, my objection is about the indeterminacy of those liberal principles within the model we are considering. As I see it, further specification of the type of liberalism that the criminal law should embody is crucial if we are to offer a successful account against inappropriate criminalization. We should not use liberalism as a trump against the uncertainties of our models of the criminal law. Instead, we need to advance a sufficient account of the liberal political philosophy backing the penal model we embrace.

Last, but not least, this model permits inappropriate punishment. This is the case because it allows the condemnation of people for things that they would not understand as legitimately condemnable. For the reasonable and committed dissenter who cannot embrace the criminalization of Φ in a 'first person' manner, to be punished for Φ on grounds that it is morally demanded is simply an expression of oppression on the part of that section of the community that holds the values that justify criminalizing and punishing Φ. Under those circumstances we seem to be using or manipulating the offender to express support for a particular morality – the morality of the dominant community – rather than trying to convey a message that we know he can understand and embrace. Justifying what we do to others through penal practices on grounds of what morality demands is an example of what the

criminal law (at least a liberal criminal law) should not do, or attempt to do, if it wants to avoid inappropriate punishment.

Perhaps, someone could respond to all this – as at some point Duff does – that insofar as the criminal law is a common law (which I accept) "it must claim to embody values that are widely, if not universally, shared in the community whose law it is" (Duff 2001a, p.210 fn.40). For the moment I will only respond to this that although a *common* law must suppose something shared by all the members of the community whose law it is, that common element neither needs, nor should, be put in moral terms: it is not a shared morality that is needed in order to have a common criminal law. Rather than grounding the criminal law in a rich notion of community with strong bonds of values and goods, we should direct our efforts to designing a model that does not require such a demanding and idealistic type of group, but which nevertheless can still explain our obligations and commitments within society.

4. Conclusion

This chapter has defended the general claim that rules are a function of social groups and that any account of the criminal law must begin by offering an account of society. I further specified this last claim by resorting to an understanding of social groups as joint activities in which people engage with others. The second part of the chapter illustrated the claims of the first part by considering some aspects of Antony Duff's important account of the criminal law. I focused mainly on his ideal normative community and on how this ideal determines a fundamental aspect of the criminal law: criminal liability and its preconditions. After presenting the basic structure of Duff's model, I moved to criticise it. More specifically, I have contested the claim that we should embrace something like moral standing as a precondition of the criminal law.

When concluding *Punishment, Communication, and Community*, Duff suggests a criticism of his own model in terms that are similar to the argument above. He says that someone may reject the theory he presents there "on the grounds that however attractive it might seem as an ideal, a theory that sets such demanding preconditions for criminal liability and punishment is too remote from human life to serve as a guide or goal for our human practices" (Duff 2001a, p.198). However, he claims any respectable normative theory of punishment (and the criminal law) will have to spell out the preconditions of its appropriately

calling people to account in terms similar to his, and ultimately, any plausible theory of the criminal law may see "its legitimacy seriously undermined by their nonsatisfaction in our existing societies" (Duff 2001a, p198).

To a large extent I accept Duff's contention. However, I think there is an important difference between his theory and some possible alternatives – like the one I shall develop in this thesis – and that this difference is in favour of the latter. My point is that we should dedicate time to depict social groups that are sensitive to the lack of agreement and harmony that characterises the societies we actually live in and derive from that theoretical picture an account of the kind of criminal law that we ought to have. This task is different from depicting an ideal normative social group with the characteristics of the one Duff develops. From such idealised and aspirational communities we inevitably obtain principles and institutions that appear to be too morally demanding, or alien, to be plausible responses to the present regrettable condition of the criminal law. Instead, I believe we would do better by offering an account of society that starts from social bonds that appeal not to an ideal but to a more recognisable human situation, that of conflict and disagreement, and from there build a genuine common law that appeals to all members of society. To derive a criminal law from an account of the good society along those lines is the aim of the following chapter.

CHAPTER FOUR

Individuals and the Free Society

> Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intentions and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects.
>
> H.L.A. Hart, *Punishment and Responsibility*, p.182

In this chapter, I defend an account of the free society underwritten by liberal theory in which the value of liberty prevails and persons can live the lives they think fit without more restrictions than those imposed by the equal enjoyment of this liberty for all. From this it follows that the free society I will defend is not a society without restrictions or obligations: "though this be a state of liberty, yet it is not a state of licence" (Locke 2003, p102).[66] However, unlike the restrictions and obligations existing in other socio-political arrangements, in a free society these limitations and constraints should be conceived, or so I will argue, as the result of individuals' internal commitment to a life in association with others.

Given this commitment to the free society, it might seem as if there would be no place for the criminal law: how could a coercive and condemnatory system of social rules result from individuals' internal commitments? The ultimate aim of this chapter is to offer an answer to this question and, in doing so, prepare the ground for an account of the general function of the criminal law of the free society in the following chapter.

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66 Despite all my references to Locke and the influence that the *Second Treatise* has in the construction of the free society, one must not overdo the link. The Lockean laws of nature are laws the content of many of which could hardly count as liberal in the sense purported in this work. Thus, for example, a clause of the line that immediately follows the text quoted – i.e., "though man in that state have an uncontrollabe liberty to dispose of his person or possessions, yet he has no liberty to destroy himself [...]" – is not something that I take as being part of the constitution of the free society.

From the very outset it is important to set out the different steps of the argument clearly. The chapter has two parts. The first one introduces a basic aspect of human nature, namely, the purposive nature of individuals and the intimate connection between this feature and individuals' subjective identities. Individuals have life purposes that significantly influence both their subjective identities – how they define themselves – and the way in which they conduct their lives. From the fact that individuals assign deep value to both these life purposes and to a life lived in close connection to these life purposes, I derive the core of what makes societal coexistence plausible, namely, the subjective benefits that associating with others contribute to a life lived according to their life purposes. Were those subjective benefits absent, there would be no reason to engage with, or remain in, a given joint activity.

In light of these conclusions about human nature, in the second part I present the general function of the state institutions of the free society. This general function derives from the importance we should assign to human's purposive natures and their capacity to live a life as they think fit. In its most general formulation, it will be argued that the function of these institutions is to serve individuals' capacity to live their lives as they think fit according to their purposive ends, not to serve those ends themselves. More precisely, I will maintain that the function of state institutions is expressed in their commitment to the principle of freedom of association. The mark of the free society is the existence of state institutions that leave individuals free to live the lives they think fit in association with others. Thus, and following the analysis in chapter 3 of social groups as joint activities, I present the free society as an association of purposive individuals engaged in the activity of free coexistence.

1. The Free Society and Purposive Individuals

1.1 *Individuals, Subjective Identity & Life Purposes*

Philosophical traditions diverge on the issue of what properly defines humanity, and this is not the place to embark on an examination of those different accounts. Instead, I would like to point to a rather uncontroversial aspect of what is to be human; uncontroversial, that is, within the liberal tradition. Any state institution that genuinely serves the individual must take this factor seriously into account.

Human beings are agents. Roughly, this means not only that humans are able to act, as opposed to being merely the subject of events or happenings, but also that they are able to act from motives and reasons. An agent is an individual many of whose actions are explicable

to her and others in terms of reasons and motives. An account that overlooks this internal aspect of human agency is an account that misses the point of what it is to be an agent. For what is of interest here, I shall underline a particular aspect of individual agency, namely, its purposiveness. An agent's action is purposive if her action has meaning; if it has a direction that explains it in a way that goes beyond the mere description of the movements involved in the action. The purposive actions of an individual, in the sense relevant here, are actions that must be explained in terms of the values and fundamental commitments held by that individual. In this sense, they are central to the way the individual defines herself. In other words, purposive actions are actions that an individual performs as a result of the values she holds and that determine how she understands and conceives of herself.

This understanding of purposive actions is influenced by, and can be further explained in reference to, what Loren Lomasky has called directive ends (Lomasky 1987, ch.4). These ends (unlike non-directive ones) make coherent, and shape, a person's life in significant ways: "In the absence of such ends [...] bodies could continue to endure in the way that bodies do and memory might still exert cohesive force. What would be absent, though, is continued identity as the selfsame purposive being" (Lomasky 1987, pp.31-2). In my account, directive ends are intimately connected with certain types of actions (purposive actions) that are required, from a subjective point of view, to provide the individual with a sense of coherence, direction, and meaning in life.

An example of a purposive action may be the act of looking after my family by providing security, affection, and so on. These actions express my commitment to particular values (e.g., loyalty, reciprocity, and care), all of which define me as someone who cares for his family (something that could be phrased as being a good son or father). So understood, my commitment to those values of loyalty and reciprocity within the context of my family represents a directive end, and my purposive actions are actions directed towards the fulfilment of those ends.

My example suggests that the connection between purposive actions and directive ends is that both are central in providing an account of the *subjective identity of the individual*. A subjective identity (i) defines the individual in a morally relevant sense (call this the relevance condition); *and* (ii) is a self-determined identity in the sense of not being determined *only* by external determinations (call this the condition of self-determination). In order to provide a more articulated account of the individual and her purposiveness, let us consider these two conditions more closely.

(i) *Relevance Condition:* Consider my action of typing these words with the fingers of my hands. This action, other things equal, does not make any moral difference in terms of who I am or how I conceive of myself. Whether I type with two hands rather than with one, or whether I intentionally type faster or slower are actions irrelevant when I am defining myself from a moral point of view. However, there are other types of actions that do have sufficient gravity to determine who I am in a morally relevant sense. That is, actions that shape my self-understanding and the way I guide my life.[67] This is what I call purposive actions. Think of the life of a good Christian. Suppose that the action of attending mass every Sunday is necessary to be a good Christian. Since one of my fundamental goals in life, let us also suppose, is to be a good Christian, then attending mass every Sunday is a purposive action, an integral part of what it takes to attain one of my life purposes. In effect, if I had to define myself – that is, if I had to give an account of my subjective identity – the action of attending mass every Sunday would take a central place in how I represent myself. This is because attending mass every Sunday is a central element of what constitutes my good life.

What explains the crucial difference between the action of typing these words and the action of attending mass every Sunday is that the latter, unlike the former, is an expression of a fundamental commitment. Fundamental commitments are expressed in certain actions, which by virtue of being the expression of fundamental commitments, acquire a deep significance for an individual's self-understanding. Indeed, insofar as they are the expression of fundamental commitments, these actions are central to individuals' self-understandings and subjective identities. In other words, they are purposive actions. Akeel Bilgrami provides a helpful explanation of the importance of these commitments: "A [commitment] is a fundamental commitment at a given time if at that time one wants it fulfilled at a future time, even if one believes that at the future time one may not have that [commitment]" (Bilgrami 1997, p.2529).[68] Bilgrami's appeal to a counterfactual seeks to emphasise the great depth of our present fundamental commitments. Individuals' subjective identities are constructed from commitments that are so deeply rooted in their present moral

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67 I am not implying that we can determine *a priori* which actions have or not a sufficient gravity. As I take it, this distinction is context-dependent and consequently, in order to determine whether an action has enough importance to contribute to a morally relevant definition of the individual, we need to consider thoroughly a series of factors whose specification goes beyond the scope of the point I am making. Ultimately, what I am asserting is simply that there are actions that have a sufficient gravity for the individual as to determine who she is and how she leads her life.

68 For stylistic reasons I have amended the original quote. Bilgrami uses 'desires' instead of 'commitments', but earlier in his paper he clarifies that in this context this variation is inmaterial. He says that he will "use a single term *desires* to cover all those motivating states of agents which [people] variously refer to as values, commitments, preferences, subjective utilities, interests, inclinations, motives, etc" (Bilgrami 1997, p.2527).

psychology that they want to remain loyal to them in a possible future even if in that future they happen not to be loyal to those very commitments.[69]

These considerations about individuals' fundamental commitments and their expression in purposive actions explain the first feature of the subjective identity of the individual. Let us now consider the second feature.

(ii) *Self-Determination:* the intimate connection between our subjective identity and the way we guide our life according to fundamental commitments (or, as I have also put it, according to our life purposes) leads us to the second feature of an individual's subjective identity, namely, that it is self-determined.

In the account defended here, an individual's subjective identity is self-determined not in the sense of being autonomously or otherwise chosen (for example, through deliberation or rational choice), but in the sense that it is an identity determined by the demands of the life the individual thinks fit. This life is different from a life we think best, or wisest, or closest to sainthood. More importantly, a life lived as we think fit is also different from an autonomous life or a life we choose among the available alternatives. The individual may well aim or want to live any of these types of lives, but neither these aims and wantings, nor the availability of these types of life, are conditions of living a life as the individual thinks fit. Instead, to live a life that one thinks fit is to live a life that, in good faith, one does not reject.

Of course, many important life purposes happen to be autonomously chosen, and many of these purposes happen to acquire part of their value precisely because they are autonomously chosen. However, there are many other life purposes that we do not come to embrace autonomously and there are many ways of living that do not take autonomy as a relevant value. For example, Peter may define himself as a Christian, a person who takes Christian beliefs and practices as fundamental commitments. This may happen not because Peter has become such an individual through the exercise of his autonomy, but because his

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69 As an example of fundamental commitments, Bilgrami mentions members of the Iranian government who argue that increasingly modernising influences around them may have the effect that in the future they will lose their desire to live by Islamic principles. However, what they desire now is to live (now and in the future) by Islamic principles, even if they do not have that desire to do so in the future. Thus, for these Iranians, to live by Islamic principles is a fundamental commitment. Other commitments that may plausibly count as fundamental include being a vegetarian, being a Christian, being an atheist, being a teacher (I would also say, perhaps more contentiously, that being a woman or a man could also count as fundamental commitment for some people). For example, I know that in the future I may be persuaded to leave vegetarianism. However, at this moment (t1) I want to remain being a vegetarian in the future (t2), even if at that moment in time (t2) I am persuaded to leave vegetarianism.

circumstances have presented him with no other 'visible' alternative. Peter may have been born in a Christian nation where his fellow nationals have a deep sense of commitment to Christianity, and perhaps the values of his family, friends and school revolve around the fundamental value of being committed to the Christian church and so on. Had Peter been born in a corner of the Himalayas, he would have perhaps professed the beliefs of Buddha. But such was not the case and, given the circumstances just mentioned, Peter could not 'see' any other alternative but that of waving the flag of Christianity, a flag that he did not choose or reflect about before waving it.

As I understand it, becoming a Christian is not Peter's autonomous choice. As it happens, Peter did not realistically consider an alternative to being a Christian; he did not choose Christianity; he did not 'see' any other alternative to it; he just became a Christian and did not object to having done so. Nevertheless, and this is my point here, the lack of choice and autonomy does not mean that Peter's subjective identity and way of living is not self-determined and/or an instance of oppression. Insofar as the Christian life is a form of life to which he does not reject, my claim of self-determination remains.

The anti-perfectionist leanings shaping this account of human nature owe much to the influence of Chandran Kukathas' account (an account in this respect influenced by David Hume).[70] As Kukathas puts it, an individual "is free because she may live a life she has not rejected and is not forced to live a life she cannot accept. She is, in a sense, free because she enjoys a certain 'inner freedom'; however, that inner freedom is not autonomy or self-direction. It is liberty of conscience" (Kukathas 2003, p.113). A subjective identity is a genuine identity insofar as liberty of conscience remains in place.

However, in a language that Kukathas would surely not adopt, I understand an individual's subjective identity as being self-determined because in some weak but significant sense not to object to a life purpose and its commitments is to allow them to shape one's identity. This is not a claim about how we become identified with, say, a certain religion and the fundamental commitments it entails, but a claim about what we do once we identify ourselves as members of that religion *and* we do not object to this fundamental commitment or to the purposive actions that are involved in it. What we do under these circumstances is to *live* that life, which is an action in which we invest ourselves. Indeed, not to object to the life we live is to embrace the content of that life and reject the alternatives – reject them in the

70 For an account of Hume's understanding of human nature see David Miller 1981, ch.5.

weak sense of not making these alternatives part of our subjective identity. I see this as an act of self-determination.

These ideas point towards an important premise of my argument, namely, that no matter what, there are alternatives to our ways of living. We may not see them but, on reflection, they are always there; not being aware of alternatives is not tantamount to a lack of alternatives. To claim otherwise is, to my mind, an overstatement. There is always a different way to go and, therefore, there is always an alternative option to follow, even if that alternative may have a very high cost or have dramatic consequences.[71] It is because there is always at least one alternative to the way we live, and because despite that alternative we opt to keep going in our own way, that I see an individual's subjective identity as a weak form (but a form anyway) of self-determination.

1.2 *The Value of the Capacity to Live a Life as We Think Fit*

As I said in the previous section, purposive actions are actions performed by purposive individuals as a result of their fundamental commitments. Purposive individuals are individuals capable of performing actions that, they believe, are both required to live the life they think fit and that provide them with a sense of subjective identity and integrity through time. Now, given the significance of an individual's subjective identity, we could plausibly conclude that both an individual's life purposes *and* what it takes to live according to these purposes are things of great value to the individual.

The idea that purposive individuals value their life purposes ought to be uncontroversial. However, to affirm that individuals value what it takes to live a life according to these purposes is more contentious. In effect, this conclusion looks more like a stipulation than a claim resulting from an argument. Although there is some true in this, I do not believe it to be a serious problem. Let me briefly recast my argument to explain why I think we should accept the idea that individuals value what it takes to live a life according to their life purposes:

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71 Hume's famous thought in the *Treatise* that "Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. Tis not contrary to reason for me to chuse my total ruin, to prevent the least uneasiness of an *Indian* or person wholly unknown to me" (Hume 1975, p.416) can be understood here as an extreme representation of the different plausible and not necessarily unreasonable ways for which an individual might opt.

(i) Individuals value their life purposes.

(ii) Life purposes are such as to require that individuals live according to what these purposes require from them.

Therefore,

(iii) Individuals value what it takes to live a life according to their life purposes.

As I said, this needs clarification because (iii) does not follow from the conjunction of (i) and (ii). We cannot conclude that all that it takes to live a life according to certain purposes has value simply from the value of those purposes. For example, the classical dancer does not need to value the physical pain it takes for her to become a gracious dancer, even though she values being a gracious dancer. However, I think this difficulty can be avoided by a clarification of one aspect of my account and further specification of another.

The clarification is that life purposes require thinking through not only the ends at which they aim but also the means required for them to be attained. Thus, unlike the case of other types of purposes, the magnitude of value we assign to life purposes takes account of the means (and therefore the costs) necessary to live according to these purposes. Thus, if my life purpose is *E*, then, all else equal, I should be prepared to accept what it takes to attain *E*.[72]

The further specification is that my account should be understood as pointing to the value of one specific element of what it takes to live according to one's life purposes, namely, the value of the *capacity* necessary to live that life. This further specification of the conclusion in (iii) makes the argument much less contentious. Consider again the case of the ballet dancer: in order to become a gracious dancer she needs to experience years of exhausting and painful exercise. To make my point, I only need to say that, as part of what it takes to live the life of a gracious dancer, the dancer values the capacity to exercise her body and not necessarily the pain that exercising this capacity involves.[73]

Keeping this in mind, let me now rephrase the central claims of my argument: human beings are purposive individuals who can direct and shape significant parts of their

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72 Lomasky offers a response to this problem along similar lines. See Lomasky 1987, p.57.

73 That said, I believe one can think of circumstances and cases in which the pain or effort undegone as part of pursuing of a life purpose may be valued. Perhaps the purpose of successfully raising one's children may count as a case in which the effort it takes is to be valued, as this effort represents an expression of care for one's offspring. Also, there are activities that are achieved immediately by their very exercise. Certain forms of artistic expression are of this last type.

lives in accordance with their life purposes. That is, they can live their lives as they think fit. Since individuals cannot live their lives according to their life purposes except by exercising their capacity to live as they think fit, we ought to grant that individuals value the capacity required to live their lives as they think fit. These different elements are at the core of both the understanding of human nature that I endorse and the conception of the free society presented in the next section.[74]

1.3 *The Free Society*

The purpose of these brief reflections on human nature is to underpin a political account of society. Given the purposive nature of individuals, the idea is to determine the general function of state institutions in a free society. As a first step, it is worth recalling the liberal commitment to state neutrality. John Rawls and Ronald Dworkin have influentially argued that the liberal state, and more specifically, the institutions that furnish it, should be neutral with respect to individuals' conceptions of the good (Rawls 1971, 1993a and Dworkin 1977). The central idea is that what the state is to do, and what it may commend to its citizens to do, cannot be justified in a way that relies on a substantive conception of the good (or combination of such conceptions). Were the state and its institutions to act in ways that could only be justified by appeal to some or other comprehensive doctrine, their commands and policies would lack the legitimacy required in the context of a modern complex society.

Rawls describes the peril of a lack of neutrality emphatically when in *Political Liberalism* he argues that

> If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for a political community. [...] A society united on a reasonable form of utilitarianism, or on the reasonable liberalisms of Kant or Mill, would likewise require the sanctions of state power to remain so. Call this "the fact of oppression" (Rawls 1993a, p.37).[75]

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74 There are, of course, other values relevant to liberalism. In my view those values are derived from the value individuals assign to their life purposes and to the capacity to live their lives according to these purposes. However, that is not an argument that I pursue here.

75 See also Rawls 1993b, p.246: "only the oppressive use of state power can maintain a common affirmation of one comprehensive religious, philosophical, or moral doctrine. If we think of political society as a community when it is united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary to maintain a political community".

To avoid the dangers of 'the fact of oppression', political liberalism "hopes to satisfy neutrality of aim in the sense that basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine" (Rawls 1993a, p.194). The institutions of the free society, on pain of falling into the fact of oppression, must avoid relying on any comprehensive conception of the good.

However, this anti-perfectionist approach to the role of the state and its institutions does not mean that the state should not protect and honour the *capacity* required to live a life as we think fit. In effect, my account of the function of the state institutions of the free society will defend the claim that these institutions ought to be neutral with respect to individuals' life purposes, but ought to serve individuals' capacities to live their lives as demanded by their life purposes. This service, more specifically, is to be expressed by the commitment of the state institutions to the principle of freedom of association.

1.4 *Shared Interests & Society*

At different points I have expressed some scepticism about the possibility of putting forth a conception of human beings and/or social groups that is grounded in a rich or comprehensive account of individuals' purposes and values (see, for example, ch.3). However, this scepticism does not deny, nor preclude us from asserting, the existence of a basic interest shared by those individuals who coexist in society. There are, at the very least, two elements pointing in this direction.

Before referring to them, a brief word of clarification about my use of the notion of 'interest' is in order. I use the term in a wide sense to refer to all those things that motivate the individual to act and lead a life in the ways demanded by their life purposes and fundamental commitments. Thus, interests comprise not only strict self-interests, but also, for example, interests grounded in affection for others or in moral principles. This triad parallels Hume's account of human motivation, which in his language is constituted by interests, affection and principle (see "Of Parties in General" in Hume 1951).[76]

The first of the elements pointing to a common interest shared by citizens has already been mentioned; namely, that individuals value – i.e., have an interest in – their own life purposes and their capacity to live their lives according to these purposes. This is

76 Here I am following Kukathas 2003, pp.42-50.

something that I take to be fairly uncontroversial. The second element, which I address in this section, is that individuals have a shared interest in associating with others and entering and/or remaining in associations. This is a contentious claim and requires the following caveat: individuals value associating with others *in so far as* the value they assign to both their life purposes and their general capacity to live according to these purposes is not relevantly undermined by this association.[77] It is in this sense that purposive individuals share an interest in engaging and/or remaining in different social groups, such as chess societies, communities, or the society of a whole nation. In this account, then, societal coexistence does not have intrinsic value. The claim I defend is much more qualified, mainly because of my commitment to the idea that the value of a given social arrangement is a function of the value individuals assign to it in accordance with their life purposes. Thus, a life in association with others is valuable for a given individual if and only if she believes it contributes to living the life demanded by her life purposes.[78]

Clearly, this account has something in common with that offered by Thomas Hobbes. Like Hobbes' position, my account takes the origin and/or the persistence of an association between purposive individuals to be the result of self-interested considerations and the advancement of mutually advantageous states of affairs. Following the line of argument of the previous chapter, individuals enter and/or remain in their joint activities as long as those activities are, from their own point of view, beneficial to their own interests. However, unlike Hobbes, I do not take self-preservation or individual security (the fear of violent death) to be the only relevant interest or the ultimate rationale for the move from a state of nature to a civil society.[79] Instead, the fundamental value of a life lived in society is the benefits individuals obtain for the advancement of their interest in living a life according to their life purposes, whatever these purposes are. In my account, an individual may well have reasons to value a life with others – in effect, most of us do – but the interest an individual may have in a life with others is a function of the advancement of her interest in living a life that fits her life purposes. This would be true even if, *pace* Hobbes, that life is at odds with self-preservation or security.

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77 There are, evidently, some types of life that necessarily involve living in community with others. In these cases, the interest individuals have in living with others overlaps with their life purposes. However, this does not represent an objection to my position as these individuals still have an interest in living in a society that allows them to live in *the particular* association relevant to their life purpose.

78 This account, then, is immune to the unencumbered-self type of objection. This is because I am not offering an ontology of human nature but an account of the source of the value individuals may find in society.

79 For a similar idea see Kukathas 2003, pp.50-6.

These considerations help in establishing what the state institutions of a free society must provide to citizens if those citizens are to have reasons to be part, and/or remain as members, of the association (the next section examines what happens when these reasons are lacking – see sec.2.3). The subjective benefits individuals may obtain are at the basis of what makes each individual engage in and/or remain in society. These benefits are of various kinds and types, but ultimately, in their most basic form, all of them relate to the advancement of individuals' interests in living a life that fits their life purposes and the protection of what they take to be necessary to live that life.

2. The General Function of the State Institutions of the Free Society

> To be happy, men need only to be left in perfect independence in all that concerns their occupations, their undertakings, their sphere of activity, their fantasies.
>
> Benjamin Constant, *Political Writings*, p.104

2.1 *Freedom of Association and Minimalism*

The discussion of the subjective benefits of associations brings us to a central question of this chapter: how does this subjective point of view – grounded in individuals' interests – translate into *the general role of state institutions*? This is the question I answer in this part of the chapter. Given that one of the starting points of this analysis is the fact of diversity and conflict characteristic of modern complex societies, there is no simple answer. If we exist in a society characterised by pervasive plurality, any answer to the question of the general role of the state institutions turns out to be as difficult as it is critical.

Bearing in mind what Rawls dubbed 'the fact of oppression', our efforts to answer the question of the general function of state institutions need to be advanced in minimalist terms. This is not only to say that the role of the state institutions should not be articulated in terms of comprehensive values and practices, but also that the functions of state institutions must be such as to appeal to all those purposive individuals who coexist in society. Given circumstances of politics characterised by conflict and disagreement, this common ground will surely be minimal. The account I defend satisfies this minimalist requirement by defending the following two claims: (i) that a basic function of the state

institutions of a free society is to serve individuals' capacity to live their life as they think fit – independent of the life purposes these individuals may have but consistent with the enjoyment of this capacity for all. And, (ii) that this function is to be fulfilled by the commitment of state institutions to honouring the classical liberal principle of freedom of association.

Robert Nozick has nicely captured the background motivational of my proposal. He argues that "[t]here is no reason to think that there is *one* community which will serve as ideal for all people and much reason to think that there is not" (Nozick 1974, p.310). I do not see how we can seriously resist this claim. Thus, I take it that in circumstances of politics characterised by diversity and conflict about the good, a non-intrusive minimalist state comitted to protecting and honouring individuals' freedom of association will provide the framework in which citizens can live according to their various, conflicting, life purposes. It is not the state or any other form of association that is to determine how individuals should conduct their lives. Instead, in the free society it is only the individual who is entitled to establish the limits, conditions, and forms of the life that is to be lived.

My account proposes that what needs to be maintained as a strong and fundamental principle of political morality is individuals' liberty to guide their lives as they think fit, and that this principle is best honoured by the state's commitment to freedom of association. This is the rationale for my emphasis on freedom of association. Given the implausibility of one ideal association that is good for all, in a free society the state is to leave individuals free to decide both what types of associations to join and to determine the conditions and practices maintained within those associations. To do otherwise, I believe, is to fall short of avoiding the fact of oppression.

What supports this proposal is the basic purposive nature of human beings developed in the first part of this chapter. If people are purposive beings with fundamental commitments that arise from their life purposes, and these life purposes are various and complex so no single type of community 'will serve as ideal for all people', then, for the state to avoid the fact of oppression *and* to serve all its citizens, it has to create conditions that allow everyone to go their own ways. As I see it, this can only be achieved by the protection of

individuals' liberty to associate; were they not at liberty to associate with others they could not go their own ways in life.[80]

To not protect the freedom to associate and to then promote other non-neutral, richer and/or more comprehensive principles and practices, would amount to acting on grounds of a particular conception of the good which, in light of the principle of neutrality, is an unacceptable option for the liberal state.[81] By contrast, to adopt a thinner liberal principle, like freedom of conscience, would make the limits of the state too narrow. It matters that individuals are protected in freely *living* their lives according to their life purposes, not merely that they can *believe* or embrace that form of life in the privacy of their minds. On the one hand, freedom of association is thicker than freedom of conscience because the conditions required for the latter are less demanding than the conditions required for the former. On the other hand, freedom of association is 'more basic' than freedom of conscience because, in a non-trivial sense, for freedom of conscience to be genuinely respected we need freedom of association.[82] As Rawls himself puts it: "for unless we are at liberty to associate with other like-minded citizens, the exercise of liberty of conscience is denied" (Rawls 1993a, p.313).

These central tenets of freedom of association and the restrictions and obligations it imposes upon state institutions are captured in the principle of freedom of association (FA):

> *Principle of Freedom of Association*: A purposive individual has a liberty-right to enter into associations with others for whatever purposes and duration in time, compatible with the same liberty for all, and with no constraints whatsoever on the voluntary benefits and obligations that may emerge from this association.

FA is the kernel of my account of the free society. Its strength is neither the result of agreements reached within associations nor of some patterned standard of the good imposed upon everyone. Instead, and following Kukathas' apt terminology, FA can be well

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80 This is not a conceptual truth. We may well conceive of a good lonely life lived in the woods. However, this does not count as an objection because here I am only interested in the life of those purposive individuals that live with others in some form of association.

81 This does not deny that there may be values and rights other than the freedom to associate that can be defended without being non-neutral. In the following section I consider this possibility in relation to the issues of education and health care.

82 I borrow the idea that a freedom is basic from Henry Shue's analysis of rights. He states that "the substance of a basic right is something the deprivation of which is one standard threat to rights generally. The fulfillment of a basic right is a successful defense against a standard threat to rights generally. This is precisely why basic rights are basic. That to which they are rights is needed for the fulfilment of all other rights" (Shue 1996, p.34).

understood as a principle of liberal indifference (Kukathas 1998).[83] Given both circumstances of politics and the unlimited variety of ways in which people may lead their lives, the free society lets individuals go their own way, associating with others as they think fit – as their consciences dictate – and not imposing or endorsing any particular standard of association.

In Hohfeldian terms, FA grants a liberty-right to individuals to associate with others. From this it follows that the right holder is under no duty to associate with others or to associate in pre-determined ways. The role of the state is both to protect this liberty-right and to respect it, which means that the state has a duty not to impede the exercise of freedom of association and it has a duty to restrain others from impeding the exercise of this freedom. Thus, although liberal indifference tells us not to hinder freedom of association, it does not command the state to remain indifferent to actions that impede the exercise of this freedom. When such actions or practices take place, the state has an obligation to act. In a nutshell, FA involves a negative right held by an individual against other individuals and the state. But FA also involves a positive right held by the individual against the state to be provided with protection from interference with her right to associate (or not) with others.

At this point it is worth emphasising the liberal nature of this principle. FA is part of a tradition whose intellectual sources can be traced to the work of the founders of liberalism. John Locke is perhaps the most apt example.[84]

> To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man (Locke 2003, p.101).

Locke's reflections are at the basis of my account of FA. In a free society, the state has a stringent obligation to respect individuals' basic freedom to associate with others. This freedom, in turn, is only limited by the common descriptions of the joint activities in which

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83 Liberalism "is indifferent to particular human affairs or to the particular pursuits of individuals and groups. Liberalism might well be described as the politics of indifference" (Kukathas 1998, p.691). The way I understand liberal indifference links closely to Constant's idea in the epigraph of this section.

84 J.S. Mill advanced what counts as a standard liberal defence of freedom of association: "With individuals and voluntary associations [...] there are varied experiments, and endless diversity of experience. What the State can usefully do, is to make itself a central depository, and active circulator and diffuser, of the experience resulting from many trials. Its business is to enable each experimentalist to benefit by the experiments of others; instead of tolerating no experiments but its own" (Mill 1989, p.110). See also Locke's *Second Treatise*: a tacit consenter is "at liberty to go and incorporate himself into any other commonwealth; or to agree with others to begin a new one, in *vacuis locis*, in any part of the world they can find free and unpossessed" (Locke 2003, p.153).

individuals participate. Consequently, in accordance with the idea of liberal indifference, the basic functions of the state and its institutions are, firstly, to allow these activities to unfold in accordance with the dictates of individuals' consciences – without more restrictions than those determined by FA – and, secondly, to rectify infringements on FA. To genuinely serve the individual, state institutions of the free society must abide by the constraints that FA imposes upon them and express this principle in public policy.

Part of the strength of this account is that it takes seriously the pervasive fact of diversity and disagreement in modern complex society. This account only considers the necessary minimum of any workable account of human nature and society. In doing so, it does not need to enter into intractable discussions about the good life and the hierarchisation of values. Instead, this account only takes for granted the fact that individuals value their *capacity* to live a life as they think fit – a life to which in good faith they do not reject. In granting this point, and no more than this point, this account talks to anyone, no matter what life purposes she has, what type of association she decides to live in, and no matter what type of life she pursues. In adopting this minimalist form, FA shapes the functions of state institutions in a way that impedes the fact of oppression in spite of the circumstances of politics.

2.2 *Two Plausible Objections*

The Objection of Instability

Despite its strengths, my account of the free society faces some serious objections. One of them results from my emphasis on the idea that the interests individuals have in their life purposes determine both how people guide their lives and the extent to which they will engage in, and commit to, some form of association. This emphasis may seem problematic. Because of the large array of different projects that individuals may pursue in life, and given that individuals will have life purposes that are incompatible with the life purposes of others (or worse, are abhorred by them), my model does not have the power to keep social groups together. This difficulty may seem the natural outcome of emphasising individuals' interests and avoiding the discussion of the types of life purposes and social groups that are appropriate, just, or permissible and thus that should be promoted and/or protected in society. In leaving these considerations aside, my model allows any type of life, even one that

is detrimental to other life purposes. In allowing this, the objection goes, the model is prone to serious disharmony, conflict and, ultimately, instability.

To respond, I should begin by emphasising a distinction that first appeared in the previous chapter. When talking about a free society I refer to a social group of a special kind. A free society is constituted by a multitude of different associations or social groups. When considering FA and the constraints it imposes upon state institutions, we need to keep in mind this distinction to avoid confusing the free society with a social group *simpliciter*. When we keep these two types of association apart, we realise that the objection of instability needs to be answered in two parts. First, social groups *simpliciter* (religious groups, chess associations, political parties, fraternities, and any joint activity falling under the description advanced in chapter 3) are certainly prone to volatility; people's life purposes are not set once and for all, and for a whole variety of reasons individuals will opt for different types of associations at different times. The outcome of this is that the possibility of a social group *simpliciter* disappearing or becoming weaker or stronger is part of what characterises the existence of different groups in a society committed to FA. Instability of social groups *simpliciter* in the free society cannot be avoided.

Second, although FA makes possible this fluidity of some associations, it ultimately represents a way to increase the stability of the free society (as opposed to the stability of social groups *simpliciter*). This is the case because in the free society people are free to find, despite diversity and disagreement, their own ways to group and regroup according to what they think serves their own life purposes better. Ultimately, all this amounts to the idea that a free society is not a society that looks for the maximization of group cohesion, or increasing adherence to certain values. Instead, a free society is an association in which individuals engage and/or remain in the activity of living together because they believe that living together contributes to their being able to live their lives as they think fit.

In his *Letter Concerning Toleration* Locke writes that "there is one thing only which gathers people into seditious commotions, and that is oppression" (Locke 2003, p.248). My response to the objection of instability is motivated by the idea expressed by Locke in this passage, according to which instability is the son of oppression. The free society with its commitment to FA is a social arrangement designed against the perils of oppression, and thus, favourable to sufficient levels of stability (sufficient for social coexistence). Although the volatility of social groups *simpliciter* is a consequence of our commitment to FA, at a more general level, this commitment provides society with stable foundations.

The Objection of Social Voluntarism

However, coexistence in a society committed to FA may still seem quite troublesome for a different and important reason that can be called 'social voluntarism'. According to this objection, individuals are bound by whatever obligations exist within the social groups to which they belong. This is problematic because, given my emphasis on the overriding character of the right to freedom of association, it might be argued that my account permits and makes legitimate any type of association within society. In effect, there is nothing in FA or the free society as a whole that prevents obligations within a group being distributed unequally, so some may obtain more benefits than others and some may have to endure more burdens than others. My emphasis on the right to freedom of association does not impede the existence of ways of life that are at odds with traditional liberal values such as, for example, equality or autonomy (racist, sexist, and social groups based on class are examples). This is the case because FA does not set as a standard of legitimate association that social groups must promote autonomous or egalitarian ways of life. Or to put it more strongly, FA allows the existence of social groups that undermine equality and/or autonomy. In the end, the objection goes, a society built around a strong account of FA is fertile land for individual oppression by the powerful.

I believe that this objection is in part due to confusion. It is certainly true that FA allows the existence of social groups that may be at odds with autonomy, and it is also true that there is nothing in FA that impedes the creation of social groups that distribute benefits and burdens unequally. Indeed, the free society I defend here permits joint activities that impose costs upon some people such that equality and/or autonomy are undermined. However, I do not take this to be a fatal objection. I rather consider the possibility of inequality and heteronomy as part of the cost we need to pay if we value human freedom – whose minimally plausible specification I understand as the human capacity to live a life to which in good faith we do not object. These costs, as I said, may be distributed unequally, but that is the inevitable outcome of human diversity in circumstances of freedom.

However, this does not mean that my account permits and makes legitimate *any* type of social group. Only those groups that abide by the requirements of FA are allowed and legitimate in a free society and, therefore, under the standards of political morality that guide the free society, any type of association that does not live up to the requirements of FA is at

serious fault. To discuss this point and its implications for the objection of social voluntarism, consider now a central corollary of FA: the right to dissociate.

2.3 *The Right to Dissociate*

The right to dissociate – the logical corollary of FA – is crucial both to avoid individual oppression by the powerful and to face those circumstances in which the burdens an individual must endure within an association are more extensive than the subjective benefits the same individual may gain from that association.

Remember that the normative *sine qua non* of associations in a free society is that the costs and burdens of associating with others do not surpass the subjective benefits that this association provides to the individual. If the value that individuals assign to their life purposes and their capacity to live a life according to these purposes is going to be honoured, the final and subjective cost/benefit calculation of living in society must be positive. That is the mark of an association of purposive individuals. However, in circumstances in which the subjective benefits are surpassed by costs – which, we must note, is different from whether these costs are distributed equally or justly – the individual lacks sufficient reason to remain in that association. When that is the case, the liberal position I endorse establishes that the individual should be let free to deliberate and exercise either his right to remain – in order, for example, to try to change those aspects of the social group with which he disagrees – or exercise his right to dissociate and attempt to engage in a different type of association with others. This is the way in which the free society must face many of the turbulences and difficulties – like those posed by social voluntarism – that may almost certainly emerge when individuals freely associate with others.

Of course, this is easier said than done, but this practical worry does not undermine the point that under ideal conditions, the right to dissociate should work as (part of) a response to oppression and/or the dissatisfaction of members of a given association. In order for this right to gain more practical plausibility further institutional arrangements would have to be implemented, and this is something to which the free society would have to devote time and effort.

In what follows, I would like to briefly explain the importance of the right to dissociate by differentiating my position from an aspect of Margaret Gilbert's account presented in chapter 3 (see sec.3.1). This aspect refers to what she calls the concurrence

condition on exit (Gilbert 2006, p.109):

> Absent special background understandings, any given party, A, has an obligation to any other party, B, to obtain B's concurrence in any new determination of the details of the joint activity. This includes A's exit from the joint activity (Gilbert 2006, p.114).

Thus, according to Gilbert, there is a concurrence condition on exit to be satisfied if dissociation is going to be legitimate. The concurrence necessary to legitimate dissociation must take place either in advance (by prior agreement or convention) or on the occasion on which an individual presents his intention to stop his engagement in the joint activity. Following Lomasky, I shall call this understanding of the right to dissociate a weak form of freedom of dissociation (Lomasky 2008).

Although I believe that Gilbert correctly accounts for the conditions of adequacy of some joint activities, I am less convinced that freedom of dissociation should adopt this weak shape in a free society. My main reason for doubt about this form of dissociation is that its application would make it legitimate for associations to retain dissident members against their will. In order to dissociate from a group, the dissident or unsatisfied member would have to wait for the concurrence of all the other members of the association.[85] Because such an outcome is not consistent with FA, I conclude that a stronger freedom is needed. To be fair, Gilbert suggests *in passim* that this concurrence condition on exit may be given a stronger, more liberal, tone. She asks whether there could be "a society with the convention that one's merely wanting to break away from *any* joint activity always suffices to free one of the constraints of that activity" (Gilbert 2006, p.113). And her answer is that, in effect, there would be nothing wrong with that society. However, despite the sympathy I have for this answer, I think we would do better to adopt a different – stronger – strategy in response to the issue of exit in the context of a free society.

What I have in mind is that, rather than adopting a condition of adequacy of disassociation from a joint activity grounded in conventions, positive agreements or

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85 This difficulty is analogous to the difficulty that classical liberalism finds in the idea of common property – the difficulties it finds in what G.A. Cohen has called "joint ownership of the external world" (Cohen 1986b, p.80). If I own nothing other than myself and external things are common property, all I can do must require the agreement – the concurrence – of others (those who own what I require to lead a life). This, in turn, renders a system of common property a system prone to unfreedom since I cannot lead a life without the agreement/concurrence of others. Of course, in a free society a social group may arrange things so that it creates an association of joint ownership in external things. However, this association would have to have a much weaker character, as weak as to allow the individual to exercise is liberty-right of association without the concurrence of anyone else but herself.

background understandings, we should adopt the right to dissociate as a right as fundamental as the liberty-right to associate. We should understand the right to dissociate as the logical corollary of the right to associate. This results in a strong right to dissociate that follows from the value individuals assign both to their life projects and to their capacity to live according to those projects.[86] This right supposes that individuals are at liberty to disassociate and others have no right to infringe this liberty. Similarly, individuals enjoy a robust claim-right held against other members of society not to be forced to stay within a given association.[87]

All of this means that, in my account, freedom of association provides reasons that *always* override the original requirements of the joint activity and, therefore, can always legitimately bring this activity to an end.[88] In support of this claim is the idea that, *pace* Gilbert, concurrence conditions are conditions of doing things together, not conditions for the persistence or termination of joint activities (or social groups). Thus, concurrence conditions are conditions that establish the legitimate standing of the participants within the joint activity, but they do not delimit individuals' right to freedom of association. They are internal elements relevant to what is entailed by joint activities – they describe what we are doing together – but they do not underwrite the joint activity itself. Thus, violating a concurrence condition means that things have gone wrong, not because we are not justified in doing what we do (e.g., leaving the association), but because we are not doing what the common description of the joint activity commends us to do. Instead, it is the individual and the subjective benefits she gains from associating with others that justifies her remaining in and/or leaving an association (this is what justifies the association in the way that matters; that is, it justifies it in her eyes).

Of course, a comprehensive account of the scope of the right to dissociate would need to be thought out much more carefully. Here, I can only narrow down this issue by emphasising two things. The first one counts as a response to general critical appraisals of

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86 Chandran Kukathas has argued along similar lines in saying that "if there are any fundamental rights, [the right to exit] has to be that right. It is an inalienable right, and one which holds regardless of whether the community recognizes it as such" (Kukathas 2003, p.96). See also Kukathas 1995, p.238.

87 A traditional objection against this liberal right focuses on the costs that exercising the right to dissociate may involve. However, this objection will not do, because the general cost that exercising the right to exit may involve does not represent an infringment or violation of this right. Whether there are higher or lower costs, what counts as honouring the right to exit is not to be forced to remain in an association.

88 Within the literature of international justice and secession, Christopher Wellman defends a right similar—although slightly more qualified—to this. He "argues that any group has a moral right to secede as long as its political divorce will leave it and the remainder state in a position to perform the requisite political functions" (Wellman 2005, p.1). I leave for a different time establishing the descriptive and normative similarities and differences between this primary right of secession and the right to exit within the framework of the free society.

this right coming from some of the literature on cultural diversity. Contrary to the worries expressed by some of these theorists, the right to exit is not to count necessarily as "enough of a protection against cultural pressures" (Phillips 2006, p.137) or as "an adequate substitute for the basic liberties" (Green 1998, p.167. See also Okin 2002). The right to exit is only one of the protections available to dissidents or unsatisfied members of associations and it is one of the basic liberties to be respected in a free society. As pointed above, another protection is the right to remain in an association, were the dissident interested in bringing change to her association. In turn, a fuller consideration of this right to remain would require additional reflection on the competing entitlements non-dissidents and/or satisfied members may have to expel others from an association (the right to permit entrance into the association should also be considered).

This is not an exhaustive list, but it suggests some of the issues to be considered in a more complete account of the right to dissociate. Considering the precise limits of these different entitlements and constraints is something that goes well beyond the purpose of this chapter. In any case, what needs to be emphasised, and what represents a central protection of the individual against oppressive associations in the free society, is the right to freedom of association and its corollary, the right to dissociate. In the face of diversity and disagreement, such principles fare better than the imposition of patterned ways to lead a life within the free society: if things do not go well for a portion of the members of a given social group, they are to be free to leave and to seek or create more beneficial associations.[89]

The second emphasis is that what is being discussed here is the right to leave associations, not the right to nullify obligations and duties. Thus, although according to my account an individual is to be free to exit society or other type of association, such a fundamental right does not *necessarily* nullify the obligations she may have contracted as a result of her membership of the association she now leaves. Of course, leaving an association means that some obligations – for example, those created by virtue of entering and/or remaining in the joint activity – will no longer be relevant, but others may remain (for example, it does not follow from my account that all the obligations a partner may incur when entering into a marriage contract are released when he or she wants to dissociate from

89 As mentioned above, I believe that the protection of the right to dissociate would involve the creation of some state institutions that may not currently exist in an adequate form. I imagine something like the agencies and programmes of protection of witnesses and their relatives but applied to all type of voluntary associations. This programmes have been successful in minimising the risk of injury or death of those who provide testimony against members of organised criminal groups (on witness protection in some European countries see Council of Europe 2004, pp.15-42) This proposal, however, does not deny that the state institutions of the free society would presumably be less substantial than those of current liberal states.

the common activity of marriage or that all type of debts one may have as result of one's membership in a given association become null when one unilaterally decides to exit). Again, the precise extent and nature of the obligations from which an individual exiting an association is released needs more analysis than I can offer here.[90]

In conclusion, the principle of freedom of association with its corollary, the right to dissociate, and a couple of ancillary constraints (rights to remain in, and rights to enter, associations) are adequate mechanisms to protect individuals from the danger of oppression. Insofar as these conditions are honoured by social groups and enforced by state institutions, society remains as a genuine expression of the free society.

2.4 *A Final Rejoinder in Defence of FA*

Nothing I have said here should make us conclude that there are no other principles and functions that the state and institutions of the free society may adopt. Such principles and purposes may well be legitimate and justified under certain circumstances. What I am presenting is the ideal towards which a liberal society should aspire.

As I have emphasised, the free society exists in the circumstances of politics. It is a society that, like ours, is characterised by deep diversity and profound disagreement. This fact is insurmountable. But in this society, unlike ours, state institutions are committed to FA, a principle that honours the basic liberal idea that individuals are to be left free to live their lives as they think fit. Given diversity and disagreement about the ways to go in life, the state should not intervene in – in fact, it should remain indifferent to – how these different associations originate and to the comprehensive doctrines they adopt. The state is not there to impose a particular conception of the good or life purpose, but simply to protect individuals' liberty to live their lives as they think fit. This 'liberal indifference' of the state to the types of lives individuals live in association with others is what FA captures. To the extent that the free society diverts from this ideal, it moves in a less liberal direction on the liberal continuum.

I accept that this strong endorsement of FA as the basis of the general role of the state institutions is controversial. What about the state provision of health? Or education?

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90 It would also be necessary to consider the obligations the association has towards the individual exiting. For an illustration (not favourable to those leaving the association), see *Hofer et.al. v. Hofer et.al.* (1970), in which the Supreme Court of Canada ruled against two Hutterites who, having been expelled from the Hutterian colony, sued for a share of the communal assets.

These are goods that we now take to be basic and, we may think, their provision should also be part of the general function of the state of the free society. But again, although under certain circumstances the state may adopt the active role of educating and providing health care to its members, in the ideal free society, on pain of making this society a less liberal association, this is not the case.

The *prima facie* problem of assigning functions such as the provision of health care and education to the state is that it involves the state in endorsing non-neutral commitments and imposing these commitments on others even if those others in good faith object. Indeed, even if these commitments are at odds with the subjective identity of those who object. To pretend that our systems of education or health are neutral is to not take seriously the different possible ways people may direct their lives. Some of the groups coexisting under the overall umbrella of the state of the free society may simply want to be left alone with respect to health and education – think of Jehovah's Witnesses and Amish – while other groups – think of conservative Christian and supremacist groups – may wish to impose health and education policies.[91] To the extent that we accept the circumstances of politics and we favour a non-oppressive state, let alone the state of the free society, the minimal workable alternative is to articulate the function of the state and its institutions around the constraints imposed by FA. This is the principle that best represents the neutrality the state of the free society ought to have.[92]

A final qualifying word is in order. Perhaps there are other functions of the state that respect the principle of neutrality. In effect, it may be that a certain system of universal access to public education and public health could be implemented without being necessarily oppressive or partial. The cost of creating these neutral services may well be part of the cost of living with others and, therefore, part of what legitimately we may be asked to endure. I do not deny these possibilities and, were they effectively conceived of as neutral institutions, they could be part of the function of the state of the free society. In any case, and keeping this qualification in place, whatever other functions the state of the free society may have,

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91 For illustrations see *West Virginia State Board of Education v. Barnette* (1943), ruling that the Free Speech clause of the First Amendment prohibits public schools from forcing students (Jehovah's Witnesses or not) to salute the American flag and say the Pledge of Allegiance. *Wisconsin v. Yoder* (1972), ruling that compulsory school-attendance laws violate the right of Amish parents to decide about their children's education under the Free Exercise Clause of the First Amendment. *Takeda v. The State* (2000), where the Supreme Court of Japan ruled that a hospital violates the rights of Jehovah's Witnesses patients by administering blood transfusion without their knowledge or consent.

92 This is not to say that we should give people full-control over their children. There are serious controversies about this issue and before applying the model I defend we would have to dwell longer on the peculiar circumstances of children.

honouring FA is the minimum the state must do.

3. Conclusion

In closing, I shall briefly refer to a couple of questions that result from my account of the free society. If the basic general function of state institutions is to honour FA we may wonder, first, what are those institutions and, second, how these institutions honour this principle. My answer to the first question will surely be disappointing: those institutions are whatever institutions we need to serve individuals as project pursuers in consistency with FA. My aim here is not to provide a full account of the institutions of the free society, but simply to lay the ground for the analysis of the institution that concerns us in this thesis; the criminal law. The argument I am pursuing in this chapter and the next proceeds in several steps, from the purposive nature of individuals to the function of the state institutions that are to serve these individuals, and from these state institutions to the criminal law of the free society. In this sense, what these other institutions may be is not a central concern here.[93]

However, and to underline what I have argued in previous paragraphs, in establishing that the general function of the state is to honour FA, one may expect that the state institutions that may furnish the free society will be minimal – not only in their function but in their number. Since individuals are let free to associate as they think fit, the institutions that may legitimately exist in that society ought not to interfere in any substantive way with individuals' purposive natures, but only to serve the capacity individuals have to live their lives as they think fit. In addition, since the state institutions' main and primary function is to honour this liberty-right, it seems plausible to think that the institutions required to fulfil this task are fewer in number than those that actually constitute modern liberal states.[94]

This answer connects with the second question of how these institutions may honour FA. There is certainly not one unique way to honour this principle. In effect, what differentiates one state institution from another is the specific way in which each of them contributes to serving individuals and, thereby, the specific way in which each institution

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93 There is certainly a question to be asked here. Is this methodological move possible? Does it make sense to talk about the criminal law without considering the more general picture of the state and society? In a sense, that is what I considered in the previous chapter when analysing Antony Duff's preconditions of liability: to what extent can we hold people subject to the criminal law if other institutional arrangements are not in place or are simply unjust? My answer was that from a conceptual point of view these are different matters that involve different questions. Hence, they can be considered separately. Perhaps a more pressing question is whether we *should* treat them as such.

94 But see fn.89 above.

translates into policy the respect owed to FA. As I said above, this thesis is meant to focus on one institution only and therefore, interesting and important as it may be, the way in which these other institutions honour FA is not within the scope of this work. How the criminal law honours its general function – the general function it has as an institution of the state – is the central concern of the following chapter.

CHAPTER FIVE

On the General Function of the Criminal Law in a Free Society

> The interest involved is that of security, to everyone's feelings the most vital of all interests. Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of anything the next instant by whoever was momentarily stronger than ourselves.
>
> J.S. Mill, *Utilitarianism*, V, p.98

Four of the central claims of chapter 4 were: (a) individuals value their life purposes and their capacity to live a life according to these purposes. (b) The value of associating with others depends on the extent to which this association provides subjective benefits to a life lived according to individuals' life purposes. (c) The general function of the state institutions of a free society is not to protect a given life purpose but to protect the individual capacity to live a life according to her life purposes – this is done by honouring the principle of freedom of association. And (d) the reasons an individual has to enter, remain in, or leave, an association are a function of the subjective benefits the individual finds in that association.

From these claims this chapter derives the general role and scope of action of the criminal law in a free society. This enterprise needs to take into account at least two aspects of the analysis undertaken in the previous chapters. First, it needs to consider the specificity of the criminal law considered in chapter 1, that is, its coercive and condemnatory character and its public dimension. The function of the criminal law of a free society must be limited by these elements. Second, this analysis must remain true to the general function of the state institutions of the free society as stated in (c) above. The combination of these elements together with some further specifications will give us an account of the general function of the criminal law of the free society. The importance of this task cannot be overemphasised: getting the general function of the criminal law right is a first and crucial step if we are going

to make any improvement in the current condition of this institution.

1. The Criminal Law and Stability of Expectations

What is the role of the institution of the criminal law in a free society? What are the limits that this institution should not trespass? What is the precise protection that the criminal law provides to purposive individuals *vis-à-vis* the principle of freedom of association? Although each of these questions is slightly different, I shall try to provide a common answer by focusing on what I take to be the most fundamental contribution of the institution of the criminal law to the individuals it serves. This contribution, in turn, provides the key to the general function of the criminal law.

The analysis in the previous chapter considered a couple of objections to my model of the free society and the central place it assigns to the principle of freedom of association. The problem of stability was at the centre of these difficulties. Part of my response was that conflict and instability are certainly a consequence that may follow from this model since freedom, and not stability, is the primary mark of a *free* society. That may be the cost we have to pay for living in a society that takes freedom and diversity seriously. However, the degree of conflict and instability a society endures for the sake of liberty cannot be such as to destroy society or to cause it to regress to a condition of nature in which no common enterprise and association is possible. This raises the following question: how does the free society, despite the possibility of instability, remain a free *society* – i.e., an association that enjoys the minimal levels of cohesion or joint commitments intrinsic to any social group (see ch.3)? At the centre of my answer to this question is the criminal law and the contribution it makes to individuals' stability of expectations.

1.1 *Stability of Expectations*

According to Hobbes, stability is what the state of nature lacks and what Hobbesian individuals fear so much that they are led to the creation of the Leviathan.

> Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in the condition which is called Warre [...] For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many days together: So the nature of War, consisteth not

> in actual fighting; but in the known disposition thereto, during all the time *there is no assurance* to the contrary (Hobbes 1985, pp.185f. My Italics).

In a Hobbesian key, the problem of instability refers to the existence of conditions in which conflict is the result of rational calculation and in which conflict undermines our interests in living a life according to plan (or, as I put it above, according to our life purposes and fundamental commitments). A life lived under unlimited or unconstrained conflict is a life where the prospect of a life with others, and more importantly, the prospect of a life where individuals' interests are advanced, is radically undermined.

Similarly, instability is what the Federalists made strong efforts to avoid whilst promoting the ratification of the Constitution of the United States. Let me quote at length some illustrative passages by James Madison:

> An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people as a speedy victim to his own unsteadiness and folly.
>
> [...]
>
> The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?
>
> [...]
>
> But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability (Madison 1987, pp.367-9).

As with the individual who swiftly and without apparent reason changes plans and projects, instability damages state institutions and the way others perceive their authority. Instability precludes individuals from knowing what lawful actions are and what they can expect from their fellow members of society and from the state itself. Instability is, in effect, the first step towards the collapse of any possible association. It undermines both the plausibility of common goals and their knowledge, and the recognition of the status of others within the joint activity of living together, all of which, ultimately, puts the existence of society at stake. What these illustrations show – both Hobbes's and Madison's – is that a life without stability makes societal coexistence impossible and, with it, a life led with others in ways that are beneficial for all.

In the following sections I will defend and further specify the claim that the contribution of the criminal law to the minimisation of instability in individuals' lives is realised by honouring the principle of freedom of association (FA). As I argued in chapter 4, respecting the right to freedom of association is the response of the free society to instability in the face of diversity and disagreement. When stability is undermined and individuals think the conditions of coexistence have been reduced to an unacceptable degree, the importance of the right to associate (and dissociate) emerges with all its force. This right, at the core of FA, allows dissenters and unsatisfied members of society to dissociate to pursue their life projects as they think fit, should they deem it to be in their interests to do so.

What we need to look at now is the specific way in which the criminal law – as opposed to other state institutions – honours this principle.

1.2 *The Criminal Law and Stability of Expectations*

To begin our task we need to recall the specificity of the criminal law as considered in chapter 1. According to the argument there, the criminal law threatens an individual with some condemnatory consequences imposed in the name of the whole polity whenever the individual performs an action that has been deemed criminal within that jurisdiction. Because we can reasonably expect that people will in general avoid performing actions that invoke such condemnation, then if the criminal law holds an action ϕ to be a criminal act, members of that jurisdiction may expect ϕ-ing to occur less frequently than if ϕ were not prohibited. Additionally, if a member of that jurisdiction performs ϕ, she may expect certain consequences on part of the state – prosecution, conviction and punishment – as a result of

her doing ϕ. By the same token, if she does not do ϕ, she may expect the absence of certain course of actions from the state as a result of her not doing ϕ – she may, at the very least, expect not to be prosecuted, convicted or punished (at least, not for ϕ-ing).[95]

The criminal law, because of its capacity to guide human actions within the boundaries of the polity, contributes to individuals' stability of expectations. It does so by establishing intended consequences that individuals can expect when others within the polity act (or fail to act) in certain relevant ways. In turn, this contribution enhances the stability of expectations needed by individuals to live their lives as they think fit in association with others. So articulated, the criminal law plays an important role in the maintenance and enhancement of levels of stability that, in turn, make the individual value her association with others. This is the crucial contribution of the criminal law: to make a life lived with others a beneficial association. By contrast, instability removes the very condition of advantage in living together, by reducing each person's ability to plan her life and trust others.

A way to explain the importance of stability in living a life with others according to plan is that our life purposes demand some substantive degree of anticipation of what is to come; they require present reliance on the existence of a future state of affairs that will be consistent with our life plans. Without this degree of anticipation, our life purposes lose their meaning and depth. If I cannot have a reasonable degree of assurance that others will act in certain ways – for example, that they will do what they promise, that they will not change their minds about the business we began, that they will behave according to our well-cemented conventions – my ability to project my life and pursue my goals with others is seriously undermined. A life lived with others without a basic level of stability of expectations about how they will act in relevant matters is not a life we can live according to our life purposes. This is not the life of a purposive individual.

This role of the criminal law in a free society fits neatly with H.L.A Hart's conception – in the epigraph of chapter 4 – of a human society as a 'society of persons'. In the

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95 Some may rebut these claims on empirical grounds. It may be said – and it has been said – that criminalizing certain types of actions does not contribute to reducing the recurrence of those specific types of behaviour. Or that even if a criminal law does not have preventive effects, it still would be a good idea to have that law. To illustrate, consider the words of Charles Krauthammer: "The assault weapons ban [...] will have no ultimate effect on the crime rate or on personal security. Nevertheless, it is a good idea. [...]Passing a law like the assault weapons ban is a symbolic – purely symbolic – move in that direction. Its only real justification is not to reduce crime but to desensitize the public to regulation of weapons in preparation for their ultimate confiscation" (Krauthammer quoted in Nisbet 2001, p.23). Whatever answer we provide to these rebutals, what needs to be clear here is that even if these responses do not succeed, empirical evidence in this respect cannot really touch the claim that the criminal law in a free society ought to enhance stability of expectations among the individuals of that society.

account defended in this thesis, as in Hart's work, persons see themselves as purposive individuals, guided by their intentions and choices.[96] This understanding reinforces the idea that the criminal law and its coercive power ought to be exercised in a way consistent with the "recognition that a man's fate should depend upon his choice"; in doing so, the criminal law of the free society becomes what it ought to be: "a mechanism for [...] maximizing [...] the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future" (Hart 2008, pp.182, 46). It is the enhancement of the freedom of individuals to determine their futures in the light of their present actions and commitments that constitutes the most important contribution of the criminal law to a free society.

1.3 *Bodily Ownership and Ownership in External Things*

Yet, of course, the criminal law cannot contribute to individuals' stability of expectations across all aspects of their lives. Because the criminal law has only a specific scope of legitimate action (see ch.2), we need to ask: which expectations is it that the criminal law is meant to protect and to make more stable in a free society?; In what way does the criminal law serve individuals' capacity to live their lives as they think fit? The argument I shall make in this section is that the only type of expectations to be reassured and/or made more stable by the criminal law are certain basic expectations that relate to, and are necessary for, the capacity to live a life as one thinks fit in association with others. They are, put differently, the preconditions of freedom of association, that is, conditions that need to be in place in order for us to exercise our capacity to engage in any type of free association.

Bodily Ownership Precondition

In determining the preconditions of freedom of association a natural place to begin is by thinking about the importance of one's bodily integrity. Indeed – leaving aside contentious metaphysics – without a body the notion of associating with others is nonsensical. Freedom of association supposes that we are entitled to do as we want with ourselves in order to associate with others, and this is possible only if we are entitled to use our bodies however we

96 Hart's reference to choices is consistent with my account insofar as we understand 'persons', and their respective 'choices' and 'intentions' as a language framed within some form of humanistic compatibilism or, more clearly, as a language devoid of a scientificist understanding of personhood, choice and intent. As I take it, this is the correct reading of Hart's position.

see fit (subject to the constraints of others being able to do so too, and to those constraints we take on as associative beings). Thus, what is relevant in this respect is something that goes beyond possessing a body or having one 'on loan'. Although having a body may be enough to associate with others, *free* associations require more than this. What matters as a precondition of freedom of association is that individuals *own* their bodies so that the exercise of their capacity to associate is not dependant on someone else.[97] Thus, my view is that the very possibility of exercising our capacity to associate freely with others depends on owning one's body and, without bodily ownership being in place, the exercise of one's right to associate and dissociate would not depend on oneself but would be contingent on someone else (and this would be contrary to FA). In this I am appealing to a reasonably common view that "if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body" (Thomson 1986, p.44).[98] I call this individual claim to an individual's own body, the bodily ownership precondition of freedom of association.

But, what does owning one's body mean? The beginning of an answer should consider that, unlike mere possession, ownership supposes a strong entitlement to use and control our bodies as we think fit. Thus, my account grants that the most basic of the preconditions of an individual's capacity to associate with and dissociate from others refers to the ownership entitlement – the property right – of the individual upon her own body. This entitlement is to the unconstrained moral control and use of one's body, compatible with the same entitlement for all. Nozick's explanation of a right to property is helpful in further unpacking the bodily ownership precondition:

> The central core of the notion of a property right in *X* [for our purposes, the property right in one's body] [...], is the right to determine what shall be done with [one's body]; the right to choose which of the constrained set of options concerning [one's body] shall be realized or attempted (Nozick 1974, p.171).

From the point of view of the criminal law, the bodily ownership precondition is understood as the most fundamental claim individuals hold against each other. The right to bodily ownership held by *A* is understood here as *A*'s ownership over *A*'s body, so that *A* is the only

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97 If my use of 'ownership' in this context sounds inadequate to some ears, I am happy to replace the term with the specific entitlements that constitute the ownership of something. In the next paragraph I specify these entitlements.

98 It is interesting to note that even (some) Marxists would find this persuasive. G.A. Cohen, for example, when referring to Nozick's theory says that "Nozick's political philosophy gains much of its polemical power from the attractive thought that [...] constitutes its foundation. That thought is that each person is the morally rightful owner of himself" (Cohen 1986a, p.109).

individual legitimately entitled to determine 'what shall be done' with *A*'s body. This entitlement, in turn, imposes obligations on others as to what they can do to *A*'s body. In Hohfeldian terms, this entitlement is a claim-right held by *A* against others who, thereby acquire duties in relation to what they can legitimately do (or not) to *A*'s body. Thus, when an individual *B* violates *A*'s bodily ownership, *B* does not fulfil *B*'s duty owed to *A*. But this entitlement is also a liberty-right so *A* has no duty to use her body in any specific way and, all else equal, no one has a right to limit the use *A* makes of *A*'s body, when that use is compatible with the same claim-right for all. Thus, when *B* limits the ways in which *A* can use *A*'s body, *B* acts illegitimately and against *A*'s liberty.

For our purposes, it is also important to note that although the fundamental claim held by individuals over their own body imposes constraints on other individuals, it also establishes limits on what the criminal law can legitimately do. Thus, when translated into the discussion of the general function and limits of the criminal law, I refer to this fundamental right as the *bodily ownership condition of the criminal law*. This condition sets the first general limit on the function of this institution.

The bodily ownership condition demands that the criminal law is to protect individuals' ownership over their own bodies from other people's and institutions' illegitimate incursions (including incursions by the criminal law). The criminal law fulfils this condition in various ways. It does so when it limits its own function according to what this right demands; when it coerces others to refrain from acting in ways incompatible with this right; and when it condemns those who violate this right. Thus, the bodily ownership condition does not only have a negative function but also establishes more precisely the role of the criminal law as a state institution. On the one hand, this condition establishes a jurisdictional limit not to be trespassed on by the criminal law and, on the other hand, it sets positively what the criminal law is meant to do. Thus, the bodily ownership condition has a twofold role in determining the function of the criminal law: it presents both the aim and limits of the general function of this institution.

Ownership in External Things Precondition

In a free society bodily ownership is not the only condition of the criminal law that needs to be in place. This follows if we accept that a fundamental complement – if not a logical corollary – of the right to bodily ownership is the right to ownership in external things.

There is, of course, an intense debate in the literature about the inadequacy of the Lockean argument of deriving rights in external things from self-ownership and/or bodily ownership rights, but this is not the place to engage in such a discussion.[99] Instead, I will clarify my claim on this point and present two arguments supporting it.

The clarification is that my claim is not about whether it is possible to derive ownership in external things from bodily ownership. In other words, the point that matters here is not about the acquisition of property. Indeed, my proposal may allow, for example, a Lockean model of appropriation or a semi-Lockean one, *à la* Nozick. Or perhaps, instead, one may think that we would do better adopting a more leftist model, along the lines proposed by Hillel Steiner or Michael Otsuka.[100] My model, in principle, does not rule out any of these possibilities. Rather, what my proposal requires is simply to establish that whenever and however we establish a right to ownership in external things, ownership should count as a matter of concern for the criminal law.

This clarification is complemented by the following two arguments in support of my suggestion that ownership in external things is a precondition of freedom of association. First, were bodily ownership not followed by some form of ownership in external things, bodily ownership would be devoid of meaning and/or all exercisability. This is explained by the idea that in order to exercise the right to bodily ownership we need something in and on which to exercise such a right. Rights of property, as Nozick's passage quoted above suggests, are entitlements to do things with what is owned. In this sense, if it is going to be a meaningful right at all, the right to own one's body, and therefore, the right to decide what to do to and with one's body, requires the existence of a right to ownership in external things. By contrast, consider instead a social arrangement that accepts bodily ownership but that does not permit any other type of property. In that context, the expression of the right to ownership in one's body would become fully dependant on the will of those who have control over external things, something like an independent overarching power – God or a *politburo* – or the common will of all. These bodies would have to decide not only if and when one could use one's body to manipulate non-bodily bits of the world, but also if and when one can remain in a place and/or move from one position in space to another. These are unacceptable conditions of coexistence in a free society.[101]

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99 G.A. Cohen is perhaps one of the most influential contemporary opponents of that Lockean argument. See Cohen 1986a, 1986b and 1995.

100 Locke 2003; Nozick 1974; Otsuka 2003; Steiner 1994.

101 This line of argument derives from Cohen 1986b.

As a counterargument it might be said that a decent use of state power would not allow the imposition of unreasonable constraints on people's movements and use of external things and, therefore, that the right to ownership in external things is not necessary for people to exercise their bodily ownership. The success of this objection can be minimised – if not ruled out – by resorting to a second argument in support of the ownership in external things precondition. We must remember that the ultimate rationale of the general function of the criminal law is to serve individuals' capacity to live a life as they think fit. As I emphasised in chapter 4, this capacity is a fundamental aspect of people's nature and, thereby, the possibility to exercise it should not be dependant on the good will of external bodies or, in the case of a general will, dependant on the good will of something different from the particular will of the individual. In this context, ownership in external things rightfully maximizes the possibility of exercising our right to bodily ownership (because we are entitled to use and dispose of our bodies without resorting to anyone else's will), and, ultimately, allows us freely to pursue our lives as we think fit.

The logic of the right to ownership in external things entails that when *A* owns a worldly thing *X*, *A* has a claim-right against individual *B* so *B* has a duty not to interfere with *A*'s use and control of *X* as *A* pleases. In addition, this is also a liberty-right held by *A*, so *A* is at liberty to use and control *X* as *A* pleases and *B* has no right to limit *A*'s uses of *X*.

When translated into the context of the function of the criminal law, the right of ownership in external things represents *the ownership in external things condition of the criminal law*. This is the second condition of the function of the criminal law in a free society: when *A* owns *X*, the ownership in external things condition is satisfied only if the criminal law both limits its function within the boundaries of this right, commands others not to act in ways at odds with this right, and condemns those who violate this right. Thus, like the bodily ownership condition, this condition is also twofold: it establishes the limits that the criminal law cannot legitimately trespass *and* presents an account of what the criminal law ought to do.

As I have argued, the reason why this right should also determine the limits of the criminal law of the free society is that ownership in external things is a crucial complement of bodily integrity as a precondition of freedom of association. Were we not minimally assured of our entitlements to those external things that we legitimately own, the exercise of our right to bodily ownership would be undermined if not nil. If the criminal law is genuinely to advance the interest of individuals in living a life as they think fit, then the first precondition

of freedom of association needs the second one.

To sum up: bodily ownership and ownership in external things are the preconditions of freedom of association that the criminal law of the free society is to protect. Together, they represent the two necessary and sufficient conditions of the general function of the criminal law in a free society. When the criminal law exceeds the scope of action established by these two conditions it becomes – or we have reasons to believe that it has become – a less liberal and justified institution; one that abuses its coercive power and threatens individuals with condemnation for actions that ought not to be condemned by the liberal state.

Instead, the free society ought to use the criminal law – the state's most extensive coercive institution – only to protect and advance the basic common interests of the individuals subject to its authority. As I have argued before, under the circumstances of conflict and diversity characteristic of the free society, these basic common interests should not be presented in a form more extensive than the shared interest we have in both our life purposes and the general capacities that allow us to live our lives as we see fit. Given the liberal commitment to neutrality (see ch.4 sec.1.3), to use the criminal law to protect or promote other types of interest amounts to using coercive measures to advance views more comprehensive than those that appeal to all: to allow this is to defend a criminal law that is illegitimately coercive. Such is the 'fact of oppression' that a free society must avoid. Respecting the two conditions of the criminal law advanced here is crucial in impeding this undesirable state of affairs; a criminal law that confines itself to these limits impedes the expansion of its coercive power into spheres that do not relate to the preconditions required for an individual to associate with others.

Of course, what I have said here does not mean that the criminal law is the only part of a system of law that contributes to the stability of expectations. Civil and administrative branches of the law may also play a role in contributing to stability. Furthermore, the law itself is not the only institution that may contribute to individuals' stability of expectations in a free society. Although I shall not refer to other social institutions and practices that may plausibly contribute to stability it is important to keep this in mind in order to avoid falling into the perils of the reductive and oppressive penal state considered in chapter 1. In a free society, the criminal law has a role in achieving peace and stability, but that role is minimal and very specific. In other words, stability is not something to be fully provided by the criminal law and, in effect, other legal, social and political institutions may have to be in place in order to obtain sufficient levels of stability. The criminal law – and this is the core of my

point here – only has a partial role in the task of achieving the required stability of expectations of individuals in the free society; it crucially contributes to this stability of expectations, but it does not provide it entirely.

2. A Misunderstanding: A Monistic vs. A Pluralistic Criminal Law

To close this chapter, I would like to consider a difficulty that results from my emphasis on stability of expectations. Because stability is valued differently depending on the expectations people may have, what counts as an unstable life for an individual depends on the life she lives or expects to live. For example, the stability of expectations about what others can do to other people's property may be valued more by the rich than by the poor; the stability of expectations about the life-saving medical treatment that one should be provided in case of an accident may be valued more by the atheist and the Catholic than by the Jehovah Witness; the stability of expectations about not being injured in one's body may be less valued by a Cartesian mystic than by the mundane individual.

What these examples show is not that stability of expectations is unimportant or unnecessary for some and necessary and important for others, but that adequate degrees of stability vary across persons. The fact that people expect different things, and thus, that they may require different types of stability, suggests that there is not *a* type of protection that the criminal law must provide that is sufficient to achieve stability of expectations for all the members of a free society. Whatever levels of stability the criminal law may advance, they will always be inadequate for some.

This conclusion raises the question of how we can determine the type and extent of stability that the criminal law of a free society should be ready to provide. In other words, how do we determine what the precise function of the free society's criminal law is?

Before offering an answer, let us recap the steps of the argument that have prompted these questions:

(i) The general function of the criminal law of the free society is to contribute to enhancing the stability of expectations of purposive individuals.

(ii) Purposive individuals in a free society have different and conflicting life purposes.

(iii) What counts as sufficient stability of expectations of a purposive individual depends on, and varies according to, the life purposes of the individual.

Then:

(iv) The criminal law cannot contribute equally to the stability of expectations of all the participants of the free society.

This conclusion suggests that the criminal law of the free society is not capable of doing the job it is supposed to do. The problem is that it leaves us with the following dilemmatic alternatives: either we adopt an interpersonal standard of value and make the criminal law enforce what *that* standard demands, or we adopt different standards of adequate stability for different people. If we opt for the former – let us call it the monistic alternative – then it seems that we renounce the project of giving an account of the criminal law of a *free* society, since we simply stop taking seriously the existence of diversity and disagreement. If we opt for the latter – the pluralistic alternative – we seem to undermine the very possibility of a free *society* because we multiply criminal law jurisdictions. This would in turn render the system of law unable to provide the protection that it is supposed to deliver to all the different purposive members of the free society.[102] Let us expand briefly on each of these alternatives.

The monistic alternative envisages a system of criminal law that embraces a specific standard of value which determines the interpersonal standard of adequate stability of expectations that the criminal law is to serve. This would be the case of a criminal law that, say, takes the project of pursuing a good Catholic life as the interpersonal standard to determine what counts as a sufficient level of stability of expectation. Under this monistic penal law it would be assumed that sufficient levels of stability of expectations are attained if social facts are arranged in such a way as to assure that people can, say, go to mass on Sundays, obtain special dietary provisions during Easter, and be assured that life is taken as

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102 This dilemma was also perceived by Madison: "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. [...] Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations. On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions" (Madison 1987, p.243. See also §63).

sacred from conception. Contributing to the stability of the good Catholic life does not necessarily mean that the criminal law will coerce people to do these types of things. Instead, what the criminal law would do under these circumstances is to contribute to the conditions that make a society guided by good Catholic life standards possible – this may involve, for example, regulating and criminalizing things like work duties on Sundays, abortion and euthanasia, and supermarkets that only sell meat. In doing so, this monistic criminal law would adopt a specific standard and apply it generally, independent of the existence of other standards within society that are not compatible with the specific standard adopted. As a result, we would obtain an oppressive criminal law that, in the end, cannot provide authoritative commands to all the participants of society.

The pluralistic alternative, in turn, would recognise different standards of adequacy for individuals' stability of expectations and would thus involve the creation of multiple criminal law jurisdictions depending on the specific demands of the groups and/or individual subjects of the penal law. The problem is that, in doing so, the criminal law – and the system of law itself – would become unworkable because under circumstances of diversity and conflict these different types of criminal law would clash. The ultimate consequence of this alternative is that the criminal law becomes subject-dependant in a way that radically undermines the possibility of society as a joint activity in which participants live together. We must note that what it is objectionable in the pluralistic alternative is not the emergence of clashes between different individual outlooks, but the transformation of the criminal law into an institution whose social dimension is compartmentalised in such a way as to make it unable to undertake its condemnatory role (and any role) in a socially coordinated fashion. Rather than having *the* criminal law of a society we have different criminal standards applying to different people within the same society, all of which is at odds with the social condemnatory dimension established by the specificity of the criminal law.[103]

As I said, this difficulty seems to leave us facing a dilemma: either we opt for the pluralistic alternative and its recognition of diversity and the importance of freedom, but we undermine the very possibility of the criminal law as serving society, or we opt for the monistic alternative and its unitary account of stability of expectations, but we turn a blind eye to individuals' differences.

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103 In conversation, Professor Chandran Kukathas has suggested to me that the criminal law of the 'liberal archipelago' would be something along the lines of the pluralistic alternative. This marks a central difference between his conception of the institutions of the free society and mine.

However, in fact this is a false (although illustrative) dilemma that arises from a mistaken understanding of what the criminal law of the free society is supposed to do. The dilemma is produced by an understanding of the criminal law as promoting and/or protecting (a) specific substantive conception(s) of the good life. It views the criminal law as embracing principles that are the result of translating into the sphere of the penal institutions substantive standards of how a life should be led. As I have argued – and accordingly to a rather standard version of liberalism committed to state neutrality – the criminal law of the free society should not be articulated in such a way. Instead, what the penal institutions of a free society are to do is to serve the capacity that purposive individuals have to track their life purposes by honouring the principle of freedom of association – and more precisely, by respecting the two conditions of the criminal law, bodily ownership and ownership in external things. Since this human capacity is internal to what it is to be a purposive individual – and thereby it is a capacity shared by everyone subject to the penal law – my account does not fall into the difficulties of having to opt for either a monistic or a pluralistic account and, thus, serves everyone living within the association of the free society equally.

The account of the criminal law defended here is not supposed to endorse and/or promote any particular conception of the good life or any specific understanding of what capacities are necessary to pursue these different ways of living. In effect, my account resists this way of considering the criminal law and takes it as a mistaken understanding of the general function of this institution in a free society. Instead, by protecting the preconditions of freedom of association, the model of the criminal law that I defend is designed to contribute to individuals' capacity to live whatever life they think fit within society. Since these preconditions are immune to the objection of parochialism, the dilemma considered above between a pluralistic and a monistic criminal law does not touch the account I have offered here. Within this account, both the autonomous and the non-autonomous life are possible, the religious and the non-religious, the egalitarian and the non-egalitarian. The criminal law of the free society makes no distinctions between them.

3. Conclusion

The argument of this chapter has aimed to advance the basic general function of the criminal law of a free society. The central claim is that the penal institutions of the free society are to serve the individual by enhancing individuals' relevant stability of expectations. As I have suggested, the focus of this contribution should be honouring and protecting individuals'

capacity to associate freely, and more specifically, the preconditions of this capacity expressed in individuals' fundamental right to bodily ownership and ownership in external things. These are the two necessary and sufficient conditions of the general function of the criminal law of the free society.

As I suggested in chapter 1, a central motivation of my analysis lies in reforming the current illiberal condition of the criminal law. The criminal law we have takes on functions far beyond is proper remit: we use the criminal law not only to prevent and sanction specific types of conduct, but also to educate, promote and enforce Samaritan duties, evangelise, moralise and so on. The model suggested here resists this overexpansion by offering a minimalist alternative that, as I take it, is an adequate response to the current regrettable state of penal institutions. Of course, the argument so far is by no means sufficient to claim victory against these illiberal developments in the criminal law. To specify the function of the criminal law is necessary, but not sufficient, in offering an account that succeeds in the task of reformulating the criminal law. In effect, there are other sources of illiberality in the criminal law that, although they relate to its function, are not necessarily *about* its function.

As discussed at length in chapter 2, the phenomenon of overcriminalization is one of these sources of illiberality. Rather than focusing only on the function of the criminal law, a model that attempts to respond to overcriminalization ought to account for a series of principles that determine the legitimate scope of substantive criminal law. To undertake this task we must consider, at the very least, the principles and rationales guiding criminalization; i.e., the principles and rationales guiding the enactment of penal law by legislators. Building on the second part of this thesis, the third and last part turns to this task by considering the most plausible liberal principles of criminalization that might guide the creation of criminal statutes in a free society. If successful, this analysis will provide a more determinate answer to the problem of overcriminalization.

PART III

CRIMINALIZATION IN THE FREE SOCIETY

CHAPTER SIX

The Question of Criminalization

This chapter considers some of the most plausible, recognizable and influential liberal answers to the question of criminalization. What this question asks is, given the type of individuals we are, what types of conduct may the state legitimately criminalize? In other words, which classes of actions may justifiably mobilise the state institutions towards the imposition of punishment? These questions are, in effect, among the most central matters addressed by the philosophy of the criminal law. To do penal philosophy is, to a large extent, to engage in the question of criminalization.

I will present and criticise four plausible and influential answers to the question of criminalization in a free society. The principles, reasons and/or motives considered are the harm principle (section 2), penal paternalism (section 3), penal moralism (section 4) and penal consequentialism (section 5). From the outset, it is important to clarify that I do not offer a full account of these different positions and the authors that endorse them, but rather I present their core claims and see how they fare in reducing overcriminalization in a principled manner. This is to say that my analysis and the criticisms I advance against each of these principles should be considered with a qualification: to the extent that theories of criminalization generally combine different considerations and principles, my analysis is not of theories or comprehensive models of criminalization but of principles, reasons and/or motives that are central constituents of different theories of criminalization. In other words, I focus on some of the elements that different authors take as necessary but, generally, not sufficient for criminalization. This qualified critical appraisal will nevertheless prove useful in understanding better which principles a theory of criminalization of the free society should or should not endorse.

Finally, it must be noted that the following analysis and the conclusions it reaches are to be thought of as applying to the legislature, as opposed to the judiciary. As will become clearer in chapter 7, the reasons, principles and constraints on criminalization that this third part of the thesis aims at are legislative reasons, principles and constraints. This is to say that the question of criminalization as it is considered here is about the types of penal laws that our representatives in parliament should (or should not) enact. Although the role of our courts and judges and their importance in the task of reducing overcriminalization are

important and need to be addressed in order to amend the institution of the criminal law, they are not queries that concern us in the following analysis.

Having said this, and before looking at the four plausible answers to the question of criminalization that this chapter considers, let us briefly clarify what is meant by criminalization.

1. Criminalization of Actions

Criminalization involves the penal prohibition of types of actions and, consequently, involves holding criminally liable those who culpably perform those actions.[104] On the one hand, if the question of criminalization is answered by the claim that actions of type ϕ within a jurisdiction J should be criminalized, what we are establishing is that when an agent P performs a token of ϕ within J, all things equal, P ought to be held criminally liable for ϕ. On the other hand, by criminalizing ϕ, a jurisdiction J is establishing that Ps conduct is condemnable and, absent justifications and excuses, P is to be condemned for ϕ. This is part of the analysis of the specificity of the criminal law presented in chapter 1.

Of course, criminalization is not tantamount to the conviction and sentencing of those who perform the criminalized action. This is because not every instance of the criminalized action ϕ is 'visible' to the criminal law as only some offences are reported to the authorities. Moreover, even when an instance of ϕ is visible to the criminal law, ϕ may not be further investigated. This is because of the high levels of discretion that the bodies in charge of investigating and prosecuting offenders have. To a large extent, it is up to these bodies to call offenders to respond for their actions. However, even if a token of a type of action ϕ performed by an agent P is visible and prosecuted by the state, this does not mean that P is going to be convicted and sentenced for having ϕ-ed. P may have ϕ-ed in circumstances that justify or excuse Ps ϕ-ing. Hence, a mere instance of ϕ by P in a jurisdiction J does not necessarily mean that P is to be convicted, let alone sentenced and punished.

That criminalization does not amount to conviction and sentencing of those who perform the criminalized action is important. It shows that criminalization is not all that matters to tackle the predicaments considered in chapters 1 and 2. In other words, that

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104 I use the term 'conduct' in a loose way to convey actions, practices and omissions. These terms have different implications for the question of criminalization but, for the time being, they should not distract us.

conviction and sentencing do not necessarily follow from criminalization shows that when we advance an answer to the question of criminalization – that is, an answer to the question 'for what type of actions people should be held criminally liable?' – we are only offering part of a complete normative answer to the problems that affect the system of criminal law. The importance of this thought is that it makes explicit the limited – although fundamental – power that a theory of criminalization has to contribute to a fair system of criminal law: to offer an adequate model of criminalization is to offer a necessary but by no means sufficient account of what should constitute the system of criminal law in a free society. A more comprehensive analysis would have to include further consideration of types of defences, the scope of prosecutorial powers, conditions of due process, and so on. Although very important, these issues are not part of my analysis here.

With these preliminaries in mind, we pose again the question of criminalization: which types of actions may the state legitimately criminalize? My answer is advanced in chapter 7 and derives from the arguments presented in the previous chapters, specifically chapters 4 and 5. That is, the answer to the question of criminalization I defend derives from the idea that the primary function of the criminal law of a free society is to contribute to the stability of expectations of its members by protecting the preconditions of freedom of association. My contention is that by deriving an answer to the question of criminalization from this idea we are in a position both to establish principled limits on the criminal law and to contribute a response to the problem of overcriminalization.

Before moving to the details of my own proposal in the following chapter, the following four sections consider an equal number of different and important liberal principles of criminalization that, it may be argued, should inform the criminal law of the free society and be effective against the problem of overcriminalization.[105] Although each of these principles has positive features, my conclusion is that all of them are either incomplete or flawed and, therefore, should not be adopted without amendment.

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105 Since what we are looking for are the principles of criminalization of the free society, it is natural to confine our search to the reasons and principles of criminalization as presented in the most plausible liberal models of criminalization. That is what I do in the following sections. However, before kicking off, a note of warning is needed. Liberalism, as we well know, is not all of a kind, so some of the principles/reasons to be considered in this chapter may be resisted by some on grounds that they are alien to fundamental liberal commitments. I am not going to engage in that debate here. Instead, I am going to assume that under certain ascriptions, each of these principles of criminalization lives up to liberal premises and that, consequently, each could contribute to a plausible account of criminalization in the free society.

2. Criminalization and the Harm Principle

The harm principle is doubtless the most influential guide for liberal models of criminalization. Its great strength derives largely from the moral intuition that, other things equal, actions that are not harmful to others are no-one else's business. This intuition is supported by both the value liberalism assigns to individual freedom, privacy and tolerance, and by how these central tenets are well honoured by a principle that, on the one hand, minimally interferes with individuals' actions and, on the other, establishes a weighty presumption against external intervention over individuals' lives.

Mill's Harm Principle

In *On Liberty*, J.S. Mill offers the classical formulation of the harm principle:

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant (Mill 1989, p.13).

Although Mill's formulation is not explicitly concerned with criminalization, I will take the harm principle as a principle of criminalization only. This should not be too contentious. If the harm principle is going to have any bite in regulating interference upon the individual, it must, at least, work at its best in restricting the application of penal coercion by the state over its members.[106]

So, what is the work that the harm principle is doing in relation to criminalization? For what interests us here, the most important role of the principle is to establish constraints on what counts as legitimate state intervention upon the individual through the criminal law.

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106 I cannot overemphasise that this is a reductive account of Mill's principle. In effect, Mill's account talks to society in general rather than to the state in particular: he is more concerned with general types of interference upon the individual than with interventions upon the individual by the state through the criminal law. Mill has strong reasons to opt for this broader approach: "Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself" (Mill 1989, p.8). It is then a mistake to take Mill's principle as a straight principle of criminalization. For an example that illustrates this mistake see Richards 1982.

The limit is set in anti-paternalist terms, so the only type of action that can be rightfully prevented – that is, penally regulated – is harm to others (i.e., excluding interference for the agent's own good). This way of putting things is attractive, at least to liberal eyes, as it leaves the individual largely unconstrained; whenever a conduct falls within the set of self-regarding actions, it is beyond the legitimate scope of state interference. Thus presented, the Millian principle emerges as a persuasive principle of individual liberty and tolerance.

Notwithstanding its liberal credentials, Mill's harm principle involves a series of problems extensively reviewed in the literature.[107] My intention, however, is not to advance a systematic and/or comprehensive critique of Mill's simple principle. Instead, I would merely like to state, briefly, why my account takes this principle as neither sufficient nor necessary for criminalization in the free society.

I shall argue that the harm principle *à la* Mill, despite appearances, cannot do the job of getting criminalization right. On the one hand, the concept of harm is too elastic and thus would allow the criminalization of types of actions that a free society should not be willing to prohibit using the criminal law. In other words, Mill's harm principle does not provide sufficiently clear and determinate constraints on what should count as a crime in a free society. This is why the harm principle is not a sufficient criterion of criminalization (should we criminalize other-regarding involuntary harmful actions? Should we criminalize *any* type of harmful conduct, however defined?). On the other hand, the criminalization of harmful actions cannot be the only aim of a system of criminal law in a free society. Both the penal law as it is, and the penal law as it ought to be, contain legitimate prohibitions of harmless actions. This is why the harm principle is not a necessary criterion of criminalization.[108] Thus, adopting the harm principle as a principle of criminalization in the free society would require important qualifications and additional complementary principles that help us obtain a 'complete' (necessary and sufficient) principle of criminalization.[109]

In addition, we should be aware of the difficulties that emerge from the general

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107 For a good collection of critical papers on Mill's moral, political and legal philosophy see Ten 1999.

108 It must be noted that Mill's general account of interference upon the individual, as opposed to Mill's account of the harm principle, has something to say against this last objection. In effect, Mill accepts as legitimate certain types of intervention on grounds different from harmfulness. For example: "[...] there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offenses against others, may rightly be prohibited" (Mill 1989, p.98. See also pp.75-6).

109 Although this section offers a generally critical account of the harm principle, I must note that my own answer to the question of criminalization can be understood as a re-elaboration of this principle. See chapter 7.

utilitarian framework in which Mill's harm principle is embedded.[110] This becomes evident if we consider that the specific aim of the harm principle (prevention of harm to others) may be overriden by utilitarian considerations, such as promoting human development and happiness. This possibility is suggested by Mill at the very beginning of the last book of *On Liberty*: "It must by no means be supposed, because damage, or probability of damage, to the interest of others, can alone justify the interference of society, that therefore it always does justify such interference" (Mill 1989, p.94). What is worrying is that, in the end, the criminalization of harmful actions to others seems to depend – at least on occassions – not on harm itself, but on something else. Consider a different passage in which Mill makes a similar point:

> There are often good reasons for not holding [someone who caused evil to others] to the responsibility [of being accountable for that evil]; but these reasons must arise from the special expediences of the case: either because it is a kind of case in which he is on the whole likely to act better, when left to his own discretion, than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those it would prevent (Mill 1989, p.15).

Hence, Mill deems it legitimate that, under certain circumstances and from considerations different from the harm principle, state action directed to prevent harm to others might be hindered. These is the result of utilitarian considerations upon which Mill's harm principle ultimately depends. This is problematic. If we want to succeed in using this version of the harm principle as a principle of criminalization, we then need to specify the limits and conditions that make penal interventions upon the individual legitimate in the light of Mill's utilitarianism.

So understood, criminalization turns out to be grounded in standards – in this case utilitarian standards – that are determined independently of the general function of the institution of the criminal law. Criminalization becomes an expression of the most persuasive (and contingent) utilitarian moral calculation, which makes this institution a mere instrument of the maximization of utility.[111] This articulation of criminalization is to be resisted, as it opens the door to overcriminalization and to undesirable developments such as those considered in chapter 1. Rather than building a system of criminalization in terms of

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110 For a similar critique see Brown 1972. See also section 5 of this chapter.
111 For a more detail criticism of consequentialism with respect to criminalization, see section 5 below.

the particular role and specificity of the criminal law, Mill's harm principle applied to criminalization within a utilitarian framework permits the transformation of this institution into a mechanism to realise the results of moral calculation. As it stands, there is nothing in this principle that would minimise the expansion (or reduction) of the criminal law for reasons alien to the proper function of the state and its institutions. The combination of Mill's harm principle and utilitarianism, we should conclude, does not do the job that a principle of criminalization in a free society is required to do.

Feinberg's Harm Principle

Mill's harm principle is not the only way to put forward a criterion of criminalization based on the notion of harm. A more recent, influential and non-consequentialist variation of the harm principle is offered by Joel Feinberg. He argues that "it is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) [...]" (Feinberg 1984, p.26). Feinberg's version of the harm principle is thus less strict than Mill's. It establishes that harm to others is not *the sole end* but merely *a good reason* for enacting penal statutes;[112] harm is one consideration, among others, for enacting penal law: on the one hand, a harmful action may not be criminalized given that other reasons (non-consequentialist reasons) preclude or override its criminalization and, on the other hand, a harmless action may be criminalized given that non-harm related reasons sufficiently support its criminalization (the offence principle is Feinberg's favoured source for a non harm-related reason for criminalization – Feinberg 1985).

Thus, Feinberg's account seems to avoid some of the difficulties found in Mill's principle. In establishing harm as *merely* a good reason for criminalization, Feinberg allows non-harm related considerations as being relevant for criminalization. This should be seen as a step forward since it may seem that the principle now has the power to accommodate harmless conduct within the general model of criminalization in a free society (e.g., harmless rape, harmless trespass to private property, unauthorised touchings, risks unknown to others).[113]

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112 As Feinberg puts it, rather than claiming that the harm principle is "the *only* valid principle for determining legitimate invasions of liberty [...] [w]e would be better advised [...] to begin in a cautious way with the claim that the harm principle is *a* valid legislative principle [...]" (Feinberg 1984, pp.11-2).

113 For harmless rape see Gardner and Shute 2007. For harmless trespass and unauthorised touchings see Ripstein

There is a second aspect of Feinberg's account that enables his model fare better than Mill's. As suggested above, adopting harm as a criterion of criminalization forces us to face the difficult issue of the meaning and limits of harm. As we saw, Mill's *On Liberty* does not provide a sufficiently determinate account of what counts as harm in a relevant sense (in a sense relevant to count as a sufficient reason for criminalization). Although the notion of other-regarding conduct (a term that Mill does not explicitly use) provides some insight, much more needs to be said if we want to achieve a sufficient criterion of criminalization. Feinberg's account, by contrast, makes progress on this matter in distinguishing two conceptions of harm: $harm_1$, a setback of an individual's interests, and $harm_2$, a setback of an individual's interests that wrongs that individual.[114] According to this account, only $harm_2$ is harm in a relavant sense, that is, in the sense of being a good reason for criminalization (see Feinberg 1987, pp.xxvii-xxix, *int. al.*).[115]

What distinguishes $harm_1$ from $harm_2$ hinges not on the consequences of the harmful action, but on the 'nature' of the action itself. Thus, if an agent *X* pushes an individual *Y* in circumstances such that *X* pushing *Y* involves the death of *Y* we need to inquire into the 'nature' of *X*'s action causing *Y*'s death to conclude both whether *Y* has been $harmed_1$ or $harmed_2$ and whether *X*'s action is a $harmful_1$ or a $harmful_2$ conduct. Thus, if *X* pushed *Y* as a result of an epileptic fit, then, other things equal, *X*'s action is $harmful_1$ and *Y* has been $harmed_1$. By contrast, if *X* pushes *Y* intending to produce *Y*'s death, and knowing that pushing *Y* would produce *Y*'s death, then, other things equal,[116] *X*'s action is $harmful_2$ and *Y* is $harmed_2$.[117]

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114 Strictly speaking, Feinberg distinguishes three senses of harm, but he only endorses the two considered here. The third sense, which Feinberg rightly dismisses, is harm in a transferred or elliptical sense (see Feinberg 1984, pp.32-3). An example of this use takes place when we say that a vandal has 'harmed' a window by breaking it.

115 It must be noted that, according to Feinberg, not any kind of wrong is relevant to harm2, but only wrongs that are "morally indefensible, that is, [wrongs that are] neither excusable nor justifiable." (Feinberg 1986, p.106) This is central to my criticism below.

116 The *ceteris paribus* clause is necessary to discard unusual cases of harm1 and harm2. The clause avoids cases in which, say, *X* intentionally does not take the pill that would have impeded an epileptic fit producing *Y*'s death. It also bypasses circumstances in which *X*'s intentionally and knowingly pushing *Y* in order to provoke *Y*'s death is the result of double effect, self-defence, and so on.

117 I do not understand harm2 as a subclass of harm1 but rather as a different and independent type of harm, a type of harm that is relevant to the criminal law and that has distinct and distinguishable causes. Thus, since the cause of death of *Y* in the example above is different depending on whether *X* pushed *Y* because of his epilepsy or because of his mischievous motivations, then this case illustrates two different types of harm. In turn, the different causal explanation of each harm determines the nature of the harmful action, so that pushing *Y* because of *X*'s epilepsy is an action different in kind from, say, pushing *Y* because of *X*'s selfish motivations. In other words, these are different actions, emerging from different causal sources and bringing about different types of harm. This reading of Feinberg's distinction between harm1 and harm2 has been resisted by some. Consider Antony Duff's account of the distinction: "harms2 are simply harms1 that are caused in ways that wrong the person harmed. What distinguishes harm2 from harm1 is not their intrinsic character as harms, but the extrinsic matter of how they are

Thus considered, Feinberg's account seems to fare better than Mill's. It establishes that prevention of certain types of harm ($harm_2$) is *only* a good reason for criminalization and that, therefore, harm is not always a conclusive or necessary reason for criminalization. This seems to be a positive development because, first, it renders harm more determinate and, second, it resists the idea that harmful action is all that is needed for criminalization. In what follows, and in spite of these positive features, I shall argue that Feinberg's account is inadequate as a model of criminalization consistent with the demands of the criminal law in a free society.

Let me begin by briefly expanding on Feinberg's notion of harm. $Harmful_2$ actions involve wrongful conduct: "The sense of 'harm' as that term is used in the harm principle must represent the overlap of [$harm_1$ and $harm_2$]: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense" (Feinberg 1984, p.36; see also fn.115 above). This understanding of harm within the context of the harm principle can be characterized as a moralized conception of harm (see Holtug 2002). Among the benefits of this approach is that it thwarts the criminalization of consensual activities that harm their participants (*Volenti non fit injuria* principle – see Feinberg 1984, pp.115-7) and establishes clearly that a large number of harmful actions are not within the dominion of the criminal law (i.e., harms that are not wrongs). All these are elements that should count positively in a liberal account of the criminal law that aims to minimise overcriminalization.

However, despite these positive elements, a moralized conception of harm *à la* Feinberg raises important difficulties. To make this model work we need to advance an account of wrongness in a sense relevant to the criminal law. This is because, for Feinberg, not any kind of wrong is relevant to criminalization but only wrongs that are "morally indefensible, that is, [wrongs that are] neither excusable nor justifiable" (Feinberg 1984, p.106). What Feinberg offers as a response is a right-based conception of wrongness, so that "[o]ne person *wrongs* another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right" (Feinberg 1984, p.34; see also p.106). Thus, when an individual *X* $harms_2$ an individual *Y* (that is, when *X* harms *Y* in a sense relevant to the criminal law), *X*

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caused" (Duff 2001b, p.18). My interpretation of Feinberg's conception of actions is more holistic than Duff's. That is, unlike Duff, I take the state of mind of the agent as part of the intrinsic nature of an action. Although Duff's reading is not ungrounded – consider, for example, the following passage: "Having qualified the harm principle so that legal coercion is justified by it only when necessary to prevent that subclass of harms that are wrongs [...]" (Feinberg 1984, p.110) – it relies on a particular and not necessarily correct understanding of the idea of a subclass. As I see it, both harm1 and harm2 are subclasses of harm *simpliciter*.

violates *Y*'s rights (see Feinberg 1987, p.xxix). As it stands, I shall argue, this right-based conception is problematic.

When we advance a principled model of criminalization we may be doing two things: (a) describing what the formal scope of criminalization is, or (b) prescribing what the formal scope of criminalization ought to be. Were Feinberg opting for the former, he would not be really establishing limits on the criminal law, but merely establishing what is the case regarding criminalization. If he opts for the latter – as he aims to do – then he is normatively committed to certain limits of the criminal law. The extension of this normative commitment is a function of the rights that Feinberg takes to be relevant to the criminal law. Although the details of these commitments are not fully specified, he is certainly aware that not every wrong violates rights in the relevant sense, which allows us to conclude that only some wrongs fall within the scope of the criminal law. This move is done, partly, by distinguishing legal from moral rights, so that even though every wrong is a violation of a right, not every wrong is a violation of a legal right (and *mutatis mutandis* not every wrong is the criminal law's business).

As it stands, however, this distinction between legal and moral rights does not get criminalization right. This is because, as Feinberg himself puts it, in some cases "moral rights seem to be derivative from, rather than prior to, legal determinations of one sort of another" (Feinberg 1984, p.110). The legal norm of driving on a specific side of the road is a typical example of this. At this point it looks as if Feinberg is shifting from a principled model of criminalization of type (b) to one of type (a). This is because his account seems to permit the establishment of moral rights from a mere description of legal rights and, in the abscence of further explanation, this seems to involve deriving a moral right from the existence of a legal right. However, if it is permissible to derive moral rights from legal rights, then we are running a serious risk since nothing would impede us from expanding criminalization as we think fit. The defence being that a fact of the matter (a legal right) justifies a normative principle (a moral right).

In a rather underdeveloped passage, Feinberg clarifies his claim and says that in those circumstances in which we talk about legal rights that are prior to moral rights we should rather talk about "legal judgments that make possible findings of moral and legal rights alike" (Feinberg 1984, p.110). His point is that those prior determinations are not legal rights creating moral rights but 'legal judgments' that provide a background for subsequent criminalization. However, this move does not resolve the difficulties just mentioned.

Feinberg does not provide a criterion to differentiate legal judgments that support the enactment of criminal law from legal judgments that do not support it (and that, however, may support some form of regulation different from the criminal law). Without this criterion in place, Feinberg's account allows the discretional expansion of the criminal law and, ultimately, the discretional expansion of moral rights through the creation of legal rights. Without a precise criterion distinguishing legitimate legal judgments on criminalization from legal judgements on non-criminal issues, matters that legitimate fall under the scope of what can be criminalized are left, dangerously, to the discretionary powers of legislators and officials.

However, Feinberg thinks that those cases in which moral rights seem to be derived from legal rights are atypical, and thus, perhaps my criticism is rather feeble. We must focus instead on the standard case in which legal rights are derived from moral rights.

As Feinberg puts it, a moral right is "a claim backed by valid reasons and addressed to the conscience of the claimee or to public opinion" whose function is to protect a certain interest (Feinberg 1984, p.110). Feinberg does refer to some tokens of those interests that should fall within (what he takes to be) the proper scope of the criminal law and takes welfare interests to be "the grounds for valid claims against others (moral rights) *par excellence*" (Feinberg 1984, p.112). He also thinks that 'morally disruptable interests' should be left to one side when it comes to the criminal law:

> If there are any interests in causing pain and suffering for their own sakes, for example, such interests cannot be the grounds of claims against others. Cruel and sadistic interests, morbid interests, wicked and sick interests, if there are such things, can be peremptorily ruled out of court, and put aside (Feinberg 1984, p.111).

Unfortunately, all of these specifications of moral rights relevant to the criminal law are insufficient. Feinberg needs to do more than simply state that there are interests to which everyone (or no one) has a moral right and he needs to do more than state that these interests have (or not) the capacity to block state intervention through the criminal law.[118] What we need is an argument that provides an account of those interests. Without that account we lack what is needed to explain, first, why these interests are so important as to be protected

118 A commentator has advanced a similar concern: "In [...] *Harm to Others*, one finds a host of types of interests mentioned (private, public, welfare, sadistic and morbid, self-centred, self-confined, competitive interests etc.), there is, however, no further elaboration on the definition of an 'interest', and consequently of 'harm.'" (Peršak 2007, p. 58). See also Stewart 2001, pp.59-60.

through coercive means and, second, why these interests are to be served through criminalization rather than through non-penal means. These are the two issues that need to be addressed if Feinberg's model is going to succeed.

Let me begin with the first. Does Feinberg have an account that explains and justifies why the interests and values he considers relevant to the criminal law prevail or are preeminent *vis-à-vis* other values and interests? I think the question must be answered in the positive. Feinberg is a self-defined liberal, and as such, he may appeal to the importance and priority of values like human dignity, individual freedom and equality.[119] In effect, his monumental *The Moral Limits of the Criminal Law* has as a main rationale "to trace the [legitimate] contours of the zone in which the citizen has a moral claim to be at liberty", which is "an extremely valuable good, perhaps even necessary for a good life" (Feinberg 1984, pp. 7, 8). Of course, in order to explain and justify the specific relevance and preeminence of the values and interests he takes into account much more needs to be said, but insofar as he explicitly claims to be committed to "vindicate the traditional liberalism derived from Mill's *On Liberty*" (Feinberg 1984, p.15) he has a story to tell in relation to the first issue: coercion needs to be made legitimate in relation to those values and interests that liberals take to be fundamental for a good life.

However, in providing a convincing and ultimately successful account of the interests that our values underpin, one is not providing an answer to the second issue, that is, an answer to the question of criminalization. This is because it does not follow from the fact that an interest *I* is either not morally disruptable or morally respectable that *I* provides a reason for or against criminalization. To put it in Feinberg's terminology, the existence of a liberty-limiting principle *H* does not entail that *H* should be put to work through the criminal law. In fairness, Feinberg is not claiming that these liberty-limiting principles are sufficient and/or necessary to make criminalization legitimate. However, he does claim that

> each liberty-limiting principle puts forth a kind of reason it claims *always* to be relevant – always to have some weight – in support of proposed legal coercion, even though in a given instance it might not weigh enough to be decisive, and even though it may not be the only kind of consideration that can be relevant (Feinberg 1984, p.10. My emphasis).

This is worrying. First, the unconditional acceptance that substantive moral reasons provide

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119 For Feinberg's explicit endorsement of liberalism see Feinberg 1984, p.15.

reasons for criminalization supposes that morality as such can carry some weight – sometimes decisive weight – in legislative decisions about penal statutes. In the name of morality, then, it is possible to advance penal statutes and then, in the name of morality, to punish people for their deeds. The problem with this combination of morality and rights is that it brings us back to some of the difficulties considered in previous chapters (e.g., chs.2 and 4). For example, the insurmountable disagreement about values and policies in circumstances of diversity, and the transformation of the criminal law into an institution primarily designed to express and coercively impose specific moral judgments. As I have argued before, rather than building up criminalization in this fashion, and on pain of permitting overcriminalization and allowing an illegitimate system of coercion, we should stick to a minimalist function of the criminal law such as the one developed in chapter 5.

However, it might be claimed that any type of argument that aims at legitimizing public policies ultimately has to appeal to morality at some abstract level. If so, morality is inescapable when applying normative theory to matters of public policy. I think this must be right. However, I doubt that Feinberg's appeal to morality is located at that abstract level of analysis. For the sake of the argument, however, let us leave this doubt aside, and assume that it is. This leads us to my second concern. As I see it, even with this assumption, the question of criminalization remains unanswered.

In *Harm to Others*, Feinberg formulates what he calls "mediating maxims". These are further specifications of the meaning of harm to help legislators to decide about the type of coercion that can legitimately be imposed upon individuals. That is, specifications that should guide legislators to enact law that imposes penal or non-penal coercion on individuals for certain forms of conduct (see Feinberg 1984, chs.5-6). These maxims seem to be the natural place to look for the determinacy required to make this model sufficiently workable.

Among these maxims, and in addition to the specification of harms relevant to the harm principle as harms$_2$, Feinberg considers: that harms relevant to the harm principle must be genuine (as opposed to minor and/or transitory disappointments or physical and mental hurts); that harms relevant to the harm principle must be located above a certain threshold of magnitude (this follows the *De minimis principle* that "The law does not concern itself with trifles" (Feinberg 1984, p.189)); that the application of the harm principle must be "based upon empirical generalizations about the likely effects on protected standard interests of various standard kinds of threatening actions" (1984, p.190); and that the application of the harm principle must be done by establishing the relative importance of each of the interest

under consideration, taking into account subjective, intrinsic and relational considerations of that interest (see 1984, pp. 202-6, 217).

These mediating maxims are surely pertinent in determining what should count as harm relevant to the harm principle. However, they do not say anything whatsoever about why *those* relevant harms should be addressed through the criminal law as opposed to through other coercive measures. To leave this unanswered is to leave undetermined the line that differentiates crimes from torts and other wrongs. Feinberg, in effect, seems to be undecided about this issue, as he constantly shifts his language from general legal coercion to specific penal coercion without really providing a justification for this move. This inconsistency in the language reflects the lack of an answer to the second issue. Although Feinberg advances reasons – generally good and convincing reasons – for legal coercion, he does not provide reasons specific to criminalization that may ground using the whole coercive penal power of the state to regulate and punish human conduct.

If what I have argued is correct, Feinberg fails to provide a sufficiently determinate answer to the question of criminalization. He certainly offers important criteria of legitimacy that need to be considered once we decide to use the law to coerce individuals. However, the move from legal coercion to penal coercion is left unexplained, and this can support the unprincipled enlargement of the criminal law. Moreover, Feinberg's moralisation of the harm principle and the consideration of 'the independent value' of conduct to be interfered with (1984, ch.5 §3) or the 'inherent moral quality' of interests (1984, ch.3 §4 and p.205, *int.al.*), seems to take us into the murky and, in my opinion, unproductive waters of scaling the values that should count as relevant when thinking of justifying public policies. In circumstances of diversity and disagreement, this is not a promising way to go.

Despite all the difficulties and shortcomings, it must be emphasised that the harm principle provides crucial insight into the question of criminalization. It tells us (1) that individuals' interests are a fundamental consideration when assessing the enactment of a statute; (2) that the setback of interests is at least part of what criminalization should aim to prevent; (3) that a harmful condition represents a setback of an individual's interests; (4) that the criminal law should at least aim to prevent wrongful harmful actions against others. All these are important elements in constructing a model of criminalization for a free society and, consequently, they are incorporated in more or less explicit ways in the model that I defend in chapter 7.

In the following sections I consider three other reasons or motives of criminalization

(penal paternalism, penal moralism and consequentialism). As we shall see, to a large extent each of them tries to accommodate or amend the difficulties that the harm principle involves.

3. Penal Paternalism

Penal paternalism responds to the anti-paternalistic clause in the harm principle. For a penal paternalist it is not always true that only other-regarding conduct can legitimately be criminalized. The claim is that there are circumstances in which, on paternalistic grounds, the criminal law can rightly sanction types of actions that either harm the agent that performs that action or that are plainly harmless.

What is of interest for this section is to consider (i) paternalistic justifications of *penal statutes*, as opposed to paternalistic justifications of non-penal statutes, and (ii) paternalistic *justifications* of penal statutes, as opposed to paternalistic attitudes within the penal law, paternalistic states of affairs brought about by the penal law, or paternalistic actions performed by the penal law. This is not to say, of course, that there are not non-penal forms of paternalism or that paternalism is only predicated of justifications. However, for our purposes, and in the light of the peculiarities and worries that permeate the criminal law, our concern here is only with paternalistic justifications of penal law.

Thus, penal paternalism will be understood here as a type of justification in favour of the enactment of penal laws that interfere with the actions of agents on the grounds that this interference promotes agents' own good.[120] In what follows, and borrowing from Gerald Dworkin's well-known work on the matter, I look at different versions of paternalism that further specify this general account of paternalism. After advancing these different versions of paternalism I move on to consider both how liberal thinkers – namely Feinberg and Raz – have adopted some of these different types of paternalism and how they fare in the face of overcriminalization.

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120 Consider the general structure of paternalism in a non-penal context as presented by Douglas Husak: "When *A* treats *B* paternalistically [...] *B* is prevented from adopting some course of action on the grounds that it would be bad for *B*. As a rough approximation, one person *A* treats another person *B* paternalistically when *A* interferes with *B*'s freedom for *B*'s own good [...]" (Husak 2003, p.388). See also Gerald Dworkin's account: "By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exlusively to the welfare, good, happiness, needs, interests or values of the person being coerced" (Dworkin 1975, p.175).

Some Forms of Penal Paternalism[121]

Soft and Hard Paternalism: Penal paternalism can be soft or hard (see Feinberg 1986, pp.12-6). The former justifies a paternalistic penal statute *S* on grounds that, and insofar as, the subject bound by *S* acts involuntarily and/or without knowing the harm risked by her action (the harm that *S* seeks to prevent and in the absence of which the subject of the law is better off). For the soft penal paternalist, if the subject of the law acted voluntarily and knew the harm risked by the action that the statute prohibits, that penal statute would not be justified. Hard penal paternalism, by contrast, justifies penal statute *S* even if the subject of the law acts voluntarily and in full awareness of the risk.

Provisions that make an agent criminally liable for consuming drugs are typical cases of penal paternalism. A soft penal paternalist would justify this type of penal statute on grounds that the consumer does not know (or runs the serious risk of becoming an individual incapable of knowing) how harmful and addictive drugs are. Since addiction undermines the voluntariness of an action, the soft penal paternalist theorist would claim that, for the sake of the well-being of the agent, a penal provision against drug consumption is justifiable. The hard penal paternalist, instead, would claim that drug consumption is harmful to the consumer no matter how free or informed her decision to consume drugs so, insofar as consuming drugs is harmful in a relevant sense, then its criminalization is justifiable.

Weak and Strong Paternalism: Penal paternalism can be weak or strong (see Dworkin 2005). Weak penal paternalism justifies a criminal statute only if it interferes with the means an agent chooses to achieve an end, and the means that the criminal statute prohibits is likely to defeat that end. Strong paternalism justifies statutes that interfere not only with the means an agent may choose, but also with the ends that those means aim to achieve.

To illustrate, think of the end of procreating. The weak penal paternalist may prohibit those means that are at odds with that end, so that he may criminalize contraception (on grounds that it does not promote the overriding end *and* that this hinders the agent's own good) and/or alternative counterproductive fertilization techniques (on grounds that the means to promote the overriding end is mistaken *and* that this undermines the agent's own good). In turn, the strong penal paternalist may consider it legitimate to criminalize ends

121 There are more distinctions than those I consider here. See generally Gerald Dworkin (1972). See also Jack Douglas (1983, pp.173ff) for cooperative and conflictful paternalism; John Kleinig (1983, pp.5-6) for coercive and non-coercive paternalism and for active and passive paternalism; Feinberg (1986, p.5) for presumptively blameable and presumptively non-blameable paternalism.

themselves on grounds that they are unreasonable, wrong or mistaken and that this hinders the agent's own good. Thus, in the face of the overriding end of procreation, the strong penal paternalist may, for example, criminalize a solitary life in the woods on grounds that it is alien to the possibility of procreation.

Pure and Impure Paternalism: Penal paternalism can be pure or impure depending on whether the identity of the agent interfered with by the statute overlaps with the identity of the individual protected by that statute (see Dworkin 1975, pp.176-7). While in impure paternalism the extension of the group that is interfered with by the law is not identical to the extension of those whom the law protects, in pure paternalism those protected by the law and those interfered with by the existence of the same law are groups with identical extension.

Criminal statutes prohibiting suicide and attempted suicide are cases of pure penal paternalism – insofar as they criminalize the attempt independent of the consequences that this action brings about to others. By contrast, provisions that criminalize the distribution of drugs are impure cases of penal paternalism. Distributing drugs is not by and in itself harmful, so the protection that this type of law provides extends to the would-be consumers who may actually be harmed by consumption and not to the individual directly interfered by the law, that is, the trafficker.[122]

Welfare and Moral Paternalism: Welfare penal paternalism justifies penal statutes in relation to the general well-being of the individual protected. Moral penal paternalism justifies penal statutes in relation to the improvement or protection of the moral character of the agents that the law addresses. Again, drug legislation is an apt example of this type of paternalism. Welfare penal paternalism may criminalize drug consumption on grounds that a consumer is likely to be worse-off compared to the way she should be (however defined) were she not a drug consumer. Moral paternalism, instead, criminalizes drugs consumption on grounds that it impoverishes the moral nature of the individual consumer by staining her soul, undermining her autonomous character and human dignity, or some such.[123]

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122 But, again, note that this is a matter of justification. What is relevant is the justification offered in support of the statute. Thus, the penal prohibition of drug distribution could be justified in pure paternalist terms if, for example, legislators argued that distributing drugs does harm the trafficker himself by, say, staining his soul or putting him at serious risk of becoming a drug consumer.

123 For an analysis of the distinction between moral paternalism and legal moralism, see Ten 1971.

For Paternalism

Each of the above categories represents a type of paternalistic justification of the penal law and, generally speaking, there is a presumption in the literature against these justifications. As Douglas Husak has put it, "[m]ost philosophers, it is fair to say, have relatively strong intuitions against the justifiability of paternalism, at least when it is imposed on sane adults" (Husak 2003, p.391). However, it is fair to say that those who embrace some central tenets of liberalism have more explicitly voiced these intuitions against legal/penal paternalism.

From a Kantian perspective, for example, penal paternalism appears to be objectionable because it does not address the individual as a fully rational autonomous being, and prevents her from deciding about her own actions and values. Thus considered, penal paternalism fares badly *vis-à-vis* the Kantian idea that individuals are ends in themselves.

Penal paternalism is also objectionable from a Millian point of view. On the one hand, it seems to contravene Mill's *dictum* that "when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk" (Mill 1989, p.96). On the other, it expands the jurisdiction of the criminal law beyond the harm principle.

Despite these general liberal objections, some liberals – for example, Joseph Raz and Joel Feinberg – defend certain versions of paternalism. Feinberg endorses soft paternalism, although he concludes, in my opinion contentiously, that this version of paternalism is not paternalistic at all. Feinberg argues that

> the law's concern should not be with the wisdom, prudence, or dangerousness of *B*'s choice, but rather with whether or not the choice is truly his. Its concern should be to help implement *B*'s real choice, not to protect B from harm as such. [...] The harm to others principle permits us to protect a person from the choices of other people; soft paternalism would permit us to protect him from 'nonvoluntary choices', which, being the genuine choices of no one at all, are no less foreign to him (Feinberg 1986, p.12).

I cannot discuss here Feinberg's claim that soft paternalism is not a form of paternalism (on this see Schonsheck 1994, pp.179-82). Instead, my intention is simply to show that Feinberg is willing to endorse penal paternalism in one of the forms I have presented above. For Feinberg, a statute *S* that prohibits an action ϕ is justifiable if *S* aims at preventing individuals from harming themselves as a result of ϕ-ing *and* individuals ϕ involuntarily. *Pace*

Feinberg, I call this soft paternalism.

Joseph Raz, in turn, endorses perfectionist penal paternalism.[124] Like Feinberg, Raz is concerned with whether the choice of the agent is in a strong sense really *his*. According to Raz's perfectionism there are limits to what counts as autonomous choice, so autonomy proper extends to an adequate range of choices only, leaving aside, say, abhorrent or perverse choices that do not count as part of what we can autonomously choose. This perfectionism can tint the penal law by justifying the criminalization of ϕ on grounds that ϕ is an action or conduct that does not fall within the sphere of those that are to count as proper expressions of autonomous choices (or, more strongly, that ϕ counts as a practice that undermines the set of autonomous choices). In this sense, Raz's penal perfectionism is harder than Feinberg's as it makes irrelevant the epistemic status of the agent that is subject to the law and focuses primarily on the nature of the choices of the agent. Raz's position could also be characterized as being impure, in the sense that his position does not preclude criminalizing ϕ in order to impede others from choosing and/or being affected by ϕ-ing when ϕ-ing falls beyond the set of autonomous choices. Moreover, his penal paternalism seems to be strong, as it makes the distinction between means and ends irrelevant; what matters is whether the action is part of the adequate range of options, not if it is a means or an end. Finally, Raz's account may well be understood as a version of both welfare and moral paternalism. A perfectionist defence of autonomy is justified on moral grounds, but the distinction between autonomous choices proper and the welfare of the individual is, on many occasions, indistinguishable. In conclusion, despite its liberal credentials, Raz's position may well be thought as endorsing most of the paternalistic categories mentioned above.

What Feinberg's and Raz's examples tell us is that penal paternalism has a place among liberal thinkers despite the liberal presumption against paternalism. In light of the current penal context, I shall now move to criticisms of paternalism as a justification of penal statutes.

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124 Some may want to resist labelling Raz as a perfectionist penal paternalist. This may be for different reasons. First, Raz's work of paternalism does not focus exclusively or primarily on the criminal law. His work on this matter is rather concerned with paternalism within the more general context of legal, political and moral institutions. Second, Raz says that paternalism needs not be coercive (1986, 417-20). This has led some commentators to claim that Raz's paternalism is not coercive (Farrell 1991, p. 57). In any case, it seems to me that this label is not utterly implausible. Raz's general approach to the issue of paternalism does not preclude the possibility that it applies also to some instances of penal paternalism. Moreover, Raz's claim that paternalism need not to be pursued coercively does not mean that paternalism may not be pursued coercively (that is, by resorting to the criminal law).

Against Paternalism

Let me begin my critical appraisal by referring to another liberal thinker who has dwelt on the question of paternalistic justifications of the law: Douglas Husak. In Husak's account, what may or may not render paternalism justifiable is "how various paternalistic laws affect the conditions of autonomy" (Husak 2003, p.403). Thus, since he believes that it is not true that *every* paternalistic justification of the law is illegitimate, his account does not represent an absolute rejection of paternalism. To ground this, Husak starts by distinguishing between paternalistic considerations that are applied to penal legislation and paternalistic considerations applied to non-penal legislation. On the one hand, Husak accepts that paternalism can be amongst the justifications used in non-criminal areas of the law. On the other hand, his account is much less permissive when considering penal statutes. The kernel of his argument is that

> One side of the balance in endeavours to justify legal paternalism involves a judgment about how the law in question affects the conditions of autonomy. Punishment – at least when it is severe – always undermines these conditions to an extraordinary degree. Persons are far less able to make their own lives when a criminal sanction is inflicted upon them (Husak 2003, p.405).

I share the spirit of Husak's distinction. If we are going to take punishment, criminalization and their consequences seriously, paternalistic justifications need to count differently when used to justify statutes backed by punitive practices. This is precisely what Husak does. However, I have doubts regarding the ultimate rationale of his analysis.

Husak argues that the conditions of autonomy are the touchstone determining the legitimacy of paternalistic justifications of the law. Thus, given that punishment is generally such as to erode autonomy, Husak concludes that penal paternalism is, in principle, an illegitimate type of justification for penal statutes. The problem I see with this type of argument – also endorsed by Feinberg's and Raz's models – is that it locates the protection of autonomy at the centre of what may justifiably be criminalized. In other words, the rationale against paternalist penal justification emerges from the importance that Husak assigns to the conditions of autonomy. For him, this is a legitimate type of objection to penal paternalism *because* punishment is destructive of autonomy, and given that "paternalists should be unwilling to impose a 'cure' that is worse than a 'disease', they should not back paternalistic laws with the criminal sanction" (Husak 2003, p.406). Hence, since the costs of punishment overweight the autonomy-related benefits obtained through the criminal law, paternalistic

laws cannot be justified.

Yet, my objection goes, what if the 'cure' is not worse than the 'disease'? What if we had an institution of criminal punishment that were not as inhumane as it is today? It seems to me that under those circumstances Husak's position would have to allow the justification of a series of statutes that a free society would not want to justify. Consider Husak's example of Bill the boxer (Husak 2003, p.405).[125] If legislators were to criminalize boxing on paternalist grounds (which is something that they may have good reasons to do if autonomy is the key to *some* types of penal justifications), they would have to balance how much autonomy is undermined by allowing Bill and others to box and by criminalizing the practice. If some sort of calculation establishes that the humane conditions of the penal sanction – which I have simply stipulated *ex hypothesi* – means that punishing those who box is less damaging of the conditions of autonomy than allowing boxing, then boxing should be criminalized (or, at least, it could be legitimately criminalized). Moreover, there is nothing in this autonomy-laden type of argument that precludes punishing people for practices that seem much less borderline than boxing. What about surfing, eating unhealthy food or smoking tobacco? If the conditions of autonomy are the touchstone of what makes penal paternalism legitimate, then it is not difficult to think that under certain circumstances punishment undermines autonomy less than these practices. For example, surfing has a high rate of accidents that threaten surfers with various types of injuries and permanent damage that, in Razian terms, can seriously undermine individuals' capacity to be the authors of their own lives (Raz 1986, p.204). Consuming unhealthy food and smoking may also have some important negative consequences for an individual's autonomy and, under certain circumstances, these consequences may be more damaging to autonomy than the punishment that might be imposed were these things illegal.

It may be objected that I am overdoing my case: incarceration, or more humane forms of punishment, can never be more damaging of autonomy than, say, basing one's diet on beacon, French fries and donuts. However, this objection is not without problems. First, it is not obvious that my claim that unhealthy food can damage autonomy more than punishment is false (and it is not obvious that the contrary is true either). A conclusive answer depends on a series of both empirical and metaphysical considerations that I cannot address here. In any case, the problem is that the fact that the matter is debatable leaves the door open to the criminalization of those types of practices (surfing, smoking, consuming

125 Husak borrows this example from Dixon 2001.

fatty food). Second, even if we concede that, in relation to conditions of autonomy, unhealthy food is more innocuous than many forms of punishment, this does not mean that unhealthy food is less damaging of autonomy than any type of punishment. If the sanction that these practices receives consisted of alternative punishments or penal compensations (compensations to tax payers, those who suffer 'psychic costs' or 'public charges' for the offence),[126] then claiming that punishment is less onerous (for autonomy) than unhealthy food becomes more plausible. Some punishments, e.g., community services, can be less burdensome to autonomy, and may even enhance autonomy, compared to allowing unhealthy food to go unregulated by the criminal law. If this is correct, then Husak's thoughts regarding penal paternalism – let alone Feinberg's and Raz's – insufficiently limit the over expansion of criminalization and punishment.

Thus, when we locate the protection of autonomy at the centre of our justification of criminalization, a large number of actions that we ought not to count as part of the legitimate dominion of the criminal law fall within it. In different words, paternalist justifications of criminal statutes allow using the coercive power of the criminal law for types of conduct that are beyond the principled minimalist function of the penal institutions of a free society. Permitting this extension is tantamount to tolerating the overexpansion of the criminal law and, thus, turning a blind eye to its current predicaments. I therefore maintain that, if we are going to take the consequences of criminalization seriously, penal paternalism should not be part of what legislators ought to consider as a good reason to enact penal statutes.[127]

4. Penal Moralism

Penal moralism is a subclass of legal moralism.[128] In *Harmless Wrongdoing*, Feinberg defines the latter as the view that "[i]t can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the

126 On 'psychic costs' see (Dworkin 1972). On 'public charges' see (Kleinig 1983). Public charges is a type of argument according to which injuries received in certain activities "may have costly consequences not only for the victim but also for others. The victim may be incapacitated for a considerable period of time, requiring the use of scarce medical resources and possibly made dependant on public funds for support. [...] Not only the victims, but also their dependents, may be cast on the public purse. Spouses and children may have both a financial and psychological stake in the victim's continued well-being, and the collapse of this may lead to their becoming charges on the community" (Kleinig 1983, p.92).

127 But note that whether paternalism may have a legitimate place in other spheres of the law or in other state institutions is a different matter.

128 The term 'legal moralism' was coined by H.L.A Hart in his debate with Lord Devlin in *Law, Liberty, and Morality*: "In England in the last few years the question whether the criminal law should be used to punish immorality 'as such' has acquired a new practical importance; for there has, I think, been a revival there of what might be termed *legal moralism*" (Hart 1963, p.6).

actor or to others" (Feinberg 1984, p.27 and 1987, p.4).[129] If we slightly amend this account to make it fit with our purposes, penal moralism can be defined as the view that it is legitimate to criminalize conduct simply on the grounds that it is immoral.

At first glance, penal moralism seems to infringe the liberal tenet of neutrality (see ch.4 sec.1.3). Penal moralism does not claim a mere overlap between the criminal law and morality, but rather argues that a legitimate justification for the enactment of a criminal statute is that the prohibited conduct is morally wrong. Put differently, penal moralism judges as legitimate the criminalization of a conduct that counts as a morally wrong within a given moral framework *because* it is a morally wrong conduct within that framework. Hence, penal moralism seems to allow the criminalization of conduct on partial grounds, that is, on grounds that intentionally favour and promote one particular moral framework. For some liberal authors this would suffice to rule out the plausibility of penal moralism as providing guidance for criminalization in a free society.

Penal moralism can also be attacked on different – although related – grounds. Mill, as we have seen, argues that penal moralism violates the very simple principle since "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (Mill 1989, p.13). And H.L.A. Hart in his famous debate with Devlin defended the view that, for the sake of individuals' liberty, in matters of sexual morality persons are to be left free from legal intervention:

> Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does [...]. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned (Hart 1963, p.47).

Thus, penal moralism may seem to be indefensible from a liberal point of view and we may have the impression that we would do better debarring it from the principles of criminalization of the free society. However, this would be too quick. As with penal paternalism, there are authors who endorse some version of legal/penal moralism despite their liberal leanings.

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129 This corresponds to Feinberg's definition of legal moralism "in the usual narrow sense", as opposed to legal moralism "in the broad sense" (Feinberg 1984, p.27). Since nothing relevant for our purposes hinges on this, I put this distinction aside.

Strong Penal Moralism

Antony Duff has distinguished two versions of penal moralism, strong and weak. The strong version is that "[t]he criminal law [...] should ideally prohibit all and only such actions as are seriously immoral, *because* they are immoral" (Duff 1986, p.41). This type of penal moralism seems to me to be implausible. It not only supposes that immoral action is necessary and sufficient as a criterion of criminalization, but also that wrongful action determines the boundaries of legitimate criminalization. Strong penal moralism does not look like a promising candidate to reduce overcriminalization in the free society and I would like to reject it straight away.[130] This can be done by reflecting on the fact that both the criminal law we have, and the criminal law we ought to have, include regulation of issues that are morally irrelevant or, at least, not 'seriously immoral'. Modern criminal law is not only constituted of *mala in se*, but also of *mala prohibita*, and it is indefensible to argue that it should be otherwise.[131]

The strong penal moralist may protest that my rejection begs the question since I am simply stipulating, based on empirical facts (i.e., the law as it is), that the criminal law is not only about seriously immoral actions. The strong moralist could conclude that my focus on the law as it is does not undermine his claim about how the law should be. To this I would respond (i) that, whatever the function of the law, there is not (and there could not be) a modern criminal law system whose statutes are determined *exclusively* on grounds of what is seriously immoral;[132] (ii) that in circumstances of diversity and disagreement – the circumstances of the free society – even what is seriously immoral turns out to be contestable; (iii) and that even in the unlikely event that we achieve consensus on the set of conducts that would count as seriously immoral, the intromission of penal coercion in some of those areas – areas that rightly belong to the privacy of the individual – should count in itself as an unacceptable wrong.

If this rejection of strong penal moralism still looks too swift, I would argue that if

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130 Lord Devlin is perhaps the most famous promoter of this position. See *The Enforcement of Morals* (Devlin 1965). Interestingly, Jeffrie Murphy says that much fruitful and insightful can be extracted from Devlin's position if, in considering it, "one applies the principle of charity of interpretation" (Murphy 2006, p.47).

131 For a more detailed discussion of this distinction see Husak 2005. See also *State of Washington v. Thaddius X. Anderson* (2000) and *State v. Horton* (1905).

132 If the law in general, and the criminal law in particular, is going to fulfil its function as a public institution it needs to address issues that are independent of positive or comprehensive moral claims. Secondary rules are examples of the general case, while some rules of possession and reckless behaviour are plausible examples of the particular case.

my rejection of the weaker version – which I present below – is successful, by extension, it should also prove successful in rejecting the stronger view. Put differently, if my argument works against the more sophisticated and qualified version of penal moralism discussed below, then it should also work against the simpler and cruder version of the same argument discussed here.

Weak Penal Moralism

According to Duff – who endorses a version of this type of moralism – weak penal moralism establishes that

> while criminal punishment may properly have purposes beyond those of moral blame, an essential part of its meaning and justification lies in its relation to moral blame; and that immorality should be at least a necessary, if not sufficient, condition of criminal liability (Duff 1986, p.41).[133]

The central tenet of this position is that the criminal law makes demands on citizens by prohibiting certain types of conduct. These demands, in turns, are of a moral nature, so that the prohibition of a conduct ϕ is seen as a moral demand made by the state of the citizen:

> what is distinctive of criminal law is [...] that it purports to define, and provide for the condemnation of, certain kinds of moral wrong; to justify the criminal law's content we must therefore show that what it defines as crimes are indeed wrongs of the appropriate kind (Duff 2007, p.81).[134]

In the weaker version of penal moralism the difficulties faced by the strong version are cleared up. Although the immoral character of the conduct criminally proscribed is still necessary if the penal prohibition is to be legitimate, we are told that not all moral wrongs are the business of the criminal law. Rather, the criminal law is concerned only with those actions or forms of conduct that satisfy conditions other than moral wrongness.

In *Placing Blame*, Michael Moore offers an important liberal formulation of weaker

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133 We do not need to get distracted with the way Duff construes what is at stake here. Instead of referring to crimes he refers to the function of criminal punishment and criminal liability. This can, I think, be easily translated into our question of what should be criminalized.

134 As Duff rightly clarifies, this claim is different from the central claim of classic natural law theorist. Duff's point is not that what defines the law is a moral criterion, but that the law must make a moral claim on the citizen. In other words, Duff is not providing a criterion to identify the law, but establishing what a good law should do. See Duff 1986, pp. 75-6.

legal/penal moralism.[135] Moore believes that the fact that

> an action is morally wrong is always a legitimate reason to prohibit it with criminal legislation. Put another way, a legislator should never restrain himself/herself from following his/her own best theories of what is morally wrong just because they are his/her own theories or just because they are theories of what is morally wrong to do. Other goods may outweigh the good that is achieved by prohibiting behaviour that is immoral; but that the behaviour is immoral is always a valid reason counting in favour or prohibiting it (Moore 1997, p.70).[136]

At other points Moore's position is expressed in stronger terms that bring it close to Devlin's moralism. Legal moralism, Moore writes, "makes *moral* wrongdoing central to *legal* wrongdoing. Prima facie [...] all and only what is morally wrongful should be criminally prohibited" (Moore 1997, p.669). However, Moore's legal moralism is liberal and cannot be bluntly linked to strong legal moralism. This is because, in addition to the first passage quoted where he argues that immoral behaviour is only *a* legitimate/valid reason for criminalization, Moore endorses a characteristic conception of morality that commends that "avoidance of much else in the way of conventionally regarded 'vice' is only superogatory but not obligatory" (Moore 1997, p.662). In addition, he notes that "the criminal law has no business criminalizing behaviours such as 'deviant' sex, abortion, drug use, and the like" (Moore 1997, p.661). These considerations makes Moore believe that his account has important (positive) implications for the problem of overcriminalization since a morality thus articulated "by itself should stay legislatures from enacting much of what passes as 'moral offences' in our current criminal code" (Moore 1997, p.662).

In the face of Duff's and Moore's nuanced legal/penal moralism, it may be claimed that the aim of attaining a more restricted system of criminal law that takes punishment seriously, and that ultimately represents an adequate model of the criminal law of a free society, can be achieved by something like liberal legal/penal moralism. After all, if we are penal moralists *and* endorse a minimal morality, then it follows that we should also obtain a minimal criminal law.

This idea seems to be persuasive. Douglas Husak, who has recently advanced an

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135 He deems his account of legal/penal moralism liberal at Moore 1997, p.662.

136 This is what Moore calls a non-exclusionary view of legal moralism, which is, in his words, "the only correct theory of proper legislative aim" (Moore 1997, p.70).

argument against legal moralism, nevertheless concedes that what (specifically Moore's) legal moralism "ultimately would criminalize may not differ substantially from those [kinds of conduct] proscribed by [his own] minimalist theory" (Husak 2008, pp.197-8).[137] In my judgement, this concession blurs what is important about the search for a liberal model of the criminal law. The ultimate rationale of this search is not merely to obtain a smaller, less stringent, less punitive, criminal law, but to obtain a criminal law that is consistent with the commitments of a free society (and this is a criminal law that will surely be smaller, less stringent and less punitive than the criminal law we have today). If the former, but not the latter, were the case then legal moralism – if backed by a minimal morality – would arguably do the job. But what we are looking for here is not simply a model that shrinks the amount of criminal law we have, but a model that advances in a principled way the criminal law of the free society, freed from overcriminalization but also from undercriminalization. In short, we want to get criminalization right.

Let me expand on my previous points in order to ground my critique. We need to consider first the fact that minimal morality is something that we can predicate only of *some* types of legal/penal moralism. Thus, it seems clear that this type of moralism is not an adequate characterization of Duff's position. His account, as we saw in chapter 3, is structured around a rich conception of community and shared values which, although not necessarily involving a non-minimal morality, suggests that the moral commitments of Duff's liberal community involve more extensive and deeper allegiances than what we would normally consider as part of a minimal moral theory.[138] In this sense, Moore's account, but not Duff's, may be taken as a version of the liberal legal/penal moralism that interests us here.

So, in the face of the current condition of the criminal law, what are the reasons for not adopting Moore's penal moralism? My first point, which reinforces what I said before, is that adopting a minimal morality *per se* does not mean that, when translated into the penal sphere, we will obtain a more adequate criminal law; one that is normatively well prepared to avoid the difficulties that affect our current penal system. Although it might be true that something like Moore's conception of morality could reduce the amount of criminal law that is enacted by our legislators (although, for reasons that will be clear shortly, I am doubtful

137 Although Husak concedes this, he then moves to criticise legal moralism on grounds that this position does not show "why the *state* is justified in punishing [...] culpable wrongdoers, or that consequentialism plays no role when state punishment *is* justified." (Husak 2008, p.201). As I take it, this is a relevant point, but it is not the right type of objection if the question that motivates the analysis are the problems of overcriminalization and inappropriate punishment.

138 For a more detailed critical analysis of some of the aspects of Duff's position see ch.3 sec.2.

about this as well) this would not be enough to obtain what we want to achieve in theorising the criminal law of a free society. In other words, it is not clear that by adopting something like Moore's penal moralism we will obtain a state of affairs in which we have the penal statutes that a free society ought to have. Indeed, it is possible that a strict minimal morality may lead us to undercriminalization, which is a condition certainly not less pernicious than one characterized by overcriminalization.

A second reason to worry about Moore's legal/penal moralism is that the model makes a clear and principled distinction between criminal and non-criminal spheres impossible. This distinction is fundamental to any adequate account of the law, so a model of criminalization that cannot offer a clear distinction between these different spheres is problematic. This becomes clearer in the light of its consequences for the problems of overcriminalization. If moral wrongs are the touchstone of criminalization, then all those moral wrongs that normally and adequately fall within the private sphere – in, for example, tort law, contract law, and so on – become issues of proper concern for the criminal law (should we criminalize and punish unfaithful lovers, wrongful defamation, wrongful breach of contracts?). This means that Moore's penal moralism effaces the intuitive line that exists between what is in the business of the criminal law and what is not. Although Moore suggests grounds to limit criminalization, even when considering immoral conduct (see for example Moore 1997, p.68), his account fails to provide a principled and sufficiently clear contrast between moral wrongs to be addressed through penal means and moral wrongs to be otherwise addressed.

One response to this line of argument that is open to Moore is to argue that wrongs of the kind mentioned above are not part of morality, and that as a result the critique is weaker than it looks. However, if Moore's position is going to provide a principled model of criminalization – a model that succeeds in overcoming or minimising overcriminalization and that draws a clear enough line between moral wrongs to be treated criminally and wrongs to be treated otherwise – much more needs to be said about the criteria that help us to identify moral wrongs relevant to the criminal law. The fact that Moore seems to endorses some sort of minimal morality does not suffice, precisely because the point at stake is not merely to reduce criminalization but to get criminalization right.

As it happens, it is not at all clear that Moore does endorse a minimal morality such that his weak penal moralism would exclude wrongs normally thought of as beyond the reach of the criminal law. Given that in Moore's model penal laws "are justified because and only

insofar as they prohibit moral wrongdoing", he believes that mutilation of dead bodies and extinguishing species should be criminalized *because* these actions are wrong (Moore 1997, pp.642-7). I do not want to make the case here in favour or against the criminalization of these types of actions, but only to note that if these actions should be criminalized *because* they are moral wrongs, then it is difficult to see why much less contentious moral wrongs (like dishonesty, ill will or unfaithful conduct) should not be criminalized. Thus, even the conclusion that Moore's account, whilst it might not get criminalization right, will lead to a reduction in overcriminalization is (at best) moot.

In the end, Moore's account of morality seems to be simply the expression of a parochial viewpoint. To that extent it represents the oppressive imposition of the criminal law upon members of society who do not share the account of morality protected by criminal legislation. If this account of penal moralism cannot avoid these difficulties and offer sufficiently clear and principled limits for criminalization, then it is a model that, in the face of overcriminalization, we should resist.[139]

These three different worries underpin the conclusion that, as it stands, Moore's penal moralism does not fare well in the face of the need to reduce overcriminalization, get an adequate model of the criminal law and, ultimately, build a system of criminalization that reflects the values of the free society. What this critique has shown is that principles of criminalization grounded in morality face a dilemma. If they want to minimise overcriminalization they need further to specify the boundaries of the morality they embrace. But in firmly specifying those limits they end up offering a comprehensive moral doctrine that, given the liberal principle of neutrality of the state, is at odds with the characteristic plurality of views about the good existing in the free society.

5. Criminalization and Consequentialism

The final account of criminalization that I will consider is one grounded in consequentialism. The common denominator amongst the different types of consequentialist theory is the promotion of neutral value (Pettit 1997a). In the case of criminalization, consequentialist

139 Douglas Husak presents another objection to Moore's penal moralism that also counts against the capacity of the model to resist overcriminalization. The central point of the objection is that Moore's account cannot explain why the state, as opposed to other institutions and/or individuals, must punish offenders if, as Moore believes, punishment is about satisfying just deserts for moral wrongs: "Legal moralism is problematic because it offers no principled reason to believe that the *state* should punish persons who break its criminal laws" (Husak 2008, p.203).

theorists further specify this common factor to endorse particular values. For example, for consequentialists, the enactment of a penal statute *S* is justified if and only if the existence of *S* promotes values such as crime prevention, law abidance or the rehabilitation of the offender. Of course, the mere enactment of *S* is not what brings about the promotion of these values. Instead, the consequentialist reckoning – and what ends up justifying the enactment of the statute – is that without *S* there is, all things considered, a less likely chance that crime prevention, law abidance or the offender's rehabilitation is going to be promoted.

A contemporary example of a consequentialist model of criminalization can be found in a series of cooperative pieces between John Braithwaite and Philip Pettit (1990, 1993, 1994. See also Pettit 1997b *int. al.*). In what follows I shall focus on the general model they advance. Their substantive work, *Not Just Deserts*, offers a comprehensive normative theory of the criminal justice system and, as such, has much to say about criminalization. In effect, Braithwaite and Pettit believe that the first key question that needs to be answered by a comprehensive theory like theirs is about the types of behaviours that should be criminalized (Braithwaite and Pettit 1990, p.12). Before getting into the details of their model of criminalization, let me present some basic tenets of their consequentialist account.

The most characteristic aspect of their model is the value it aims to promote. Rather than focussing on utility, deterrence, law abidance, incapacitation or any other traditional consequentialist target, this theory aims to promote the enjoyment of dominion. Dominion, as the authors understand it, is the republican version of negative liberty; it is a conception of freedom in a social world. Dominion involves the idea "that liberty is constituted by the support against interference, and the status of being manifestly so supported, which goes with citizenship in an appropriately governed society; in a society where the rule of law obtains and power is systematically checked" (Braithwaite and Pettit 1993, p.226). An individual enjoys dominion when she "has control in a certain area, being free from the interference of others, but has that control in virtue of the recognition of others and the protection of the law" (Braithwaite and Pettit 1990, p.60. See also Pettit 1988, p.52). For Braithwaite and Pettit, this understanding of dominion involves a holistic conception of society in which liberty is understood as a social status. This means that whether an individual enjoys liberty depends largely on how the freedom of that individual fares in comparison to the freedom of other members of society. In other words, she cannot enjoy liberty if she is subject to more constraints than some others. Liberty is then defined relationally. But liberty as a social status requires not only as much absence of constraints as anyone else. It also requires assurance – as much assurance as anyone else – of that absence

of constraints, and common knowledge of that assured absence of constraints. Thus, besides negative liberty, this account involves some positive epistemic and psychological features that are to be satisfied if dominion is to obtain (Braithwaite and Pettit 1990, pp.62-69).

For Braithwaite and Pettit, the promotion of dominion counts as an uncontroversial aim of a theory of criminal justice and, therefore, of criminalization. Accordingly, criminalization is to prohibit those actions that diminish or undermine dominion. From this general function of criminalization we can derive a more complex account of crimes as challenges to dominion, by which offenders "typically present themselves as dominators of the victim: they act in a way that suggests a belief that they can interfere on an arbitrary basis with that person" (Pettit 1997, p.68). Also, crimes not only involve the domination of the victim by the offender, but also a reduction in the extent and intensity of the dominion enjoyed by the victim. In addition, crimes do an evil to the whole community, as they affect "the overall dispensation of dominion established in society [...] because, with every act of crime, it becomes less clear to everyone that they really do have non-interference in a resilient manner" (Braithwaite and Pettit 1993, p.230). The republican model opposes all these developments resulting from criminal conduct and supports, consistent with its consequentialist nature, the promotion and maximization of neutral value, namely, dominion.

On the face of it, the consequentialist character of this model may look to be its most obvious source of weaknesses. However, Braithwaite and Pettit embrace a sophisticated consequentialism that combines elements of indirect consequentialist theory with a series of limits and conditions. This allows them to avoid some of the well known objections traditionally advanced against consequentialist positions.[140] Indeed, Pettit claims of his consequentialism that it is able to circumvent the idea that people "are pawns in the consequentialist's beneficent scheme" (Pettit 1988, p.53) and thus that it can avoid the traditional difficulties of this ethical theory (for example, punishing the innocent). Consider the following two passages illustrating the type of consequentialism that Braithwaite and Pettit endorse:

> We assume that under a republican dispensation criminal justice agencies should be assigned limited roles of briefs within the system; no agency should have the global brief of doing whatever it can to promote republican dominion.

140 Pettit has dubbed his favoured version of consequentialism *restrictive consequentialism* (see Brennan and Pettit 1986 and Pettit 1988), which "suggests that while it may be appropriate to evaluate options by the criterion of maximising probable value, it need not be sensible to select them on that basis. The idea is that the way to satisfy the criterion of evaluation may often be to restrict or forswear its application, relying rather in some other criterion of choice" (Brennan and Pettit 1986, p.439).

> [...] [I]f any agency had the discretion required for the global brief, then people would be peculiarly vulnerable to its decisions and that would impact negatively on their enjoyment of dominion (Braithwaite and Pettit 1993, p.231).
>
> There will be no point in criminalizing something in order to reduce domination, if the very act of criminalization itself facilitates more domination than it removes (Pettit 1997, p.68).

This republican restrictive consequentialism seems to emerge as a strong model of criminalization: it overcomes the traditional critiques that consequentialism both cannot accommodate rights and that it locates value in a way that leaves the individual in a vulnerable position. Indeed, it looks as if this model of criminalization has the required conceptual tools to avoid overcriminalization. The cornerstone of this account – the promotion of dominion – seems to be incompatible with policies and practices that unjustifiably expand penal statutes and, therefore, with overcriminalization.

Part of the plausibility of Braithwaite and Pettit's position depends on the fact that the enactment and enforcement of the statute under scrutiny does promote dominion (that is, the value adopted as the rationale of criminalization). But, things are slightly more complicated. Since penal statutes have to do (at least more directly) with conduct, not values, the plausibility of a consequentialist model depends, in addition, on the fact that the penal proscription of, say, conduct ϕ does promote dominion. Whether ϕ promotes that value is something we cannot determine except empirically. Thus, on the one hand, we need evidence supporting the idea that a penal statute proscribing ϕ will really serve the aim of minimising the occurrence of ϕ in the world. And, on the other hand, we need evidence supporting the idea that criminalizing ϕ will promote dominion more than either not criminalizing it or pursuing some other policy altogether.

Given these empirical elements, in many circumstances republican consequentialism will lead to a reduction in penal statutes. This is because it will often be unclear whether a given statute *S* will actually reduce the occurrence of that action that it is intended to inhibit, or because some other public policy will enhance dominion more effectively.[141] This feature of

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141 For example, on occasions, the prohibition of some types of conduct does not reduce the occurrence of that conduct and sometimes can even be counterproductive (e.g., criminalization of drugs and alcohol consumption, flag burning, risky driving). This is due to what has been called the 'forbidden fruit effect'. See Filley 1999, Husak 2008, pp.147-8. See also Sampsell-Jones 2005 for an empirical analysis of the contestable, opaque and counterproductive message of expressive legislation: "When the criminal law tries to teach them a lesson about drugs, they suspect ulterior motives. The heavy imposition of criminal sanctions on members of street culture

Braithwaite and Pettit's position is further reinforced if one considers their presumption in favour of parsimony, so that "less rather than more criminal justice activity" should be favoured (Braithwaite and Pettit 1990, p.87). In this respect, I share the spirit of the republican consequentialist theory of criminalization. However, in what follows I want to raise doubts about the capacity this model has to minimise the problems in our criminal law. I will claim that, despite its attractive features, republican consequentialism cannot do the job of restricting criminalization in a way that is consistent with the demands of the free society.

My first concern has to do with the extent to which the promotion of dominion has the power to avoid or minimise overcriminalization. If we accept that an individual's dominion is enhanced when she is free from other people's interference, and that dominion is grounded in the recognition she receives from others and the law, then we may conclude that there are a large number of cases in which this model allows the enactment of statutes that a free society may consider unjustifiable. Consider the following example: after an horrendously bloody terrorist attack dominion has certainly been critically undermined, mainly because people's capacity to trust others may have been seriously undermined. As a response – following the dominion-promoting rationale – the legislature decides to pass a package of penal statutes that enlarge the weakened dominion of society. This package includes a series of very intrusive statutes (e.g., surveillance in private spheres, identity-check points in popular streets, long periods of preventive detention, and so on). Under pre-attack circumstances these measures would diminish the dominion of society, whilst under post-attack circumstances these statutes provide great reassurance for the community, reassurance that is needed and demanded by the people and that, consequently, is crucial in promoting dominion. This reassurance is so appreciated by people post-attack that the magnitude of the dominion that these intrusive statutes provide overrides the discomfort that these statutes otherwise produce. Since the set of criminal statutes passed by the legislature *does* enhance dominion overall, the model has no objection to offer againts augmenting the criminal law in the ways described. This is problematic for a number of reasons.

First, it seems that dominion is a too elastic value as to provide sufficient stability to people's expectations in relation to the law. When the promotion of a value like this is the cornerstone of a model of criminalization, then the criminal law becomes too sensitive to

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provokes many to deny the sincerity and the justice of drug policy. As a response, some seek means of rebellion and expressive opposition. Drug policy itself invests drug crimes with meaning of rebellion and resistance; it thus undermines its own expressive goals" (Sampsell-Jones 2005 , p.140).

circumstantial vicissitudes which expand or shrink its scope of action depending on the social, political, or economic temperature of society. Although sometimes this temperature may make the legislature lean towards the reduction of the criminal law – e.g., under circumstances of peace and prosperity – at another time circumstances may encourage the legislature to enlarge it. In either case dominion may be promoted, independent of whether the system is over- or undercriminalized. To follow the example above, after a terrorist attack dominion may need to be heavily boosted and this may be achieved by creating a statute that permits extended detention without charge, or the criminalization of storing material that can be useful to realise a terrorist act (for an apt example see the Terrorism Act 2006 part 1 sec. 2). What this shows is that a system of criminalization thus constructed ultimately becomes a function of the circumstances and contingencies that promote a given value. In the face of the current predicaments of the criminal law, this dependence is pernicious as it allows the transformation (expansion/reduction) of the penal law in ways that are not constrained by the restricted role this institution should have. As long as the criminal law promotes the value guiding republican consequentialist institutions (dominion), then, despite the constrained nature of the consequentialist theory, anything (in principle) goes.

My claim here is not that criminalization should be indifferent to contextual elements, but rather that criminalization should not be dependant on those elements. When a theoretical model permits that, overcriminalization – and in rearer circumstances, undercriminalization – becomes a likely outcome of the application of that theory. As I see it, republican consequentialism is an example of that type of model, as it is not capable of preventing the inadequate enlargement (or reduction) of the penal law when such an enlargement (or reduction) promotes dominion.

Second, this approach to criminalization seems to blur the basic distinction between penal and non-penal spheres of the law. If the promotion of dominion is the ultimate rationale of public policy, then dominion is to be promoted by whichever means produce a favourable outcome. The function and work of the criminal law then becomes dependent on how other institutions capable of promoting dominion fare. If non-penal law (or any other non-legal coercive institution for this matter) fares better than penal law in promoting dominion, then the republican consequentialist will opt for the former. Similarly, when penal laws produce a better outcome overall, then penal laws shall be favoured. This is problematic because the promotion of dominion is undertaken without further consideration of the nature of the institution that promotes this value. As I have argued here, this is something to be resisted because it obliterates the specificity of the criminal law and makes

this institution indistinguishable from other branches of the law (and from some non-legal institutions). On the republican consequentialist account, if the criminal law is judged to be better than other legal institutions in advancing dominion within, say, the family, then the criminal law may legitimately include family law within its scope. This outcome is indefensible.

We must distinguish between the different branches of the law and the specific normative, functional and descriptive roles that each of them has. Collapsing penal and non-penal spheres of a legal system under one general umbrella or goal must be resisted, because the public condemnatory nature of the criminal law does not fit (neither normatively nor descriptively) with other social institutions and spheres of social interaction. The consequentialist approach is in this sense flawed: undermining the distinction between what should and should not fall within the criminal law risks overcriminalizing the system because it overlooks the principles that prevent making non-penal matters penal.

As I argued in chapter 1, one of the chief aspects that any theory of the criminal law must clearly establish is the threshold that separates the penal system from other institutions of social control. This is particularly important because the regrettable present condition of the criminal law is in part due to the absence of appropriate boundaries of legitimate penal coercion. Consequentialism does not fare well in this respect when applied to the criminal law.

6. Conclusion

This chapter has explored traditional liberal principles and motives of criminalization in order to assess both their capacity to minimise overcriminalization and their compatibility with the demands of the free society. As I have argued, each of these principles has some appeal and offers some type of limit on penal regulation. To that extent, each of them has something positive to contribute to our understanding of criminalization in accordance with liberal commitments.

However, as we have seen, these principles are not sufficient or adequate to constitute a model of criminalization in the free society. A common flaw is that these principles ground their criteria for criminalization in something external to the function of the criminal law. Thus, Feinberg trusts in moral rights, Raz in autonomous choices, Duff in communal values, Moore in a certain conception of morality, Braithwaite and Pettit in

maximizing dominion. Although these criteria may have a role in an adequate model of criminalization, they are insufficient for distinguishing between legitimate penal coercion and legitimate non-penal coercion, and for explaining why this separation is justified as a matter of principle. As I have tried to show, when a model of criminalization does not offer clear and explicit answers to these issues, it leaves the door wide open to overcriminalization.

If these important and influential liberal principles cannot model criminalization in a way that impedes overcriminalization, what should we do? Offering an answer to this question is the task of the following chapter.

CHAPTER SEVEN

Criminalization in the Free Society

The foregoing chapter advanced a critical account of some of the most prominent liberal principles of criminalization. If my analysis is correct, each of these principles – the harm principle, penal moralism, penal paternalism, and consequentialism – fall short in one way or another when answering the question of criminalization in a free society. Insofar as these principles cannot systematically block the inadequate expansion of the criminal law, they are incomplete, insufficient or even flawed guidelines for criminalization.

The question we now need to answer is, if these prominent principles of criminalization cannot do the job, what could do it? In what follows I propose an answer to this question by presenting a model of criminalization that derives from my account of the general function of the criminal law in the free society as developed in chapter 5. If successful, this model should be capable of both addressing the problem of overcriminalization and constituting itself as a model of criminalization in a free society.

After a brief methodological note, this chapter proceeds by presenting the two principles of criminalization that constitute this model, namely, the principle of direct violation of bodily ownership and of ownership in external things (sec.2.1), and the principle of effective reduction of direct violations (sec.2.4). The last section of the chapter puts these principles to work by considering a bill on hate-crime and whether a legislature using these two principles could legitimately make this bill a penal statute.

1. A Methodological Note

In the analysis that follows this section I borrow some aspects of a method advanced by Jonathan Schonsheck in his book *On Criminalization* (Schonsheck 1994). Schonsheck develops a 'filtering decision-procedure' of criminalization, as opposed to a 'balancing decision-procedure'. He proposes

> that we think about criminalization in this way: when it is suggested that some action be criminalized, we think of that action as having to pass, successfully and successively, through three distinct 'Filters'. Failure to pass through any Filter entails that the action cannot justifiably be criminalized; passing through all

three Filters entails that the action is justifiably made criminal (Schonsheck 1994, p.64).[142]

There are various things that could be said about Schonsheck's interesting approach to criminalization. I shall mention one that I consider particularly relevant for my purposes: Schonsheck uses his filtering method as a method competing with, and more succesful than, what he takes to be a flawed methodological alternative, namely, the balancing decision-procedure. Unlike Schonsheck's favoured method, the balancing decision-procedure addresses the question of criminalization by weighing arguments for and against criminalization. In doing so, Schonsheck would say, this method weighs the un-weighable (see Schonsheck 1994, p.33) and renders decision about criminalization in a too simplistic either-or procedure: if something weighs, say, against dominion, then it weighs in favour of criminalization, if something weighs in favour of autonomy, then it weighs against criminalization.

This is relevant because the 'weight problem' clearly points to a difficulty shared by the principles of criminalization reviewed in chapter 6. All of these principles decide for criminalization by weighing conduct and comparing this weight with the normative weight of their favoured values and ideals. This procedure for criminalization is very much evident in the consequentialist approach, but it also has important resonances in both Feinberg's model (Schonsheck takes Feinberg's account as one of his main targets) and in some aspects of penal paternalism and moralism (penal paternalists 'weigh' conduct *vis-à-vis* the weight of autonomy, and penal moralism tries to find the moral weight of conduct in order to determine whether that conduct should be criminalized). The central problem of these principles and motives of criminalization is that, in the end, they fail to provide a sufficient and clear limit that differentiates conduct to be addressed criminally from conduct that is not.

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142 The three different filters Schonsheck considers are: (1) *The Principles Filter*: A conduct C satisfies this filter if C falls within whatever one takes to be the legitimate sphere of state authority. The question to answer here is whether C (a conduct that the statute aims to criminalize) falls within those conducts upon which the state has authority to somehow regulate (see Schonsheck 1994, pp.64-8). (2) *The Presumptions Filter*: A conduct C satisfies this filter if the incidence of C will not succesfully be reduced by a less coercive measure than a criminal statute (see Schonsheck 1994, pp.68-70). (3) *The Pragmatics Filter*: A conduct C satisfies this filter if the social cost of enacting a criminal statute prohibiting C is less onerous than not criminalizing C. According to Schonsheck methodology C is a conduct that can be legitimatelly criminalized if and only if it successfully and successively satisfies these three filters (see Schonsheck 1994, pp.70-2). As Schonsheck himself notes, this methodology does not say anything about the content of the conducts that a statute may legitimately criminalize – we may well understand Schonsheck's principles as second-order principles of criminalization. The answer to the question of criminalization I defend derives from the general function of the criminal law as presented in chapter 5, and in this sense it adds substantive and determinate content to the types of conducts that are to be considered as adequate subjects of criminalization.

The 'weight problem' points to this difficulty and invites us to find an alternative procedure. The filtering method is just that alternative procedure.

A second and independent preliminary: as with any principles guiding a social practice, the principles of the criminal law cannot avoid at least some degree of vagueness, and this will surely be reflected in the filters of criminalization I shall put forward below. Thus, an important part of my efforts is to minimise this vagueness knowing from the outset that complete avoidance is not realistic. As a result, the filters of criminalization that I am going to defend need to be understood as capable of, on the one hand, providing a strong presumption in support of the criminalization of action that successfully and successively passes these filters and, on the other hand, blocking the criminalization of action that does not pass them.

There is, therefore, an asymmetry in the results provided by filtering actions: whereas action that gets 'caught in the net' of one of the filters should be discarded as a legitimate candidate for criminalization, action that passes the two filters should be considered 'only' as a strong candidate for criminalization. The filtering procedure conveys more conclusive outcomes when impeding criminalization than when supporting it. The reason for this asymmetry is that, as I have emphasised throughout this thesis, the consequences of criminalization have an enormous impact on people's lives and, therefore, we need to be extremely cautious when establishing what type of behaviour is to be regulated through the penal law. The unavoidable (but hopefully minimal) vagueness in the constitution of the filters of criminalization should make us be especially careful in the imposition of penal burdens, but it should not impede us from adopting a very firm position against criminalization when actions under consideration do not satisfy these filters. As I argued in chapter 1, although the criminal law and criminalization are necessary institutions of the free society, their use should be strictly constrained and leaving action uncriminalized ought to be seen as the default practice.

A last clarification before proceeding: my claim that the model presented below provides all the required tools for adequate criminalization needs to be qualified. This is the case for the following reason: since my topic of analysis is confined exclusively to the criminal law, and since the criminal law cannot be understood other than as a part of a more general system of law, the model I present here takes for granted that fundamental principles of legality are in place (that is, principles that apply to a system of law generally, and not only to one 'dimension' of it). Thus, and just to illustrate, the model I present supposes that the

general system of law in which this model of criminalization is to be located honours principles of legality that block *ex post facto* legislation and that are committed to both the idea of *nulla poena sine lege* and *mens rea*. Were these principles and contraints not in place, this model (and any model for this matter) would be utterly unstable. In short, my claim that the two principles of criminalization here presented are all we need to put forward a model of criminalization in the free society remains true if and only if more basic principles of legality are in place and enforced.

Thus, keeping these considerations in mind, let us move now to the two filters of criminalization in the free society.

2. The Two Filters of Criminalization

The two filters of criminalization I will present establish the conditions that need to be satisfied for an action to qualify or not as a legitimate candidate for criminalization – that is, the conditions an action needs to satisfy to determine whether or not there is a strong presumption in favour of the criminalization of that action.

As I have argued, the main and primary concern of the criminal law in the free society should be the preconditions of the capacity of the individual to associate with others. This is to say that the juridical goods that are to be respected and protected by the criminal law in general and criminalization in particular are bodily ownership and ownership in external things (see chs.4 and 5).

However, establishing what are the legitimate and adequate juridical goods of the criminal law is only part of what we need in order to obtain a more comprehensive model of criminalization. In addition, we also need to consider (I) the more specific conditions that make an action qualify for penal regulation and (II) the minimal requirements of legitimacy for the enforcement of penal regulation of actions that pass the conditions in (I). The two filters that this section presents capture these two different aspects respectively.

Thus, according to this account of criminalization, the legislature of the free society has a strong presumption in favour of the criminalization of action *C* if and only if *C* satisfies (I) the principle of direct violation and unacceptable risk to bodily ownership and/or ownership in external things and (II) the principle of effective reduction of *C* (for short, the principles of direct violation and effective reduction respectively). These two principles

constitute the model's two filters of criminalization. According to the filtering method, there is a strong presumption for the criminalization of conduct *C*, if and only if the legislature of a general jurisdiction puts *C* through the two filters of criminalization and *C* is criminalized on grounds that it has passed successfully and successively these two filters. The formulation of the two filters is:

(I) *Filter of Direct Violation*: Action *C* is a direct violation of, or creates an unacceptable risk to, individuals' bodily ownership and/or ownership in external things

and

(II) *Filter of Effective Reduction*: Criminalizing *C* effectively reduces the occurrence of *C*.

In what follows I unpack these two filters by considering their different constituent elements. In conjunction with the juridical goods to be protected by the criminal law – bodily ownership and ownership in external things – the task I undertake in the next two sections provides an account of the principles of criminalization that should guide penal legislation in the free society.

2.1 *(I) Filter of Direct Violation*

This first filter of criminalization establishes that only direct violations and unacceptable risks to bodily ownership and/or ownership in external things can count as legitimate candidates of criminalization. In the following three sections I unpack this complex claim into three parts: action, directness and violation. Before doing so, it is important briefly to recall the view put forward in chapters 4 and 5 from which this principle derives.

The free society is an association of purposive individuals engaged in a common practice; the practice of living together. Within this associative scheme, members of the free society live their lives in association with other individuals because these associations benefit their lives lived according to their life purposes. Were agents not to perceive subjective benefits from the different associative schemes to which they belong, they would have no reasons to remain with others in those associations. Within this context of free associations the state institutions fulfil an important role, namely, honouring and protecting the principle

of freedom of association.[143] As I argued in chapter 5, the criminal law honours this fundamental liberal principle by protecting and respecting the preconditions of the capacity of the individual to associate with others, namely, bodily ownership and ownership in external things. No other good qualifies as a legitimate juridical good of the criminal law of the free society.

In relation to bodily ownership, what matters is that individuals own their bodies so that the exercise of their capacity to associate is not contingent on someone else. The view I defend is that the very possibility of exercising our capacity to associate freely with others depends on the fact that one owns one's body and that, without bodily ownership being in place, the exercise of one's right to associate and dissociate would not depend on oneself, but would be contingent on someone else. In this context, ownership refers to the entitlement to use and control our bodies as we think fit in a way compatible with the same entitlement for all.

A fundamental complement of the right to bodily ownership is the right to ownership in external things. Were bodily ownership not followed by some form of ownership in external things, bodily ownership would be devoid of meaning and/or all exercisability. This is explained by the idea that in order to exercise the right to bodily ownership we need something in and on which to exercise such a right. In this sense, the right to own one's body, and therefore, the right to decide what to do to and with one's body, requires, if it is going to be a meaningful right at all, the existence of a right to ownership in external things.[144]

These two rights are stringent property rights to use and dispose both one's body and one's external goods as one believes fit and in a way compatible with the same rights for all members of the free society (see ch.5). The more specific scope and limit of these rights in relation to criminalization is determined by the three different conditions that I now proceed to consider.

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143 According to this principle, individuals have a liberty-right to enter in associations with others for whatever purposes and duration in time, compatible with the same right for all, and with no constraints whatsoever on the voluntary benefits and obligations that may emerge from this association. See chapter 4 sec.2 for further elaboration.

144 As I argued in chapter 5, my claim does not depend on the possibility of deriving property in worldly things from self-ownership. Instead, my claim is that however we determine property entitlements in external things, these entitlements are generally required for the exercise of our right to bodily ownership.

I.a Action

The filter of direct violation of bodily ownership and/or ownership in external things focuses on human actions. 'Action' (which I use interchangeably with 'conduct' and 'behaviour') refers to acts of the individual (or relevant failures to act) that bring about a certain state of affairs. As it stands, this is a rather uncontroversial factor of the first filter. In a free society the criminalization of things different from actions, such as status, physical or mental conditions, race and other things of this sort are simply unacceptable.

However, things are more complicated. For the purposes of the criminal law, actions are not merely bodily motions but, using Moore's expression, "willed bodily movements" (Moore 1993, p.28). The central thought is that actions, in the sense relevant to criminalization, are *intentional* bodily movements. The mark of an agent's intentional action is that the agent performs ϕ with the intention to bring about a state of affairs e believing and desiring that by performing ϕ she will bring about e. Thus, an individual D intentionally kills V if and only if D kills V through the performance of action ϕ, D believes that ϕ will kill V, and D desires to kill V.[145]

What follows from this account of 'action' is that when considering whether an action qualifies as a legitimate object of criminalization, legislators of the free society must focus on intentions, not motives or other reasons for action. To illustrate the contrast between what is relevant to criminalization and what is not consider the following case: Peter puts some drops of lethal poison in a cup of tea in order to kill George. George does not want to die, but unaware of Peter's action he drinks the poisoned tea and dies. Now, what matters for the criminal law as a matter of criminalization is the agent's action in terms of intentions (collateral or lineal).[146] The reasons Peter may have had for the action (that is, Peter's motive in putting some drops of poison in George's tea believing that this would kill George and

145 This account of intentional action is an adaptation of Lowe's analysis of intentionality in Lowe 1980. See also Kenny 1975, ch.4 and Hart 2008, pp.90-112. I should note that this case is tighter than a law on, say, murder which holds that you can murder someone if you intentionally act to do him serious harm and he dies from that harm; that is, even if you did not intend to kill him.

146 I borrow the distinction between collateral and lineal intent from Bentham: "A consequence, when it is intentional, may either be *directly* so, or only *obliquely*. It may be said to be directly or lineally intentional, when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It may be said to be obliquely or collaterally intentional, when, although the consequence was in contemplation, and appeared likely to ensue in case of the act's being performed, yet the prospect of producing such consequence did not constitute a link in the aforesaid link" (Bentham 1996, p.86).

desiring to kill George) are a different issue and, as a matter of criminalization, should not concern legislators.

The point of this specification is that, in order to determine whether an action *C* is a legitimate candidate for criminalization, legislators should only consider, and define *C* in terms of, the mental states that are *necessary* to qualify *C* as a violation of the relevant juridical goods. Because motives are generally not necessary to determine whether an action is a violation, legislators must thereby define *C* in a way independent of the motives that an agent may have to perform *C*. Thus, Peter may have decided to poison and kill George motivated by the prospect of getting George's money to use it in the casino or to give it to charity, or perhaps he was motivated by the belief that George's death would save hundreds of lives or he was motivated by the thrill that killing George would provide him. However, whatever Peter's motives are, they should not be what matter to legislators when thinking of criminalizing actions (although, of course, motives may be relevant to subsequent criminal procedures such as trial or punishment). As we shall see below in section I.c, what matters to criminalization is whether an action can be described as a violation of the preconditions of the capacity of the individual to associate with others. This description, in turn, only demands the appropriate type of intention, which is a matter that is independent of the reasons an agent may have had to perform the violating act.

Hence, the temptation to define actions that are candidate for criminalization in terms of motivations and/or other reasons must be resisted. To do otherwise is to involve in questions of criminalization factors that in a complex pluralist society cannot be judged without infringing the principle of neutrality (see ch.4 sec.1.3). Judging motives involves complex considerations of values, preferences and interests, and – on pain of turning criminalization into an expression of oppression – all these are not what should matter when regulating action through the penal law. In short, when legislating on penal issues, legislators should not be concerned with inquiring into the type of motivations that should or can guide individuals' actions; that is not part of the legitimate function of criminalization and none of the business of legislators creating penal statutes.

To be sure, nothing in what I have said negates that both motives and other reasons *and* intentions constitute human action, or that we can have intentions without motives, or that on occasion motives and intentions cannot be clearly distinguished from one another. The specification of actions in terms of intentions only sharpens the focus and indicates the adequate direction of what should matter for legislators when they are considering the

criminalization of action in a free society. In a complex liberal society, constituted by many and perhaps conflicting views about the values and interests that should guide social life, we have very good reasons to leave judgments of motives aside when considering criminalization and, instead, to focus only on intentional violations.

Furthermore, it cannot be argued against this account that motives and other reasons are necessary to make sense of central aspects of the criminal law such as defences. This objection would misunderstand the point of this analysis, as my concern here is not with doctrines of defence but with doctrines of criminalization. Put differently, arguing that intentions are the primary, or only, state of mind relevant to criminalization does not mean that motives do not play any role whatsoever in a system of penal law.

In effect, it may not only be legitimate but required to include motives as relevant to conviction or sentencing. For example, if a free society has been achieved after circumstances of constant unfairness and illegitimate prosecution of some specific groups or individuals, we may plausibly think that their wrongdoings or the wrongdoings perpetrated against these individuals should count differently under current circumstances; the circumstances of the free society achieved through deep unfairness. I understand this as a principle of historical rectification in criminal justice. However, and independent of the criteria that allow us to establish whether or not this exception is justified under particular circumstances, it must be clear that in the model defended here such a principle of historical rectification is to be applied not as a matter of criminalization (which is what concerns us here), but as a matter of sentencing or as a part of a doctrine of defences. In other words, motives may matter in sentencing or defences not in criminalization.[147]

I.b Directness

In addition to the specifications just mentioned, the first filter establishes that actions that are relevant to criminalization – i.e., actions that should make criminally liable those who

147 Alan Norrie and critical legal theorists in general are vocal opponents of the exclusion of motives from criminalization and their being restricted to issues such as sentencing. As an illustration: "The possibility of mitigation of sentence is a marvellous mechanism for allowing the criminal process to 'have its cake and eat it'. Having convicted the accused by strict, unbending set of rules, the rule books are cleared away and judicial or governmental discretion comes in to do 'real' justice to the individual, or to temper legal justice with 'mercy'. None of the orthodox doctrinal scholars appear to appreciate the irony of this. Having insisted upon a strict legal code so as to protect the liberty of the individual, it transpires that the individual's liberty is ultimately dependent not upon the rule of law at all but on a group of men operating with a wide discretion at the sentencing stage" (Norrie 2001, p.46). For a response to Norrie's point, see Duff 1998b. See also Kelman (1981) for a general account of critical legal studies.

perform it – must be *direct* violations. The factor of directness relates to two different but related factors: causation and immediacy. Actions that are legitimate candidates for criminalization must be either a proximate cause of the wrong to be prevented, or must be the wrong to be prevented by criminalization.

When the immediacy between the action examined for criminalization and the wrong to be prevented is absolute – so we could perhaps talk of an identity between the two – the factor of directness is fully satisfied (such as in the case of rape and robbery). However, proximate causation becomes a more complicated matter when immediacy is less than absolute (as in shooting a gun at someone). In those cases, what matters is that the action under consideration causes in a relevant sense the wrong to be prevented by criminalization.

As we know, a generally accurate way to determine causal relevance is to appeal to a counterfactual question: would the wrong to be prevented not have taken place but for the action that is being scrutinized; would the victim not have been injured had the gun not been shot? As we also know, the literature is full of pages pointing to the problems of this 'but for' test.[148] An important source of difficulties relates to potential overinclusiveness – the gun could not have been shot but for the presence of gunpowder in the bullet, so what made possible the presence of gunpowder in the bullet is a cause of the injury to the victim. In order to avoid such an undesirable consequence, my model adopts a common-sense form of the 'but for' test (see Hart and Honoré 1985). The idea is to use causation as a way to offer a common sense narrative of a state of affairs, which is a task different from attempting to account for the complete and/or sufficient conditions required for a certain effect to happen; individual acts are certainly only one of the numerous causal elements producing an effect in the world, but this should not stop us from talking about causation *in the law* and from using causation as a relevant factor to explain and account for states of affairs that concern the law.

The common-sense approach adopts ordinary language and understandings to identify whether an action is a direct cause of a wrong to be prevented by criminalization. To illustrate, it goes against this common-sense understanding to argue that Hitler's mother's action of giving birth to, and raising, her son is the, or even a relevant, cause of the Holocaust, even if it is true that the Holocaust would not have taken place but for her actions. By the same token, it is not part of my understanding of causation that the cause of the suicide of a depressed person was the cold shoulder given by her friend, even if it is true

148 For example, see Katz 1987 and Kagan 1989, ch.3, pp.92f. For a volume covering many of the philosophical problems of causation and counterfactuals see Collins, Hall & Paul (Eds.) 2004.

that the cold shoulder was a part of what brought about her final decision to terminate her life.

In my account, more precisely, the crucial point for why an action counts or not as a relevant cause is captured by the notion of directness. Directness is a function of the foreseeability of a given event after performing an act, where that event is the wrong to be prevented by criminalization and the act is the action under consideration for criminalization. Thus, what makes the examples above not qualify as proximate causes is the lack of sufficient foreseeability of the undesired effects (the Holocaust and the suicide) after the agents have performed their intentional actions (Hitler's mother bringing up her son and the giving of a cold shoulder to the depressed person). The more foreseeable is the occurrence of the wrong to be prevented as a result of the action under consideration, the more direct the relationship between the action and the wrong and, therefore, the stronger the presumption in favour of criminalizing the action.

What justifies my emphasis on directness is the general function of the criminal law (see ch.5). The criminal law is to maximize individuals' freedom within the context of society by contributing to individuals' stability of expectations without interfering with the capacity of individuals to associate with others as they wish (recall that this general function of the criminal law is determined by the respect owed by the state to the principle of freedom of association). By contrast, to widen the scope of authority of this institution to the extent of introducing actions that non-directly produce the wrong to be prevented represents an illegitimate attack on the exercise of the capacity to freely associate with others. Making individuals liable for types of conducts whose consequences cannot reasonably be anticipated shrinks people's freedom in a way incompatible with the general function of the institutions of a free society.

The criterion of directness as a function of foreseeability is certainly not clear-cut, and many of its limits may have to be determined as a matter of policy. However, it indicates a general and necessary feature of any action that is legitimately criminalized. Furthermore, this lack of complete determinacy turns out to be less problematic than it may seem once we recall that this model has adopted a filtering strategy. Directness is only one of the different factors relevant to the first filter of criminalization and, therefore, there is much more to the criminalization of actions than directness.

I.c Violation and Unacceptable Risk

This third factor of the first filter of criminalization is grounded in Judith Thomson's distinction between infringements and violations. Whereas the former may produce injury or damage and may perhaps require some compensation on the part of the responsible agent in favour of the injured or damaged, the latter represents a wrongful incursion into the relevant interests of others and is to be responded to with appropriate reactive attitudes. Thomson writes, "I shall say that we infringe a right [...] if and only if we bring about that it is the case. I shall say that we violate a right [...] if and only if *both* we bring about that it is the case *and* we act wrongly in doing so" (Thomson 1977, p.47).

The emphasis of this first filter on actions that are violations resembles a central aspect of Feinberg's harm principle in so far as violations of individuals' bodily ownership and ownership in external things constitute a setback of interests that wrong those individuals violated. This use of violations mirrors the general structure of harm$_2$ as developed by Feinberg (see ch.6 sec.2). To this extent, I understand the principle of direct violation as a re-elaboration of Feinberg's harm principle.

In addition, the sense in which actions that create unacceptable risks are violations (and therefore wrongs) is that unacceptable risks to bodily ownership and ownership in external things undermine stability of expectations in relation to these two goods. Because the main rationale of the criminal law of the free society is to assure individuals about the preconditions of their capacity to associate, actions that make these expectations unstable by creating unacceptable risk – i.e., risks that according to our best normative theories we have good reasons to avoid or minimise – represent a legitimate concern for individuals and the criminal law and, therefore, are to be considered as legitimate candidates for criminalization.

The idea that only actions that are violations and/or unacceptable risks should be part of a system of criminalization results from taking seriously the specificity of the criminal law as considered in chapter 1. What characterizes non-criminal violations is that they are condemnable actions *simpliciter*, whereas what characterizes violations of bodily ownership and ownership in external things (to the extent that they are preconditions of the capacity of the individual to associate) is that they are condemnable actions of a relevant public interest and, thus, a matter of proper concern for the criminal law. Violations, and not other type of incursions into individuals' bodies and property, are the only adequate foci of the criminal law of a free society.

2.2 *Taking Stock: The Principle of Direct Violation and The Harm Principle*

As I noted above, the principle of direct violation can be seen as a re-elaboration of Feinberg's harm principle. However, given my critical analysis of that version of the harm principle in chapter 6, and in order to clarify further the different conditions that constitute the first filter of my own model, it makes sense to differentiate my position explicitly from Feinberg's.

The principle of direct violation is more determinate than the harm principle (in both Feinberg's and Mill's versions). Unlike the harm principle, the principle here endorsed establishes explicitly that only setbacks of interests that represent a direct violation or an unacceptable risk to individuals' body and/or ownership in external things are legitimate candidates for criminalization. Conversely, setbacks of interests that remotely violate individuals' bodily ownership and/or ownership in external things or that merely infringe these two claim-rights (as opposed to violate them) are not to count as legitimate candidates of criminalization.[149] This, I think, clearly separates the principle of direct violation from both Mill's and Feinberg's account of the harm principle.

To illustrate consider the following cases:

(i) *A* intentionally pushes *B* in order to kill *B*.

(ii) *A* intentionally pushes *B* in order to kill *C* and it is reasonable to think that by pushing *B*, *C* will die.

Respectively, these cases represent the direct violation of *B*, and of both *B* and *C*. My account would certainly criminalize the actions of *A* in both cases and so would the harm principle in any of the two versions considered.[150]

Think now of a case of direct non-violation (that is, infringement) of an individual *B*.

(iii) *A* unintentionally pushes *B*, in virtue of which *B* dies.

(iv) *A* intentionally pushes *and* harms *B* to save *B* (or *D*) from *C*s illegitimate attack.

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149 I do not distinguish here between remote violations and non-direct violation. My conception of a remote violation derives from the notion of remote harm, which is "harmless 'but for' the fact it encourages another independent party to commit a harmful criminal act" (Baker 2007, p.370).

150 Of course, the sentences in cases (i) and (ii) would differ, but that is something we do not need to worry here.

My account would not criminalize (iii) for the simple reason that a direct or indirect infringement of bodily ownership is not a violation of bodily ownership and only violations are part of the legitimate concern of the criminal law. In turn, case (iv) is covered by my model of criminalization (*A* intentionally pushes and harms *B*), but the addition of an explanation as to why *A* pushes *B* suggests that there is an infringement, not a violation. However, whether *A* will be punished in this case is not a matter of criminalization – and therefore something my model does not answer – rather it is something that needs to be responded to through a theory of sentencing and/or defence. I believe all this mirrors Feinberg's account of $harm_1$ and $harm_2$, which is well equipped to separate infringements from violations of interests. In turn, Mill's harm principle would have difficulties explaining why we should not criminalize the conduct in (iii) and is ambiguous about the criminalization of conduct in case (iv) and so needs some additional argument in this case.

Consider now indirect violations.

(v) *A* intentionally convinces *B* that members of a given group should be exterminated (and perhaps, to convince *B*, *A* has intentionally deceived, misled, confused, and manipulated *B*). *B* knows that *C* belongs to that given group and *because* of *A*'s words, *B* intentionally pushes *C* in order to kill *C*.[151]

Although the principle of direct violation makes legitimate the criminalization of *B*'s action, it impedes the criminalization of *A*'s conduct. By contrast, in Feinberg's account of the harm principle, the criminalization of *A* in case (v) is legitimate because he accepts that actions that have indirect harmful effects in others are within the proper scope of the criminal law (Feinberg 1987, pp.128, 131-2, 329). Conversely, Mill's harm principle is ambiguous about the criminalization of indirect violations. On the one hand, Mill's principle claims that only self-protection and the prevention of harm to others is the legitimate source of criminalization. On the other hand, Mill argues that "even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a

151 Note that this case is different from one in which *A* convinces *B* that *C* should be killed and *A* does this intending to kill *C* through *B*. The principle of direct violation would criminalize *A*'s conduct on the grounds that *A*'s action intends to wrong *C* and the wrong prevented by criminalizing this action is directly linked to *A*'s action, where directness is used in the technical way specified above.

positive instigation to some mischievous act" (Mill 1989, p.56), which suggests that for Mill there may be sources of criminalization different from the harm principle (see ch.6 sec.2).[152]

The principle of direct violation is not only more determinate than the harm principle, it is also more comprehensive. In including the protection of ownership in external things it easily accommodates as matters of legitimate criminalization violations of things other than harmful conduct against the body. In addition, since the principle makes legitimate the criminalization of violations (as opposed to harm or material setbacks of interests), harmless trespasses of property, joyriding, wrongful incursions into private documents, unauthorized touches, and cases of harmless rape are all seen as matters of legitimate concern for the criminal law.[153] What matters to this principle is the actual violation of the preconditions of freedom of association, not the perceived setbacks as a result of incursions like those just mentioned. By contrast, the criminalization of all of these cases cannot be easily justified by the harm principle. Feinberg's definition of harm as a setback to interests can accommodate incursions into ownership in worldly things, but it cannot do the same when these incursions are inconsequential and/or unknown to the victim.

Although the comprehensive scope of the principle of direct violation should be seen as a positive accommodation of non-harmful conduct, it needs some extra justification. It may be striking – and objectionable – that a model of criminalization like the one I defend here, one that wishes to reduce overcriminalization and adopt a minimalist shape, legitimises the criminalization of inconsequential actions. However, this objection emerges from confusion. As I take it, the claim that only relevant actions with undesired consequences are to be the legitimate focus of the criminal law results from the mistaken belief that criminalization of action has as its primary concern the direct would-be victim of crime. As I argued in chapter 1 and in other passages of this thesis, the criminal law should not be thus understood. The public dimension of the criminal law supposes that criminal conducts are acts of concern for the public as a whole (actions that are to be condemned by the polity) and for each individual member of society *qua* member of society, independent of whether they happen to be the direct victim of the crime. Thus, whether a type of conduct has undesired consequences for an individual (the direct victim of an offence or someone else) is irrelevant

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152 I must emphasise that I am pointing to the *ambiguity* of Mill's model in relation to the criminalization of conducts like the one illustrated by (v) and also by (iii and iv). This is to say that, as it stands, Mill's harm principle is indeterminate about whether we should criminalize *A*'s conduct, not that his position cannot be complemented to support (or not) the criminalization of A's behaviour. The same applies to the rest of my analysis of Mill in this paragraph.

153 For harmless rape see Gardner and Shute 2007. For harmless trespass and unauthorised touchings see Ripstein 2006.

(or of not primary importance) in determining whether this conduct falls within the legitimate scope of the criminal law. As I argued in more detail in chapters 4 and 5, a central matter for the criminal law in general and for criminalization in particular is whether a given conduct contravenes the basic preconditions of the capacity of the individual to associate with others. This contravention does not require that a disadvantageous state of affairs is brought about, but simply that the preconditions needed for individuals to associate with each other are not being respected. This is not to say that just because some action passes through the filters it must be criminalized. An action that passes through the two filters is an action that falls within the legitimate scope of the criminal law and, therefore, is (only) a legitimate candidate for criminalization.

Thus, the principle defended here states that harmless trespasses of ownership in external things can legitimately be criminalized because they are illegitimate trespasses. In turn, their illegitimacy is independent of the negative impact trespasses may have on an individual's interests and independent of whether these trespasses are known to the individual. These trespasses are illegitimate because they undermine the stability of expectations in ownership in external things that members of society require to exercise their bodily ownership. This is the basis of their illegitimacy. Unknown harmless trespasses (upon the body or external things owned by the individual) can be criminalized for the same reason. If rightful owners know that others can legitimately trespass *their* worldly things – and joyride in *their* vehicles and access *their* private information – even if they do not know of these trespasses and no material setback of interests is created, then individuals' stability of expectations is undermined because both ownership in external things and, ultimately, the principle of freedom of association have been violated. The individual exercise of the capacity to associate freely requires reasonable assurance that the claim-rights individuals have over their body and property is respected, and this assurance cannot depend on whether an individual believes no one is violating their body and/or property, but on whether an individual believes no one is entitled to violate them. Violations are actions that lack due respect for the preconditions of free association, that is why they are condemnable, even if there is no knowable or material setback against the victim.

2.3 *The Principle of Direct Violation and Overcriminalization*

Despite my efforts to differentiate my account from the harm principle and to show it to be superior to that principle – and, by extension, to the other three principles considered in

chapter 6 – what I have said up to this point only shows that the principle of direct violation is different from the harm principle and that, consequently, these two principles may end up criminalizing different types of conduct. In other words, what I have said in this section seems to work solely as a comparative analysis of two principles that reaches the following conclusion: the sharper determinacy of the principle of direct violation makes it criminalize less than the harm principle and its wider comprehensiveness makes it criminalize more types of conduct than the harm principle. Then, on pain of being trivial, an additional question is in order: if the question of criminalization is about getting criminalization right – as opposed to either overcriminalizing or merely shrinking the amount of criminal law – why should we prefer the principle of direct violation to the harm principle?

In addition to the more determinate specification of the juridical goods that criminalization is to protect, the principle of direct violation fares better than alternatives because of its capacity to minimise overcriminalization. As I showed in the first part of this thesis, the problem of overcriminalization is not uniquely reduced to – and, in effect, it is independent of – the number of penal statutes a general jurisdiction may have. Overcriminalization, the abuse of coercive power by the state through the criminal law, can adopt different forms. In chapter 2 I considered five forms of penal statutes that, under certain circumstances, qualify as instances of overcriminalization. These statutes – ancillary offences, inchoate offences, vicarious penal liability offences, jurisdictionally mistaken offences, and overlapping offences – represent some of the penal developments where we might discover overcriminalization. In what follows, I shall argue that the principle of direct violation has positive effects not only in reducing the number of penal statutes the legislature of a free society may enact, but also in responding to most of the different instances of overcriminalization that I have discussed.

The principle of direct violation establishes a stringent limit on the enactment of *ancillary offences*. The emphasis on the directness of the violation means that criminalization is about actions that directly cause the wrong to be prevented by criminalization, and not about actions that non-directly contribute to these violations or about actions that follow the commission of the violation. Although the precise threshold at which actions leading to a violation become a criminal matter remains indeterminate (this is something that no general model of criminalization can completely avoid), the emphasis on *direct* violations suggest a clear and strong presumption against remote or non-direct violations. Legislators creating the law will have to work out the limits between direct and non-direct/remote violations, but, whatever conclusions they reach in this matter, they should favour a threshold that gets

closer to the actual foreseeability of the wrong to be prevented as a result of the action under consideration: the weaker the foreseeability of the wrong to be prevented, the stronger the case against criminalization, and the stronger the foreseeability, the stronger the presumption in favour of criminalization.

For example, under the principle of direct violation, acts of preparation are to be considered beyond the pale of criminalization, as there is no unacceptable risk created and the levels of foreseeability of the wrong to be prevented are too unclear at this stage. Genuine attempts do satisfy the unacceptable risk clause and, therefore, there is a case for their criminalization. Similarly, given the unacceptable risk clause of the principle, unsuccessful violations are to count as a legitimate part of what matters to criminalization (insofar as they are violations of the relevant type). Unknown violations are also to count as candidates for legitimate criminalization. As discussed above, not to criminalize unknown violations would undermine individuals' expectations in the exercise of their capacity to associate with others and, thereby, undermine the respect due to the principle of freedom of association that the state is to protect and honour through the criminal law.

For similar reasons, the principle of direct violation should also count against the enactment of *inchoate offences*. As we saw in chapter 2, and adapting Douglas Husak's definition, these offences proscribe conduct that does not directly violate others on each and every occasion in which it is performed. Thus, some of the conduct proscribed by inchoate offences does not directly violate any individual. Again, since the emphasis of the principle I am defending is on the directness of the violation, typical inchoate offences like offences of possession, reckless behaviour or incitement are presumptively not candidates for legitimate criminalization.

As I suggested above, at this level of abstraction, a degree of indeterminacy as to where exactly draw the line between legitimate and illegitimate inchoate offences is inevitable. However, as a general rule the principle of direct violation advocates pushing the threshold towards actual violations or unacceptable risks. If we follow this general rule, drug possession, for example, would be beyond the limits of criminalization. In turn, reckless conduct would require a more contextual analysis since the extent to which a conduct is reckless is relevant to determine whether or not it falls within the pale of the criminal law. In any case, what matters here is that the level of recklessness is to be considered only in the light of the preconditions of freedom of association. Thus, careless conduct that does not

impose unacceptable risk upon individuals' bodily ownership and ownership in external things should not count as a legitimate object of criminalization.

It is clear that *vicarious penal liability* offences do not fare well in the face of the principle of direct violation. Holding a person responsible for actions that he has not committed does not fit with the principle that only direct violations are to be candidates for criminalization. Vicarious offences are not direct offences.

To illustrate, consider again the case presented above as a direct violation: *A* intentionally pushes *B* in order to kill *C* and it is reasonable to think that by pushing *B*, *C* will die. Although the most immediate cause of *C*'s death is *B*'s unintentional action (let us suppose that *B* performs the deadly action but for *A*'s action would not have done so), *A*'s conduct is to be counted as direct to the violation of *C* because *A*'s conduct is aimed at killing *C*.

Now, contrast this with a case closer to a vicarious offence, like case (v) presented above: *A* intentionally convinces *B* that members of a given group should be exterminated. *B* knows that *C* belongs to that given group and *because* of *A*'s conduct, *B* intentionally pushes *C* in order to kill *C*. In this case, *A*'s conduct, even if someone could show that it was sufficient to ensure *B*'s killing of *C* (which is unlikely), is not to count as part of what the criminal law is to regulate through criminalization. *A*'s conduct is not a direct violation of *C* in the relevant sense because *A's* conduct is not intended to kill *C* (it would be different if *A* intentionally convinced *B* that *C* is to be killed and *A* ought reasonably to expect that convincing *B* would be sufficient for *B* to kill *C* and *A* desires *C* to die. In that case, *A*'s conduct would presumably count as a direct violation of *C*'s bodily ownership – see fn.151 above).

Similarly, the principle of direct violation counts against *jurisdictionally mistaken offences*. The principle explicitly confines legitimate criminalization to direct violations of bodily ownership and ownership in external things. It offers this conclusion in a principled manner by establishing that the function of the criminal law derives from the general function of state institutions in a free society and the commitment of those institutions to the principle of freedom of association. These factors are important features guiding the job of legislators when deciding about the penal statutes that ought to be enforced in the free society. The principle of direct violation, considered within the context of the free society and its commitment to freedom of association, makes clear that the criminal law is not to command

individuals in whatever sphere legislators or judges may wish. On the contrary, the criminal law thus shaped has a very specific and reduced sphere of action.

All this shows that, within the reasonable levels of indeterminacy that characterise any model of criminalization offered at this level of abstraction, the principle of direct violation has the power to reduce overcriminalization in a substantial way. Consider, for example, the significant impact this model would have when confronted with the panoply of drug-related penal legislation (one of the most important sources of punishment today): no criminalization for drug possession, trafficking, production or consumption would be allowed. The effects of this would be enormous, not only on criminalization, but also on some of the other predicaments of the criminal law, such as the overpopulation of prisons and the imposition of harsh and unfair punishments.[154] Unlike the other principles and motives of criminalization discussed in chapter 6, the principle of direct violation represents a principled and strong filter to catch some forms of criminalization.

2.4 *(II) Principle of Effective Reduction*

It is now time to consider the second filter of criminalization, which is the principle of effective reduction. Unlike the previous filter, the principle of effective reduction does not refer to the content of the criminal law, but sets minimal conditions of justifiability for the criminalization of actions that have passed through the first filter. As I put it above, this principle establishes that for a conduct *C* to fall within the legitimate scope of the criminal law, criminalizing *C* must reduce effectively the occurrence of *C*. If we are going to take criminalization and the criminal law seriously, this constraint ought to be respected.

To introduce this filter it is helpful to recall the way in which criminalization performs its function. As I have put it in several places, the criminal law threatens an individual with certain condemnatory consequences whenever the individual performs an action that has been deemed criminal by the jurisdiction. Because we can reasonably expect that people will avoid actions that are generally followed by public condemnation, if the criminal law of a given jurisdiction holds an action ϕ to be criminal, members of that

154 This especially true if we consider that according to the Office for National Statistics a third of all adults in England and Wales have used illicit drugs in their lifetime and one in ten used them in the last year (Office for National Statistics 2008, p.14). These are actions for which people may face years in prison (note that consumption is not a penal offence in this country, but people may face some form of prosecution and punishment for inchoate offences, like drug possession).

jurisdiction may reasonably expect a reduction in the occurrence of ϕ compared to what would happen were ϕ not criminalized. Additionally, if a member of that jurisdiction does ϕ she may expect certain consequences on part of the state – say, prosecution, conviction and punishment – as a result of her doing ϕ. By the same token, if she does not do ϕ, she may expect the absence of certain course of actions as a result of her not doing ϕ. She may, at the very least, expect not to be prosecuted, convicted or punished. Hence, criminalization also contributes to individuals' stability of expectations by establishing with a reasonable degree of certainty what individuals' ought to expect from others and the state when acting (or failing to act) in certain relevant ways.

Effectiveness and Reduction

The principle of effective reduction can be helpfully spelled out by considering its two central components, namely, effectiveness and reduction. The *reduction* condition supposes that an important part of the legitimacy of holding an action ϕ to be criminal depends on whether criminalizing ϕ reduces its occurrence when compared to the same circumstances without criminalization. This means that legislators need to compare the effects of criminalizing ϕ on the occurrence of ϕ with the effects of not criminalizing ϕ. Given that criminalization has such serious consequences in individuals' lives, the enactment of criminal statutes must be bound by the reduction condition that constraints the principle of direct violation. The claim is that if legislators were to enact statute *S* prohibiting ϕ on grounds other than that enacting *S* reduces the occurrence of ϕ-ing they would not be taking these consequences seriously. Let me elaborate.

When it is believed that criminalization does not have any effect on whether people constrain their behaviour in the relevant way, the condition of reduction holds that criminalization should be barred. Inconsequential criminalization represents a waste of all sorts of resources for everyone. The cost in time, money and human resources that passing a penal law involves must not be overlooked when determining the criminal law that we ought to have. Moreover, inconsequential criminal statutes passed despite having failed to satisfy this principle involve the imposition of coercive measures by the state when it is believed that these measures are not going to live up to the general function of the criminal law, which is to protect the preconditions of the capacity to associate. This is problematic, particularly when we consider the coercive and condemnatory nature of the criminal law and the impact of criminalization on people's lives. Inconsequential criminalization, ultimately, represents the

use of coercion for reasons other than the protection of the goods the criminal law is meant to protect. Inconsequential criminalization is, in the end, simply the infliction of brute might by the state.

Many features of drug legislation are apt examples of penal legislation that does not meet this principle, and the same could be said of legislation that tries to criminalize identity-related conduct (for an example see section 3 below).[155] Of course, if we think of a society governed by an unreasonably intrusive penal state that does not draw any limit between the private and the public and that uses all possible means to coerce individuals, then it is likely that people will choose (or be forced) to avoid those forms of conduct prohibited by the law of the oppressive state. But in a free society, where people are at liberty to associate as they wish, where the general function of the criminal law does not extend beyond honouring the principle of free association, there will be a different outcome.

In addition to reduction, we need to consider the second condition of this filter: effectiveness. According to this condition, not any type of reduction of the action to be prevented by criminalization will do, but only *effective* reduction. This is a standard that needs to be considered holistically. That is, by reference to various circumstances and available policies.

Briefly, let me mention two holistic considerations that should shape this factor of criminalization.[156] The first relates to the economic costs involved in criminalizing ϕ compared to both not criminalizing it and using other legal or non-legal course of action to regulate it. Indeed, criminalization should not be considered in isolation from the additional economic costs for the state and the taxpayer involved in enacting and enforcing each specific piece of legislation. Consider, for example, the resources that could be used in different policy areas if the state did not prosecute and punish drug related offenders. A second holistic consideration refers to the serious risk of error and the cost of these risks becoming material. The criminal law, as any institution, errs, but the mistakes in unfairly prosecuting, convicting and punishing an individual have an extraordinarily heavy impact on people's lives

155 It must be noted that my use of examples in this section is illustrative of the second filter only – the principle of effective reduction. I am saying this to make clear that when a given conduct is being tested against this filter, the conduct under scrutiny should be deemed to have satisfactorily passed the principle of direct violation. Thus, the examples offered in this section have a rather illustrative character, not of the model in general, but of the second principle in particular. In effect, some of these conducts (like drug consumption and homosexual behaviour) would not have passed the first filter and, therefore, would not have 'survived' to be tested against the principle of effective reduction.

156 The following paragraph draws from Husak 2000, pp.996-1000. See also Husak's account of the drawbacks of punishment in Husak 2008, pp.203-6.

and do a serious moral wrong. The risk involved in criminalizing action must be taken carefully into consideration, as it may well be that, under certain circumstances, it is a risk not worth taking.

The decision to enact criminal law, and therefore, the decision to criminalize those actions that have passed the first filter, must carefully consider the costs and benefits of criminalization compared both to other possible forms of state regulation and to non regulation. Of course, these are only general indications of the type of costs that criminalization of action in the free society would have to deal with effectively. The precise meaning of what counts as 'effective' will have to be determined by empirical analysis and interdisciplinary work that go far beyond of the scope of this work.

It must be noted that, because the workability of these conclusions depends on empirical evidence, there is not a 'once and for all' standard of effectiveness. Thus, it is possible that under certain circumstances the principle of effective reduction bars the criminalization of conduct ϕ because all available evidence shows that criminalizing is inconsequential. That is, that criminalizing ϕ will not reduce the occurrence of ϕ. But under different circumstances, circumstances in which certain empirical evidence has been defeated, or improved, or enhanced, conduct ϕ may possibly pass the principle of effective reduction and then a jurisdiction may legitimately criminalize ϕ. Thus, the effective reduction of conduct does not take as given that criminalization reduces the occurrence of undesired behaviour nor does take empirical evidence as a once-and-for-all type of proof for (or against) criminalization. Legislators need to be alert and states should be willing to contribute to the advancement of independent and unbiased research on these matters.

Effective Reduction and The Problem of Demandingness

The way I have presented the central elements of the second filter may suggest that it is very demanding and that there is therefore a risk of impeding criminalization beyond what is reasonable. Think of murder, a type of conduct that would surely pass the first filter. We can then say that the empirical evidence we have now makes us conclude that its criminalization does *reduce* its occurrence. But, once we have reached this conclusion, there still is the different question of whether criminalizing murder is an *effective* way to reduce its occurrence.

For example, given that criminalization of action is a very expensive way of dealing with problems, it is natural to think about reducing the occurrence of murder by non-punitive means that may be, *ex-hypothesi*, cheaper than criminalization. We could reduce the occurrence of murder, say, by creating hi-tech systems of bodily protection that impede various forms of homicidal assault. Or, more simply, we could reduce attempts at murder by multiplying the number of CCTV cameras on the streets, or confiscating guns, or building fences and improving pre-crime detection systems. We can also think of some educational schemes that emphasise something like the 'sacredness' of life or the wrongfulness of infringing other people's rights. In short, there are a series of different ways in which society can think of reducing the incidence of murder that, for the sake of the argument, may be more effective than criminalization. Indeed, it looks as if we have entered into a problematic slippery slope that makes us think that there are *always* more cost effective ways to minimise the occurrence of types of conduct. But, if that is the case, and provided we have all the empirical evidence we need to compare the payoffs of these different ways of reducing behaviour, the issue is whether or not the second principle of criminalization provides too strong an argument against criminalization. In other words, is not my search for a model of criminalization that minimises overcriminalization ultimately allowing a version of abolitionism? This question needs a nuanced answer.

On the one hand, the answer is negative. The principle of effective reduction *is* a principle of criminalization and, as such, admits that criminalization fulfils an important role in society and that criminalization is an institution that must be maintained. Put differently, this principle resists abolitionism and does not invite us to get rid of criminalization altogether. Although we should do whatever we can (subject to some further principles) to reduce through non-penal means the occurrence of murder and/or any conduct that passes the first filter of direct violation, we need to keep in mind the positive function of the institution of the criminal law. As stated in chapter 1, the criminal law has a minimal and precise role that cannot be fulfilled by other policies or institutions. Those types of behaviour that pass the principle of direct violation are such that their occurrence not only has to be minimised, but also, when they do occur, are such as to require publicly condemned. Condemnation by the polity – as opposed to condemnation by a particular individual or group within the polity – is condemnation directed through the channel of the criminal law. No other institution available to the free society can fulfil this social role. Thus, the principle of effective minimisation states that, insofar as a given conduct has passed the first filter of criminalization and insofar as the occurrence of that conduct can be effectively

reduced through criminalization, the legislature has a very strong presumption in favour of penal regulation of it. Of course, this is a grey area, but it seems clear that most offences passing the first filter are types of action that the state has a duty to criminalize – which is something that must also count in the cost/benefit reckoning – because these conducts contravene the preconditions of the capacity of individuals to associate with others.

However, there is a sense in which the answer to the question of whether the principles of criminalization share something with abolitionism is partly positive. Once we are aware that the principle I am presenting here *is* a principle of criminalization, we should consider what effectiveness amounts to within this context. Given the serious consequences that the criminal law has in people's lives we should make our criminal statutes the least extensive we can when criminalizing conduct that has passed the first filter. This is to say that the principle of effective minimisation commends that if we have two different possible statutes (*P* and *Q*) aiming to criminalize *C*, and one of them (*P*) is more extensive than the other, we should then block the enactment of *P* and pass *Q* – assuming that either both *P* and *Q*, or *Q* effectively reduce the occurrence of *C*.[157] This principle commands effectiveness in the sense of making us opt for the least extensive statute, where extensiveness is a function of the restrictions imposed on individuals, their right to associate with others, and the costs involved in criminalizing action.

So understood, the principle of effective reduction is a principle of parsimony in criminalization constrained by the condemnatory function of the criminal law of actions that satisfy the principle of direct violation. To get criminalization right supposes embracing parsimony without forgetting the central social condemnatory role of this institution.

To conclude, I would like to indicate briefly how this second principle complements and completes the first one in the task of minimising overcriminalization. As noted above, the principle of direct violation has a positive impact in preventing most instances of overcriminalization. However, it is the second principle that is most likely to diminish the occurrence of *overlapping offences*. Recall, statutes that create overlapping offences criminalize conduct that has already been addressed by the legislature. The demand of effectiveness posited by the principle of effective reduction rules out criminalizing action twice (or more). Overlapping criminalization is not an effective way to address the same type of conduct and, therefore, the second filter should block this multiplication of penal statutes.

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157 Schonsheck's second and third filters fulfil a function similar to my principle of effective minimisation (see fn.142 above). In *Overcriminalization*, Husak develops a similar constraint on criminalization. It "requires the state to show that the challenged offense is no more extensive than necessary to achieve its objective" (Husak 2008, p.153).

The next section provides an example of the way in which this principle contributes to ruling out overlapping offences.

3. An Illustration: Hate-Crimes

In the last part of this chapter I shall put the two filters of criminalization to work. I will do so by considering an adaptation of the Local Law Enforcement Hate Crimes Prevention Act, a bill recently passed by the U.S. Senate and signed by President Barack Obama (also known as the Matthew Shepard Act – House of Representatives 1913 (2009)). This bill expands and amends the 1969 United States Federal hate-crime law which gives the federal government authority to prosecute hate crimes motivated by race, colour, religion or national origin if the victim was attacked whilst performing a federally protected activity such as voting or attending school. The new Act expands jurisdiction of the federal government to hate crimes motivated by, in addition to the elements just mentioned, gender, sexual orientation, identity or disability. Moreover, the bill extends the authority of the federal body to prosecute these offences independent of whether they were committed whilst the victim was engaged in a federally protected activity.

Two preliminaries justifying my choice of the example of hate-crimes: first, although I shall not undertake a comprehensive analysis of this timely and complex issue, choosing hate-crimes as a way to test my model of criminalization should prove helpful in beginning to capture the complexities involved in this problem as well as the consequences of my model for matters as important as this.[158] Second, and this is something I shall consider now, this example gives me the opportunity to sharpen my analysis by contrasting it with the worries of those interested in a specific aspect of overcriminalization in the Unites States and elsewhere. These worries relate to the overexpansion of federal law. Although this expansion is an important cause of the inappropriate extension of the criminal law I would like to separate my position from these concerns (see also ch.2 sec.2.1).

Overfederalization is certainly worrisome. By making sentences harsher (federal sentences are generally more stringent), it contributes to more and inappropriate punishment, it threatens some fundamentals of the rule of law (e.g., double jeopardy), it deflects scarce federal resources into matters that are already dealt with by the states, and it

158 For two opposed approaches to the question of legislation on hate crimes see Lawrence 1999 and Jacobs & Potter 1998.

expands the competence of the federal state into issues that are considered to be in the business of states governments. Many of these legitimate concerns are aspects of overfederalization that anyone worried by overcriminalization should take into account.

However, and despite these genuine and important concerns, my analysis does not concentrate on this matter. For my purposes it is not of great importance whether overcriminalization emerges as a result of overfederalization or of any other constitutional arrangement. Rather, my main concern is with overcriminalization itself. Thus, it is not of particular importance whether the problem of overcriminalization emerges as a result of abuses and misuses of the criminal law by the federal or by state government. What matters is only that the criminal law is being misused and abused.

3.1 *The Hate-Crime of Identity-Related Assault*

Let us now move on to the analysis of the hate-crime Act. For the sake of clarity I shall reformulate the Act and present it in a simplified version. According to the adaptation of the Hate Crimes Prevention Act that I propose, the type of conduct considered for analysis – the conduct that a hypothetical legislator of the free society may propose for criminalization – is the assault of an individual or group motivated by the victim's identity (ethnic, religious, sexual, and any other) or disabilities – for short, let us call this conduct IA (identity assault). It is on this type of conduct that I shall apply the filters of criminalization considered above.

By now it should be clear that a type of conduct becomes a legitimate candidate of criminalization – i.e., there is a strong presumption in favour of making it criminal – if and only if it passes successfully and successively through the two filters (of direct violation and effective reduction) considered above.

IA and Direct Violation

In undertaking the task of filtering IA, legislators would immediately find a difficulty due to the peculiar nature of the conduct covered in IA. This complication emerges from the fact that IA is a type of action partly defined in terms of motivations. It is thus in tension with the limited scope of authority that the principle of direct violation leaves to the criminal law. As I argued above (section I.a), legislators should refer solely to those states of mind that are necessary to characterise an action as a violation of the preconditions of the individual

capacity for association. This means that legislators must specify those actions to be tested for criminalization not in terms of motivations or other reasons, but only in terms of intentions. When we do so, only assault, and not IA, meets the requirements for the characterisation of actions commended by the first principle of criminalization.

The assertion that intentions are necessary for a plausible characterisation of violations connects with another condition of the first filter that impedes the criminalization of IA. Violations are the only legitimate focus of criminalizing action. Criminalizing IA, in turn, suggests that part of what is being considered as a candidate of criminalization is not a violation, but a state of mind which is independent of any material violation of the preconditions of the capacity for free association – to hate, and wish the death of, white people violates neither the right to bodily ownership nor the right to ownership in external things. The criminalization of IA is thus indefensible. What matters to criminalization in the free society is that violations of the relevant type be captured by the enactment of penal regulation. To consider the motives of an action as part of what is going to be criminalized is to go far away from the legitimate limits of the criminal law of the free society.

We should then conclude that IA cannot pass the first filter of criminalization and, thereby, we should deem it as an inappropriate object of criminalization. The analysis that legislators should pursue when scrutinizing IA should finish here. As I have argued, the fact that a type of conduct has not passed the first filter successfully is sufficient to conclude that this conduct is beyond the legitimate scope of the criminal law.

IA and Effective Reduction

For the sake of offering an exposition of the second principle using the same example, let us consider a scenario in which our hypothetical legislators are divided about whether IA passes the first filter (perhaps they consider, contentiously, that IA is defined in terms of intentions, not motivations) and decide to move to the second filter of criminalization in order to establish whether IA should be criminalized.

In applying this filter, legislators should ask themselves whether criminalizing IA effectively reduces the occurrence of IA. There are two reasons to think that there is a strong case against the possibility that IA passes this second filter. The first reason is, for the most part, a matter of empirical speculation about the lack of impact that criminalizing IA would have on the reduction of the occurrence of identity-oriented assault.

First, assaults motivated by the victim's identity are the result of deeply entrenched prejudices that would very unlikely be overcome through criminalization. In effect, it seems that criminalizing IA would not only be ineffective, but counterproductive. As some theorists have explained it, this is because hate crimes are typically characterised by the expression of the identity of the offender in *contrasting* ways – that is, the identity of the offender is reaffirmed by acts of violence against an identity that is different from his (see, for example, Hamm 1993). Thus, criminalization and punishment of IA may create a stronger and 'clearer' message to be delivered on the part of prejudiced individuals who are now encouraged by the existence of identity-hatred penal laws. Indeed, the inclusion of ethnic, racial and/or religious considerations in the criminal law undermines the capacity this institution has to address all members of society as citizens (as opposed to members of a particular racial, ethnic or religious group) the ultimate outcome of which is social upheaval and more inter-group violence (see Jacobs and Potter 1997 and 1998, ch.9).

Moreover, given its indeterminacy, criminalization of IA poses extremely difficult interpretative problems for all the parts of the penal system responsible for enforcement. To illustrate consider four of the nineteen questions that the Training Guide for Hate Crime Data Collection offers as a way for an officer to make "the final determination of whether an incident was motivated by bias" (U.S. Department of Justice 1996, p.22):

1. Is the victim a member of a target racial, religious, disability, ethnic/national origin, or sexual orientation group?

2. Were the offender and the victim of different race, religion, ethnicity/national origin, or sexual-orientation? For example the victim was black and the offenders were white.

3. Does a substantial portion of the community where the crime occurred perceive that the incident was motivated by bias?

4. Does a historically established animosity exist between the victim's and offender's groups? (U.S. Department of Justice 1996, pp.22-3).

This is too indeterminate. The Guide, for example, does not say precisely how many of the nineteen questions need to be answered in the positive for an action to be declared to have been motivated by identity bias. Indeed, these questions represent an arbitrary (and surely inefficient) way to determine the motives of a given action. Consider this counter questions: are able white people part of 'target' groups? (question 1). Can there be identity bias directed

against members of the same race? (question 2). What does 'a substantial portion of the community' mean? (question 3). Can there be identity bias directed against members of traditionally friendly groups? (question 4). What these counterquestions and the difficulties involved in them suggest is that, ultimately, whether criminalization effectively reduces the occurrence of IA will depend on the details, and use, of the classificatory scheme for identifying these acts.

But, in the light of the second filter of criminalization, there is a second reason against the penal prohibition of IA: it does not *effectively* reduce the occurrence of any violation of the relevant kind because it is an overlapping offence. If the criminalization of assault *simpliciter* is already in place in the jurisdiction, as it ought to be, then IA does not contribute to the protection of bodily ownership and/or ownership in external things, but it only repeats what has already been established as a criminal violation, i.e., assault *simpliciter*. If legislators of the free society want to reduce the occurrence of IA through the criminal law, the existence of the crime of assault (as opposed to the crime of IA) is the only legitimate way to achieve that aim. IA, thereby, contributes to overcriminalization by multiplying the number of statutes, permitting stiffer punishments for the wrong reasons, and allowing the criminal law to enter into areas beyond its proper jurisdiction (see ch.2). The second principle of effective minimisation, then, rules out IA on grounds that it does not effectively reduce what it aims to minimise.

It is worth noticing that although the criminal law of the free society does not allow the criminalization of IA even if it is argued that the victim of this conduct suffers differently (or suffers more) than a victim of *mere* assault, this does not mean that the free society is not to do anything else to favour the victim of IA. Although the victim's feelings should be irrelevant when assessing what types of conduct we should criminalize, victims of IA must get all the support they need. In effect, if one assumes (perhaps mistakenly)[159] that hate-crimes victims are more psychologically damaged than those who suffer a similar wrong out of different motivations, special care needs to be provided to those who suffer from this type

159 I say mistakenly because my assumption seems not to have clear empirical evidence. Arnold Barnes and Paul Ephros argue that the emotional responses of hate-crimes victims compared to common emotional reactions of ordinary crime victims (based on existing research on victimisation) is less severe: "A major difference in the emotional response of hate violence victims appears to be the absence of lowered self-esteem" (Barnes and Ephors 1994, p.250).

of conduct. This means that the free society may then allow an asymmetry in its response to certain type of crimes (amongst which I would include hate-crimes).[160]

However, independent of how much support the victims of IA should receive and of how the free society will arrange the provision of this support, what needs to be clear is that criminal law is not to provide that special succour. Instead, its function is effectively to reduce those forms of conduct that threaten the preconditions of free association. This is to say that the victim may in justice receive larger amounts of support than she currently receives (and larger than the victim of assault *simpliciter* receives), but – the claim goes – this support is not to be provided by special pieces of criminalization or by the criminal law as such.

What this exercise should make us conclude is that IA ought not to be criminalized. The first filter pointed to the peculiarity of IA, a type of conduct partially defined by its motivation. Since the criminal law of the free society is to criminalize only actions that violate the relevant juridical goods, and since the state of mind necessary to determine violations refers to intentions, not motives, the first principle rules out the criminalization of IA. For methodological reasons – as a way to illustrate the second filter of criminalization – I considered whether IA satisfied the principle of effective minimisation. IA did not satisfy this test either. This was because criminalizing IA is not an effective way to minimise its occurrence. Assuming that a crime of assault *simpliciter* is already in place, the creation of further pieces of legislation that simply add overlapping criminal regulations ought not to be considered as an effective way of reducing the occurrence of an action. If we want to reduce the occurrence of actions motivated by identity hatred, the criminal law is not the right mechanism to use. The criminalization of assault *simpliciter* (as a violation of bodily ownership) is the only legitimate contribution the criminal law can make to the reduction of actions motivated by identity hatred.

4. Conclusion

This chapter has presented the two principles of criminalization of the criminal law of the free society: the principles of direct violation and effective reduction. I have argued that these

160 But remember that under certain exceptional social circumstances my model allows motives to be included in sentencing and, therefore, under those circumstances, it may be legitimate to punish hate-crime offenders more stringently than non-identity-related ones. For a case illustrating an enhanced sentence for hate-crimes see *Wisconsin v. Mitchell* (1993).

principles derive from the general function of the criminal law as developed in chapters 4 and 5, and they are to honour and protect the preconditions of the individual capacity freely to associate with others; namely, bodily ownership and ownership in external things.

The basic methodology of this model of criminalization is based in the idea of filtering (Schonsheck 1994). Thus, for a given type of conduct to count as an object of legitimate criminalization, it needs to pass successfully and successively through the filters constituted by the two principles of criminalization. When criminalization is the result of this filtering process, the outcome is a model of criminalization that, on the one hand, represents more closely the ideal of the criminal law of the free society and that, on the other, minimises overcriminalization in a more substantive and principled way than the principles of criminalization considered in chapter 6. This is the case because the model of criminalization here proposed establishes explicitly the limits that ought to exist between legitimate penal coercion and illegitimate penal coercion and other types of non-penal coercion by the state. In doing so, this model of criminalization has the capacity to minimise overcriminalization and its perils.

Of course, criminalization is only one of the stages of the criminal law that needs to be considered if we are to overcome overcriminalization. Thus, what I have offered here should only be seen as part of a complete response to this regrettable phenomenon. Nonetheless, criminalization is without doubt one of the crucial 'moments' of a system of criminal law that aims to pursue its role in a principled and legitimate manner. The model I have defended here should then count as a crucial first step towards the construction of a properly liberal criminal law.

GENERAL CONCLUSION

> It would be a great misunderstanding of this doctrine to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-being or well-being of one another, unless their own interest is involved. Instead of any diminution, there is need of a great increase of disinterested exertion to promote the good of others. But disinterested benevolence can find other instruments to persuade people to their good, than whips and scourges, either of the literal or the metaphorical sort.
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> J.S. Mill, *On Liberty*, IV, §4

This work has presented the criminal law of the free society. To do so, I have reconsidered the general function of the criminal law and of criminalization in particular. As I take it, this re-articulation offers an account of the criminal law that we ought to have when we take individuals and liberty as sources of paramount value. In addition, I have defended the view that a criminal law so understood has the capacity to avoid and/or minimise one of its most serious current predicaments: overcriminalization. Thus, the account I have defended not only represents the criminal law of an ideal free society, but also counts as a normative model that confronts some pressing and timely difficulties faced by existing criminal law systems.

This account, I believe, should be judged as an adequate expression of both the penal institution we ought to have in a free society as well as the normative principles that should guide legislators enacting penal law. However, it is evident that numerous details and nuances of this account are still to be scrutinized, developed and/or defended. As mentioned in different passages and footnotes of this thesis, important issues that it would be necessary to discuss in a comprehensive account of the criminal law of the free society have hardly been mentioned and many challenges are still to be faced. Thus, this account should be seen only as a first, but necessary, step towards a complete model of a genuinely liberal criminal law.

In what follows, I would like briefly to consider two issues. The first one presents in a concise manner the answer to one of the central questions that has guided this thesis – is it

possible for a liberal state to justifiably coerce its members? Although an answer to this question has been advanced *in extenso* both in part II and III, at this point it is worth representing it in a more succinct fashion. The second issue is the extent to which my conception of liberalism, and its application to penal theory, may persuade others who endorse a different account of liberalism in particular and the good society in general. Because the liberalism defended here will be rejected by many – perhaps for reasons like those mentioned by Mill in the epigraph to this chapter – it seems that the proposals of this thesis are unlikely to be sufficiently persuasive and convincing.

1. The Free Society and Legitimate Coercion

In chapter 1, I referred to the tension that exists between liberalism and coercion. Part of the point of this thesis is to offer an account of the criminal law that makes the justified coercion of individuals possible in a liberal system. In these concluding remarks, I would like to take stock of the analysis developed in previous chapters and offer a concise answer to the question of the possibility of legitimate coercion in the free society.

My account in chapter 7 defended a model of positive criminalization. In contrast to, for example, Mill's harm principle, the principle of direct violation tells us not only what not to criminalize, but also what we have a very strong presumption to criminalize. In effect, and despite the importance and emphasis I have put on the idea that criminalization in the free society should be kept to a minimum, the model suggests that, when certain conditions apply – conditions that have to do with the principle of effective reduction – there are certain types of actions that should be criminalized. Thus, the criminal law of the free society has a positive role that is expressed in the idea that the liberal state has a duty of coercion. In those circumstances, if the criminal law does not impose coercive measures upon the individuals of the free society, then the criminal law is at fault.

Thus, the free society, contrary to what some may believe, is not one that favours abolitionism. There is a conclusive difference between a minimalistic model, such as the one I defend, and a straight abolitionist theory of the criminal law. From the point of view of abolitionists, the main claim against the criminal law is that criminalization and punishment impose a specific and partial standard on how people should conduct certain aspects of their lives. In this sense, the criminal law, or at least some aspects of it, is illegitimate. The abolitionist claims that the criminal law system transforms *conflicts* among individuals into

crimes and, by doing so, 'steals' what belongs to the individual and illegitimately transfers it to the sphere of the criminal law, where victims and offenders are denied real and effective participation.[161] Although I believe that some of the worries that abolitionists point to need to be seriously considered (part of my concerns, discussed in chapter 1, emerge from a standpoint similar to some versions of abolitionism), I also believe that, in the end, none of those worries should make us abolish the criminal law, criminalization, or punishment. What a free society demands is less unprincipled criminalization, not a penal vacuum.

This distinction between abolitionism and the criminal law of the free society means that penal coercion can be made legitimate and, thereby, that the tension existing between liberalism and coercion can be reduced. This thesis has shown that the existence of the free society makes legitimate institutional arrangement to ensure that some types of conduct are both condemned and minimised. These two purposes of the criminal law must go together, so that actions that are to be condemned (because they fall under the principle of direct violation) are also to be minimised (on grounds of, and constrained by, the principle of effective reduction). The question is how does the criminal law of the free society, motivated and constrained by these two principles, render penal coercion legitimate?

An answer to this question should begin by considering, as I did in chapter 1, the notion of crime. As we saw there, one plausible way of understanding crimes is to conceive of them as public wrongs that disrupt a public good of the relevant type. When a public good of the relevant type is disrupted by the action of an individual offender, a series of things may happen (an offender may trespass the rights of others; the victim may be worsen off, the offender may become better off, and so on). However, what is crucial from the point of view of the criminal law is that a public wrong has taken place – because a public good has been disrupted – and that it is for the state to respond to that wrong by condemning the offender in the name of the members of the polity. The basis of my justification of coercion depends on this articulation of crimes – an articulation that, in turn, results from the three elements of the specificity of the criminal law.

The idea that crimes are disruptions of public goods of the relevant type supposes that crimes are actions taking place within the context of society. In other words, there is no plausible conception of crimes without some form of association in which a public shares some type of common interest. As we have seen, a free society is a free association of individuals committed to the joint activity of coexisting, and this commitment is a function of

161 This is roughly what Nils Christie, a notable theorist of abolitionism, develops in Christie 1977.

the advancement of each individual's interest in living the life each of them thinks fit. It is within this framework that both crimes occur and the coercive action of the state through the criminal law can be justified.

Crimes undermine the conditions of the free association in which individuals live their lives. Following a passage by Scanlon quoted in chapter 1, I said that crimes impair the type of relationship that should exist between individuals acting together within a free association. When crimes impair this relationship the stability of expectations that individuals enjoy by associating with others is undermined, and thus the very possibility of society as a free association is put at risk. The criminal law is there to ensure, as far as it is reasonable, the survival of that association in which individuals benefit themselves. Thus, failures of the criminal law are failures against the stability of society and the interest individuals have in societal coexistence.

Thus, the legitimacy of coercion is the result of understanding crimes as actions that ultimately attack individuals' common interest in a life shared with others. More precisely, the criminal law of the free society, through its coercive mechanisms, is there to protect and respect this interest that relates to everyone's capacity to live a life as they think fit in association with others. This, I have argued, relates specifically to the interest individuals have in maintaining the preconditions of freedom of association. The difference between illegitimate and legitimate coercion, then, depends on the type of connection that holds between the reasons offered by the coercer and the interests held by the coerced. When the criminal law is understood as an institution whose aim is to protect the interests individuals have in a life shared with others, then it represents an instance of legitimate coercion. Both the reasons for criminalization of action and the reasons individuals have to remain in association with others, converge in these circumstances. By contrast, when the criminal law is understood as an institution designed to defend the interest of some faction – as it does when it criminalizes action on moral grounds, or in accordance with the values or interests of the majority, or in order to make the government popular in the eyes of the electorate (in short, when it overcriminalizes) – it becomes an instance of illegitimate coercion. The reasons for action it offers to the whole polity are not consistent with (or worse, are in conflict with) the common interest of the individuals coerced by the penal law.

In conclusion, the criminal law of the free society defended in this thesis is an instance of legitimate coercion to the extent that it contributes to the advancement of individuals' common interest in living their lives as they think fit in association with others.

The criminal law of the free society is bound by the principles that express this interest and by its coercive, condemnatory and public dimensions (what I have called, its specificity). When it goes beyond these limits, or when it falls short of them, the criminal law fails all of us and may become an instance of oppression.

2. Classical Liberalism and Criminal Law Theorising

Finally, I would like to reflect on the capacity of my account to persuade legislators and other people interested in the question of criminalization. It is clear that many of the different aspects and proposals of this work may sound appealing to those with libertarian or classical liberal leanings. Yet, all sorts of liberals and non-liberals alike are concerned with the kind of criminal law we should have. Those who believe that the criminal law is there, for example, to promote the value of autonomy, enhance equality, protect individuals from themselves, impede society from falling into the arms of false creeds, or increase overall economic profit, may certainly feel uneasy with some (or all) of what I have been proposing here. What can I say to them?

First, it must be clear that, despite my emphasis on the idea of a free society shaped by libertarian authors and arguments, the central focus of this work is the institution of the criminal law and the way this state institution may become more responsive to the type of beings that we are. This is to say that a central goal of this work is to conceive a model of the *criminal law* that takes individuals seriously, independent of whether other non-libertarian political and philosophical ideals inform the nature of non-penal institutions of the state (institutions about civil law, distributive justice, education, health care, and so on). In effect, I do not see why a liberal egalitarian, for example, may not want to apply the filters of direct violation and effective reduction when deciding the type of criminal law her model of society should adopt, and the model of criminalization we ought to have, in the face of overcriminalization. As I see it, if we want to succeed in reducing the expansion of the criminal law in a principled manner, what I have offered here under the label of the criminal law of the free society should be appealing to most people independent of their preferred distributive, moral or aesthetic commitments.

But, is this too optimistic? What could my model possibly say to someone such as Professor Biggar, who I quoted in the Preamble? Indeed, in response to the central tenets of this work, he would be quick and ready to say that it follows from what I have argued

> that not just the terminally ill, but the chronically ill or disabled, the grievously bereaved, the philosophically miserable and the amorously unsuccessful should have the same right [to kill oneself]. After all, if the individual is the sole arbiter of the value of his or her own life, and if some adult reckons that living is no longer worth the candle, then who may gainsay them? It also follows that when someone should volunteer to die in the masochistic ecstasy of being mutilated and eaten [...] the law should be silent, no crime having been committed (Biggar 2009).

The arguments advanced in this thesis do not contradict a single word in Professor Biggar's letter. My account takes the individual and her interests as fundamental sources of value. From this, one can derive a case against the criminalization of all types of suicide, masochistic conduct, self-inflicted harm, drugs consumption, and consensual cannibalism (as well as a case against all the five forms of overcriminalization discussed in chapter 2).

However, the argument against criminalizing these forms of conduct does *not* depend on a moral judgment about their legitimacy or rightness. An action can be morally condemnable and still be such that it should not be criminalized. Moral condemnation does not entail condemnation by the state in the name of all the members of the polity. In effect, the criminalization of an action and the moral evaluation of that very action are independent matters that, I have argued, should not determine each other.

If one has a different understanding of what the criminal law is for (that perhaps flows from a different understanding of the nature of human beings), then the minimalist model will not be persuasive. In that sense, I cannot hope to persuade someone like Biggar (but then, it should not be expected that some ideas on liberalism and the philosophy of the criminal law could convince someone with other entrenched views on the meaning of life and humanity). What can be said, though, is that opponents of the minimalist model presented here need to complete their arguments for criminalization.

Sadly, Biggar's letter represents an unfortunately widespread argument for criminalization that holds sway amongst both the laypersons and legislators. The loose structure of the argument is that some forms of conduct are so reprehensible, immoral, or otherwise repellent that 'something must be done'. The thing that must be done must be done by the state, and that what the state should do is criminalize the conduct. Thus, perhaps even in response to an unusual, random, and individual incident, the cry goes up that 'something must be done' and criminalization follows.

Whatever one's liberal or other commitments, this is a plainly fallacious argument that is nevertheless at the heart of many calls for the criminalization of conduct. It is at the base of the problem of overcriminalization. What is needed, of course, is an explanation of each step: of why the conduct requires a response, why that response is the business of the state, and why, if it is, it is properly the business of the criminal law (rather than some other kind of public policy).

This thesis has specified when and why a type of conduct either should or should not be criminalized. It has done so by resorting to the specificity of the criminal law and the value one ought to assign to human nature; if unsuccessful in the task of persuasion, it should, at least, invite others to recognise and avoid the dangerous and pervasive mistaken reasoning presented above.

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