Victimless Crimes

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GLOSSARY

Alienable rights — Rights, such as certain rights in property or contract, which the possessor is free to transfer or to relinquish.

Civil law — The law governing relationships or transactions, in areas such as property, contract, personal injury or domestic relations, between private persons.

Consent — Agreement given, either expressly or by implication, to assume, exercise, forego, or modify one's rights, liberties or obligations. As to legal rights and obligations, invalid, i.e., without legal effect, if given under duress or fraud, without mental competence, or without legal competence (e.g., by a minor). (see ↦**informed consent; insanity, legal concept of**)

Criminal law — The law governing public obligations and prohibitions placed upon persons by the state on behalf of society as a whole, and typically prescribing punitive sanctions for violations.

Harm — Any injury or wrongdoing of a physical, psychological or moral nature.

Inalienable rights — Rights which cannot be transferred or relinquished by their possessor. In classical liberalism, these include so-called fundamental human rights, e.g., in life, liberty or property, which can be abridged by the State only with some appropriate rationale and with procedural safeguards.

Victimless Crimes

Nemo punitur sine injuria, no one is punished except for wrongdoing. It would seem that a just society should punish only those acts that cause harm. Yet many acts have, at one time or another, met with penal sanctions despite the speculative nature of the harm they cause. Drug or alcohol consumption, loitering, gambling, cockfighting, hate speech, blasphemy, possession of weapons, euthanasia, flag burning, smoking, spitting, contraception, abortion, nudity, indecent exposure, erotic art, obscenity, pornography, prostitution, adultery, polygamy, homosexual as well as heterosexual 'sodomy' (oral or anal intercourse), sexual sado-masochism or bestiality all provide vivid examples. If non-therapeutic consumption of drugs is harmful for some people but harmless for others, when, if ever, should it be prohibited? If greater incidence of death or bodily injury results from boxing than from public nudity, should the latter be legal and the former illegal? If eating sweets causes more overall illness than failure to wear seat belts, which should government punish? The distinction between 'victimising' and 'victimless' acts raises questions as to 1) the definition of harm, 2) the persons or entities who are harmed, 3) the gravity of various harms, and 4) the appropriate forms of redress. These issues cannot be resolved by purely objective or empirical criteria. Any resolution assumes some broader legal, ethical, political, economic or social theory. A number of standard theories have long competed with each other. These include liberalism, utilitarianism, communitarianism, paternalism and republicanism. Each school provides cogent possibilities for delimiting the legitimate reach of criminal law. Yet each is subject to ambiguities and contradictions.

I. PROBLEMS OF DEFINITION

A. Harm as a Basis for Legal Prohibitions

The concept of crime presupposes a concept of harm (see ↦**crime and society; punishment, historical views on**). Throughout history, however, jurists have avoided explaining exactly what constitutes harm for purposes of defining the elements of a crime. Does harm necessarily mean bodily injury or pain? Clearly not. Theft is a classic crime. Does harm necessarily entail emotional distress? Psychological harm can indeed suffice as a component of the crime, as with crimes of extortion or stalking, for which the mere threat of force or intimidation suffices to constitute the act. Yet most crimes are subject to identical penalties whether their victims react with agony or apathy (although, for some crimes, emotional impact on the victim or the victim's relatives or dependants can affect sentencing or can augment liability in civil law). If neither physical nor emotional pain are necessary ingredients of harm, then what is? What is the least harmful ingredient necessary to constitute harm? Offence to the sensibilities of a civilised society? Yet *Ulysses* and *Les Fleurs du mal* have caused such offence, incurring prohibitions in one generation that were ridiculed by the next.

In addition to the problem of defining harm, there are questions about who suffers it. Should harm incurred by someone with informed and willing consent, as in the case of boxing or assisted suicide, nevertheless justify criminal liability for the person who caused or assisted in it? What if the two are the same person, as in the case of drug use? (see ↦**drugs, moral and legal issues**) What if there is disagreement about whether a given entity, such as a ↦**fetus**, can be a person, hence a victim, at all? Moreover, should harm only justify

criminal proscription when it is incurred by some specifically identifiable person, or should some acts, such as loitering or gambling, be penalised for the harm they do to society on the whole, regardless of whether harm is caused to some specific individual? If society as a whole can count as a victim, then must the harm caused to it be material -- based, for example, on the statistical likelihood of other criminal activity ensuing from acts such as loitering or gambling? Or does society's moral outrage, such as that still caused in some countries by private, adult, consensual homosexual sex, provide an equally valid basis for a criminal proscription?

B. Standard Definitions of Crime

Standard definitions of crime barely advance the inquiry. *Black's Law Dictionary* (5th ed., 1979) offers two. One defines a crime as 'an act committed or omitted in violation of a law forbidding or commanding it.' Yet that description is circular: a crime is an act that violates the criminal law, and the criminal law is the sum total of recognised crimes. Another defines a crime as 'any act done in violation of those duties which an individual owes to the community.' Such a definition does not, however, explain what those duties are. If they are duties not to cause harm, then the question as to the nature of harm remains. If they are duties to obey the law, then this definition is as circular as the first. The American Law Institute Model Penal Code Official Draft (1962), although eager to define such ingredients of crime as 'act', 'action', 'actor', 'omission' or 'conduct', avoids defining the term 'crime' itself. Legal doctrine has resisted formulating some *sine qua non* of criminal acts, which would distinguish, in self-evident fashion, those acts that do properly constitute crimes from those that do not, either on the basis of harm or of any other element. Law offers no

algorithm by which, for any 'truly just' legal system, one would know *a priori* which acts would and would not properly constitute crimes. Throughout most of history crime has largely been whatever those in power have said it is. Yet that 'might makes right' principle has never sat comfortably with post-Enlightenment liberal democracies. Fundamental to liberal democracy is that laws should be made by deliberative government and should not be arbitrary or capricious. They should have some rational basis. It is this need for a rational basis that brings the concept of harm to the forefront of the problem of victimless crimes.

II. THEORETICAL PROBLEMS

A. Classical Liberalism and Utilitarianism

Where law equivocates often philosophy ventures. The most famous philosopher to attempt a theory of criminal acts based on notions of those acts' specific, demonstrable harmfulness was John Stuart Mill. In his essay *On Liberty* (1859) Mill observed that, throughout history, nations were largely in agreement in punishing at least some forms of clearly harmful acts, such as murder or assault. '[B]ut if we except a few of the most obvious cases,' he continued, acts that do not so clearly entail some specific, demonstrable harm create a dilemma 'which least progress has been made in resolving. No two ages, and scarcely any two countries, have decided it alike; and the decision of one age or country is a wonder to another.'

Mill proposed a solution to the problem of victimless crimes consisting of 'one very simple principle' to which he nevertheless lent two different formulations. The first echoes the philosophy for which Mill is most noted, ↦**utilitarianism**: '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.' The second, on the other hand, stresses the language of classical ↦**liberalism**: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'

The first formulation has suffered the fate of utilitarianism generally. It introduces a concept not only of individual but also of collective self-protection on which consensus would be difficult to achieve. Does collective self-protection entail only that which is necessary to the organic survival of a group, or does it extend to that group's sense of identity, to its sense of spiritual well-being? Under sufficiently precarious circumstances, for example, a work such as Salman Rushdie's *Satanic Verses* could sow such discord as to threaten the spiritual self-protection of a local, national or even international collectivity. The criterion of collective self-protection suggests a 'greatest good for the greatest number', despite inevitable disagreement about what that is.

In most contemporary debate the utilitarian formulation generally cedes to the classical liberal formulation. Contemporary inquiry emphasises harm rather than self-protection, in accordance with Mill's second formulation, although such a formulation is by no means unique to Mill. Article 2 of the French *Déclaration des droits de l'homme et du citoyen* (1789), another landmark document of classical liberalism, had already proclaimed, 'Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights.'

B. Varieties of Harm

If Mill's theory were to end here it would add little to the indeterminate or circular concepts of crime offered by the standard legal texts. In the second formulation of his general principle, Mill does not simply speak of acts that cause harm. He speaks of acts that cause harm to others. According to Mill, a harmful act may be perfectly lawful, as long as the 'right' person is harmed, namely, someone who was willing to incur the harm. The issue of victimless crimes thus involves two distinct questions. The first question concerns the persons harmed: Assuming that an act does cause harm, should it nevertheless be lawful if it harms someone who has validly consented to it? The second question concerns the actual acts that cause harm: Assuming that an act does not cause harm, are there nevertheless grounds for making it unlawful?

The first question simply assumes that a given act causes harm. The second question, however, must be further subdivided. There are different kinds of harm, as is suggested by contrasting two simple examples. On the one hand, the physical, psychological or material harms caused by acts such as murder, assault or theft are generally acknowledged; any disputes center largely around such issues as the frame of mind of the accused, permissible defences or the appropriate form of punishment. On the other hand, acts such as failing to act with courtesy towards a neighbour or to show respect to one's parents can also cause harm, if only through an affront to another's status or dignity, as is acknowledged by age-old moral injunctions governing such situations. Although these kinds of harm would not generally be considered to be as grave as the former kinds, that does not mean that they cause no harm at all. The question is whether the difference between these two classes of harm is a difference

in degree or a difference in kind. Is harm the same whenever it is caused, varying only in degrees of intensity? Or, despite the use of the word 'harm' for both, do these two classes actually correspond to categorically different kinds of effects of the acts that cause them, such that all acts, once the context be known, would fall self-evidently either under one or under the other category?

Any suggestion that the difference is merely subjective, merely a matter of personal opinion, is belied by what law actually does. As a general matter, the legal systems of contemporary liberal-democratic societies punish murder and theft, but not lack of courtesy towards a neighbour or of respect towards one's parents ('courtesy' and 'respect' understood, here, in the ordinary sense, and not encompassing special duties or so-called culpable omissions). Thus the two types of harm merit at least a rugged, approximate distinction, even if a transcendental principle that would distinguish them in all cases, for any 'just' legal system, remains elusive. We can call the harm caused by the former acts *palpable harm*, which would consist of at least minimally significant physical, psychological or material damage. We can call the harm caused by the latter acts *putative harm*, which would essentially encompass outrage or disapproval, including offence to deeply held values.

The terms 'palpable' and 'putative' are formulated here only for convenience. They are not current in traditional debate about victimless crimes. (Various writers, such as Kadish, Packer, Kaplan, Feinberg, von Hirsch and Jareborg, have developed their own conceptual schemes.) Even a cursory inspection of these two categories suggests possible ambiguities. As to the definition of palpable harm, for example, it is not indicated when damage becomes 'significant', let alone 'minimally significant'. Differences between 'psychological damage' and 'moral outrage' may also become nebulous, particularly in light of different persons' varying levels of sensitivity. Even more troubling, as examined in Part III *infra*, is the question of the link required between the act and the harm caused. Rules

requiring the wearing of seat belts, for example, envisage only a probable, cumulative harm, and not individual harm in every instance of breach. The same holds true for rules governing environmental pollution, the cumulative effect of which may be very much in dispute. Yet once a concept of cumulative palpable harm is admitted, certain applications might dissolve any practical distinction between palpable and putative harms. Adultery or fornication, for example, might be proscribed for purposes of preventing venereal diseases. Indeed, such arguments have been proffered for maintaining bans or limits on ↦**homosexuality**, particularly with reference to ↦**AIDS**, precisely where there was some doubt about the cogency of arguments based only on putative harms. Acts such as blasphemy offer an extreme example. These might be banned merely because of the uproar, hence the prospect of violence and thus of palpable harm, that might occur, despite the fact that such reactions would be ensuing from a harm that originally was only putative.

Nevertheless, these potential ambiguities have not prevented voices in the debate from assuming some distinction between these two types of harms. Classical liberalism follows it closely, generally endorsing the proscription of acts causing palpable harm and rejecting the proscription of acts causing only putative harm. As a basic rule (some exceptions are noted below), classical liberalism would recognise only palpable harm, not putative harm, as harm at all for purposes of criminal prohibitions. Meanwhile theories that do advocate proscriptions on victimless acts do not necessarily attempt to contrive palpable harms out of putative ones. They may freely acknowledge that some acts do not cause any harm aside from moral outrage, but would nevertheless deem putative harm to count as legally actionable, moral outrage supplying sufficient grounds for punishment. Thus they, too, implicitly acknowledge the validity of some distinction between palpable and putative harms. Opponents of ↦**pornography** or homosexuality, for example, may well offer

empirical evidence of palpable harm to bolster their claims, but are also likely to cite ethical principles -- principles that would govern even if no palpable harm could be adduced.

C. Law and Morality

Assuming that palpable harm justifies criminal sanction, the question then becomes whether putative harm does so. This formulation of the question restates one of the classic problems of law, namely, the relationship between law and morality. Briefly, the problem can be stated as follows. On the one hand, law and morality are not one and the same. Again, some widely held moral values, such as the opprobrium of murder, are generally subsumed by law while others, such as courtesy to neighbours, are not. On the other hand, law and morality are not utterly distinct. All rules of law, even 'technical' rules governing, for example, time limitations on bringing law suits or filing rebuttals to the submissions of other parties, are, presumably, chosen on the basis of their desirability in contrast to alternatives. Such choices can be called moral if only because they are normative -- because they assume some political order, even some minute aspect thereof, to be preferable to alternatives. The relationship between law and morality might be envisioned as two partially overlapping spheres. But then the question arises which elements lie within the overlap and which outside. Or the relationship could be envisioned as hierarchical, morality taking a number of forms of which law would be only one. But then the question arises which elements fall within, and which outside, of law as a subset of morality, and what relationships law maintains with other such subsets, such as politics or religion. (Indeed, whether religion is merely a 'subset' of morality is itself subject to dispute, with important consequences for law.)

The relationship between substantive criminal law and morality has always been of special interest to the broader inquiry into the relationship between law and morals. The classification of crimes in terms of varieties of harm does not solve, but does formalise the problem. As the harmfulness of palpable harms is not generally in dispute, it generally becomes a sufficient justification for legal proscriptions; no further inquiry into the independent immorality of the corresponding acts becomes necessary. Those acts are immoral *because* they are, by common consensus, harmful. The loss of life caused by the act of murder, for example, generally provides sufficient grounds for penalising murder, obviating further inquiry into whether the overall detrimental effect of that murder, or of murder generally, in society provides independent justification for the proscription. What characterises putative harms, on the other hand, is the impossibility of separating harm from morals in this way. Unlike palpable harms, they do not, on the basis of harm caused, provide justification of criminal proscriptions independent of a distinct assessment of the morality of the acts at issue. An ascription of putative harm is *nothing but* an ascription of immorality.

The observation that the problem of victimless crimes involves the more general question of the relationship between law and morals has become a focal point of the contemporary debate. Barely a hundred years after Mill's philosophical excursus, the debate was taken up, impeccably intact, by two renowned jurists of Mill's own soil, Professor H.L.A. Hart and Sir Patrick Devlin. In the wake of a 1959 British government report (*The Wolfenden Report*) urging that private, adult, consensual homosexual conduct no longer be prohibited, the two men took opposing positions on how the government should respond. Although the debate took place in the legal literature over a period of several years, with occasional third voices joining in, full expositions can be found in Devlin's *The Enforcement of Morals* (1961) and Hart's *Law, Liberty and Morality* (1963). Each has become a classic statement of its respective position in the modern debate. Hart, following in the steps of Mill,

generally denounced the use of the criminal law to prevent activities that cause no harm other than moral outrage. Devlin, on the other hand, attributed to law the vital role of maintaining values so deeply held as to form the fundamental moral fibre of society.

D. Communitarianism and Paternalism

Mill's liberalism, then, is not the only theory to inform the debate. Indeed, historically it is rather an aberration. In most cultures and at most times, lack of palpable harm to a specific, ascertainable victim has not sufficed to shield from the criminal law acts otherwise deemed detrimental to society. Pre-liberal and anti-liberal theories play an important and, historically, by far the dominant role. These include ↦**communitarianism** and ↦**paternalism**. Both offer justifications for penalising at least some acts causing only putative harm.

Communitarianism challenges certain assumptions of classical liberalism as adequate bases for a just social and political order. It rejects the notion that civil society serves as nothing more than a well-ordered arena in which individuals may freely pursue their own interests as long as they do not harm others; in which persons may do positively evil things as long as no specific, palpable harm to others can be demonstrated. It rejects what it sees as a world of ↦**moral relativism**, where 'anything goes' and all individuals' ideas of good and evil are equally valid, where good and evil are nothing but matters of personal choice and preference. Liberalism's ostensible neutrality towards victimless crimes, from gambling to loitering to homosexuality, is seen as acquiescence, and acquiescence implies approval. With Hobbes's *Leviathan* (1651), the state purports to triumph over the *bellum omnium contra omnes*, the war of all against all in the brutal state of nature. Yet, in an unrestricted

marketplace of morals as well as goods, it is, on the moral plane, that same brutal condition that re-emerges. There is no moral order, only the moral chaos—the immorality—of countless private morals antagonistic to each other. Liberalism's relativism ensues from its individualism. We all become Cain, never our brothers' keepers.

For communitarian theories, the mission of civil society is not simply to keep people from injuring each other, but also positively to undertake to eliminate evil, private as well as public. The private *is* public. It is the mission of civil society to induce people to co-operate in realising certain general human needs and goods that only can be achieved collectively. Whilst the liberal asserts that, by definition, an act is not evil unless others unwillingly suffer some palpable harm, communitarians point to obscenity, pornography, promiscuity, hate speech or drug use as harms to society as a whole, in the long run, even if discrete acts of palpable harm cannot be adduced.

Liberalism, however, insists that the good that emerges from such a social order is not necessarily the goodness of gambling or loitering *per se*, but rather the goodness of personal freedom to choose whether one wants to pursue such activities. Even if such acts are evil, the goodness of permitting them lies in the goodness of allowing the individual to come to the knowledge of their evil, rather than having it dictated within a legal order that obliges all to accept it on faith. The liberal ideal is the Enlightenment ideal. In the words of Milton, 'though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple: who ever knew Truth put to the worst, in a free and open encounter.' Liberalism does not deny the existence of good and evil. It rejects only dictatorial means of reaching such judgements. In a wondrous clash of 'isms,' just as communitarianism would accuse liberalism of relativism and egoism, so would liberalism accuse communitarianism of

absolutism and authoritarianism. Liberalism would condemn any impulse to decree good and evil beyond the bounds of palpable harm, imposing judgements of good and evil on others.

Paternalism is equally motivated by a critique of liberalism's shortcomings, but tends to emphasise more of a corrective of liberalism's defects than a fundamental rejection of liberalism. Paternalism assumes that ignorance, ↦**poverty** or some other incapacity can cause people to act contrary to their best interests, and thus recognises a duty on the state to, as the standard formulation runs, protect persons from themselves. In civil law, for example, this means that persons may be relieved from contractual obligations to which they have given otherwise valid consent, as in the case of usury, if those obligations would entail excessive hardship. In areas of health, education, or social welfare, it generally connotes tax and transfer plans for the benefit of the materially disadvantaged. In criminal law, it means that the state may legitimately prohibit, say, drugs, gambling or possession of certain firearms, not because these necessarily entail harm to persons involved with them, but simply because they may entail such harm if abused -- a rationale which, ostensibly, avoids the question of harm to society as a whole. To its friends, this is a welfare state, elevating our quality of life, caring about its citizens. To its foes, it is a nanny state, wagging its finger, telling us what to eat and drink, butting into every detail of our lives, refusing to let people make their own choices about their lives.

E. Left and Right

Liberalism and communitarianism are umbrella concepts. Each includes a variety of perspectives on the left as well as the right. Not all liberal theories are mutually compatible, nor are all communitarian theories. Nowhere are the mutual incompatibilities of theories under each umbrella more apparent than in those theories' approaches to victimless crimes.

Certainly, liberal ideas motivated the -- in the context of their time -- progressive politics of the Enlightenment, politics of anti-monarchism, constitutionalism, disestablishment, free trade, and free transfer and development of property. Since that time, however, adherence to such ideas to the exclusion of tempering concepts of the paternalist, welfare state have come to represent a leading strand of conservatism, often known in our era as 'libertarian', in contradistinction to the contemporary English-language notion of 'liberalism', particularly in the United States, as left wing. On the other hand, theories that have attempted a reconciliation of classical liberal ideas with the welfare state have been represented in the social-democratic policies that have dominated most of the post-World War II government policies of Sweden, Denmark, Norway, and the Netherlands, and, to a greater or lesser extent, the social democratic movements of Britain, Germany, France, Italy or Spain.

Attitudes towards victimless crimes reflect this division. Extreme libertarians would lift prohibitions on any activity, right up to suicide, Russian roulette or duelling, that does not cause palpable harm to persons who have not given valid consent. Nor would they recognise crimes of homosexuality, sexual sado-masochism, prostitution, contraception, polygamy or flag burning. What makes them conservative is the purity of their liberalism, which, applied

with equal zeal to the marketplace, results in little more than survival of the fittest. Those unable to help themselves are, at best, consigned to charity of strictly voluntary origin. Even taxation for goods or services aside from those, such as an army, absolutely necessary to the survival of the state is seen as punitive -- punitive of the victimless act of earning and spending one's money as one sees fit -- and would be abolished for the same reasons that punishments of homosexuality or duelling are abolished. Social democrats, on the other hand, have sometimes favoured policies deemed progressive across the board, in social as well as economic areas. A number of social democratic governments have thus lifted prohibitions of homosexuality, sexual sado-masochism, prostitution, pornography or soft drugs, while maintaining prohibitions on gambling, cockfighting or hate speech.

Some issues do not clearly appear as either 'left-wing' or 'right-wing'. Libertarianism, for example, however pure, assumes no particular stance on what constitutes a legal person. It only characterises the freedoms rightly accruing to legal persons once these have been ascertained. Accordingly, it would entail no particular view on whether a fetus can count as a person, hence a victim, of an act such as ↦**abortion**, and, if so, whether such personhood starts at conception or only at a later stage of pregnancy. Equally 'pure' libertarians could disagree on these issues, and could thus create internal contradictions within libertarianism about whether, or at what stage, abortion is a victimless crime. Similar contradictions are to be found in social democratic liberalism.

Communitarianism, too, comes in different hues, from traditional-values conservatism or religious fundamentalism to Marxism or certain schools of feminism. Distinctions between left and right are even hazier than in the case of liberalism. Again, all forms of liberalism aim for the greatest possible individual freedom: libertarianism in an absolute sense, social democracy through the greatest possible personal liberty that a balancing against social welfare will allow. Communitarianism, on the other hand, does not necessarily seek

even that individual freedom which might be balanced against social welfare. Individual freedom is never a priority in the first instance. It is at best residual, to be enjoyed only after more important collective goals have been achieved. Nevertheless, some distinctions between more left-wing or right-wing theories of communitarianism can be made. Enlightened, as opposed to Stalinist or Maoist, ↦**Marxism**, along with communitarian ↦**feminist ethics**, can properly be characterised as left-wing. Such theories have, for example, generally favoured individual freedom to practice contraception or to engage in homosexual acts. Nevertheless, prostitution, pornography, sexual sado-masochism, polygamy or hate speech are more readily frowned upon. These are seen to perpetuate, if only symbolically, misogyny, exploitation or racism. Right-wing communitarianism, such as religious fundamentalism or traditional-values conservatism, is even less disposed to concede to individual interests. In the first instance, everything must, so to speak, cede to the word of God or to time-honoured values of families and communities, however harmless by other measures. God or community are always judges of evil, always sufficient 'victims' of evil acts.

It is the extreme views, then, on the left and the right, that offer more uniform but perhaps more simplistic theories of victimless crimes. For these theories take only one principle into account. Libertarianism places the value of individual liberty above all others, and is thus hostile to any use of the criminal law which would deprive persons of individual liberty absent a showing that the exercise thereof would palpably harm the person or liberty of another. Right-wing communitarianism places a vision of the collectivity above all others, and thus invokes the criminal law to advance that vision, regardless of the abridgement of individual liberties. It is the more moderate theories, attempting to find some status for individual liberty within a broader collective good, that run into graver contradictions. In the United States, for example, the American Civil Liberties Union (ACLU), traditionally, self-

avowedly, associated with the political left and with progressive politics, also remains strongly committed to classical liberal ideals of free expression. It has thus found itself uncomfortably allied with Nazi, racist and male-supremacist causes against holocaust victims, racial minorities and feminists. Meanwhile, in pursuit of progressive communitarian aims, a number of feminists have found common cause with the religious right in campaigns against pornography.

F. Republicanism and Fundamental Rights

The foregoing discussion should not be construed as implying a necessary correlation between, on the one hand, liberalism and democracy, and, on the other, communitarianism and authoritarianism. Some versions of communitarianism approach a pure, popular democracy more closely than do some versions of liberalism, which would expressly renounce pure democracy. If a society is to be governed by a principle of collective welfare, and if notions of collective welfare are to be ascertained by consensus, then majority rule provides sufficient justification for deciding which acts should be penalised. No additional justification, with reference to the specific harm that would be caused by penalised acts, would be required. If the majority wishes to penalise gambling, alcohol consumption, flag burning, contraception or homosexuality, then it may do so with no greater notion of harm than the sentiment that individuals and society would be better off without such things.

It was precisely this power of the majority -- to its foes, 'tyranny of the majority' (see **↦minority, concept and definition of**) -- that motivated Enlightenment thinkers to temper democracy not only with notions of constitutional republicanism, by which government,

albeit largely through democratic elections, would enjoy certain insulation from direct democratic pressures, but also with notions of fundamental, inalienable, or 'human' rights, interests of vital interest to human life, such as expression or association, which would enjoy special protections from popular or state interference. (see ↦**rights theory**) Classical liberalism purports to incorporate these anti-democratic buffers for the sake of strengthening democratic society overall. Yet anti-democratic they are. Liberal democracies tend to resolve the problem of victimless crimes through appeal to fundamental rights. If a victimless act, such as gambling, does not entail a discrete, legally cognisable, fundamental right, then it may more easily be penalised by government. If, on the other hand, such an act, such as production and distribution of atheist literature, does involve such a right, then government must present a stronger case against the purported harm. A special sphere of protection thus becomes reserved for acts performed in the exercise of fundamental rights where such exercise does not cause palpable harm. These relationships can be depicted as follows:

	ordinary right	*fundamental right*
palpable harm caused by exercise of right	I. exercise of right may be penalised without special justification	II. exercise of right may be penalised without special justification
putative harm caused by exercise of right	III. exercise of right may be penalised without special justification	IV. exercise of right may ***not*** be penalised without special justification

Such a scheme envisages a balance between liberal and communitarian ideals, although adherents of a strong liberalism or communitarianism would still find it inadequate. Acts not performed in the exercise of fundamental rights, or acts causing palpable harm (fields I, II and III), are left to normal democratic consensus for determinations as to their legality or illegality. Acts performed in the exercise of fundamental rights and causing no palpable harm (field IV) enjoy greater protection from those forces. Field I would comprise most acts that have traditionally and uncontroversially fallen under the criminal law. Murder, assault or rape, for example, are palpably harmful exercises of freedoms of bodily mobility that are not generally supported by fundamental rights. Although some civil or human rights instruments recognise specific rights of travel or movement, these rights are not conceived so broadly as to create general rights of bodily mobility. Field II would comprise acts within the

sphere of fundamental rights, but constituting abuse of these. Rights of free speech, for example, tend to be rather broadly conceived in liberal democracies, but preclude such palpably harmful exercise as, for example, treason or incitement to imminent violent activity. It is in the remaining areas that problems of victimless crimes more readily arise, and in which liberal democracies are likely to draw distinctions between ordinary rights (Field III) and fundamental rights (Field IV). Field III would comprise acts, such as drug use, gambling, loitering or possession of firearms, not causing palpable harm, but not supported by fundamental rights. Liberal democracies have maintained some margin of discretion on the part of government to regulate or prohibit such activities, despite their possibly victimless nature. It is only acts that are committed in the exercise of fundamental rights and cause no palpable harm (Field IV), such as religious dissent or use of contraceptive devices, that most liberal democracies have increasingly recognised as meriting greater protection, and requiring special, perhaps compelling, justification on the part of government before criminal punishment of them will be allowed.

Such a regime, however, still leaves numerous questions unanswered. What, for example, properly counts as a fundamental right? The first ten amendments to the United States Constitution, for example, known as the Bill of Rights (1791), were one of the earliest attempts to enumerate fundamental rights that might not be abridged by government without special justification. These include, *inter alia*, rights governing free speech, free assembly and free exercise of religion. They do not, however, include, as such, a fundamental right to ↦**privacy** -- a concept of more recent vintage. In a landmark case, the Supreme Court nevertheless deduced the implied presence of such a right, overturning a state prohibition on the use of contraceptive devices (see ↦**birth control technology**), and in subsequent cases, held that the right protects individual autonomy in such areas as abortion, marriage and child rearing. Yet in a later case the Court declined to overturn a state prohibition on private,

adult, consensual acts of 'sodomy' as applied to homosexuals. The United Kingdom, maintaining a tradition of constitutionalism rather than a single and unified written constitution, has no instrument of constitutional stature enumerating fundamental rights, which, as a result, tend to be promulgated and ascertained *ad hoc*. Newer efforts, such as the European Convention on Human Rights (1950), although by no means free of problems of interpretation, are more comprehensive and more specific as to the content and limits of fundamental rights, and have produced a jurisprudence less ambiguous in the elaboration of the relationships depicted in this schema. Although differences of opinion will invariably arise about the boundaries between fields I, II and III, it is the boundaries between these and field IV that pose the most difficult problems concerning victimless crimes. Finally, an additional question arises as to the 'special' justification that would be required for the state validly to punish Field IV acts. If that justification is not based on some palpable harm, there is likely to be some question about how 'special' or urgent it is.

III. SPECIFIC APPLICATIONS

A. The Problem of Casuistry

Absolute doctrines of liberalism or communitarianism provide easy answers to the question of victimless crimes. Yet the question persists precisely because absolute doctrines of liberalism or communitarianism are difficult to maintain. More moderate doctrines, such as paternalism or republicanism, tend to be preferred. The more moderate, however, the more subject a position is to contradictions. Such are the dilemmas of ↦**casuistry**, the application of general principles to specific problems. (see ↦**slippery slope arguments**) Even Mill, in the later portions of *On Liberty*, attempting to apply his principle to specific cases, ultimately cedes ground to a communitarian impulse. He concedes, for example, that 'taxation for fiscal purposes is absolutely inevitable.' Similarly, whilst Hart and Devlin represent, respectively, liberal and communitarian views, neither's position is absolute. Devlin hardly sets out to abolish the liberal state. Hart grants a doctrine of 'limited paternalism'. Where Mill was surely correct was in his observation that no two jurisdictions, nor even the same jurisdiction at different periods of time, resolve the problem of victimless crimes in the same way.

B. Persons Harmed

Various entities can be harmed by various acts. These include legal persons, such as oneself, another person, members of society as a whole, even a corporation (in its capacity as a legal person), but can also, depending on one's philosophy of harm, include entities not generally deemed in contemporary, liberal democracies to be legal persons. These may be either material, such as animals, or immaterial, such as deities or spirits. Any view about who can suffer from harmful acts raises its own set of questions. 1) As to oneself or some specific, ascertainable person, the question arises whether willingness to incur palpable harm removes legitimate grounds for punishment. Putative harm does not raise such an issue, as grounds for punishing it are based either on harm to a specific, ascertainable person who has not consented, or to society as a whole, or to an intangible entity such as God. 2) As to members of society as a whole, the question arises whether the desire (be it popular or on the part of state officials) that they not incur putative harm creates legitimate grounds for punishment. Palpable harm does not raise such an issue, as it, by definition, is incurred by oneself or by specific, ascertainable persons, even if on a massive scale. 3) As to entities other than legal persons, such as animals or deities, the question arises whether they can be harmed, either palpably or putatively, in a way that would justify criminal punishment.

1. Harm to Oneself or to Specific, Ascertainable Persons

What if the persons palpably harmed have consented to the harm? Despite regular occurrences of grievous bodily harm and even death, boxing, for example, remains a lawful sport (see ↦**sports, ethics**). There is no question about the harmfulness of the acts involved. A swift punch to the jawbone in the barroom might well send the author to jail; placed in the ring with the lawful consent of both parties, that same punch will shower the author in glory.

Still, consent is not a green light to cause harm to whomever consents. Ironically, criminal haw has often prohibited ↦**suicide**, which entails only harm, albeit consensual, to oneself, whilst harms caused to someone else, albeit consensual, in the form of boxing, may be rewarded with a world championship and film contracts. Of course, suicide is an act that intends death as its purpose. Acts with that same purpose, directed towards someone else, have also met with criminal sanctions, hence prohibitions against mutual suicide pacts, duelling, Russian roulette and ↦**euthanasia**. On the other hand, given the statistically certain knowledge that a significant number of deaths and grievous injuries will result every year from boxing, quaere whether such a teleological distinction truly explains the different legal treatment of the respective acts. Another explanation might lie in the state's desire not so much to punish those who would commit suicide or euthanasia as to help them. Yet it remains unclear why the state would 'help' people out of these kinds of acts, but not out of boxing. Particularly as contrasted with euthanasia, the implication would almost be that it is more desirable to die accidentally by boxing than deliberately by euthanasia, despite the questionable ↦**medical ethics** of promoting the death of healthy boxers while frustrating the wishes of those whose health may be terminally impaired. The difference might also be thought to lie in the private, concealed practice of suicide, euthanasia, duelling, or Russian roulette, as opposed to the public, supervised practice of boxing. If, however, the latter does not preclude regular and foreseeable death and grievous injury, the cogency of this distinction is equally dubious. As a practical matter, prohibitions of boxing might be seen as useless, as they would merely push the sport underground, rendering it even less susceptible to open scrutiny. However, the same is true of such consensual activities as drug use or gambling.

The disparity is more likely rooted in the popular affection for certain dangerous activities, such as sports, as opposed to popular repugnance towards others. This view would seem to ensue, for example, from a comparison between boxing and sexual sado-masochism.

Whether sexual sado-masochism is, as a general matter, dangerous at all is questionable. There is no evidence that it approaches the number of fatalities and grievous injuries caused by boxing, taking into account respective proportions of accidents with respect to the probable numbers of participants in each activity. Yet sexual sado-masochism involves fears and taboos without parallel in conventional athletics. In the United Kingdom, for example, legal boxing has culminated in well-publicised deaths whilst persons have been prosecuted for engaging in acts of adult, private, consensual sado-masochism that had not resulted in death or grievous bodily injury. The result is a legal regime in which certain acts causing palpable harms may be committed with impunity, whilst acts that appear, for the most part, to cause only the putative harm of moral disapproval are proscribed.

The element of consent is muddled not only by the problem of consistent application but also by the assumption of individual rational choice. **↦Prostitution** has traditionally been regulated or prohibited on the grounds that it poses dangers to public morals -- again, a justification difficult to reconcile with liberal ideals of privacy or individual autonomy. A number of feminists, however, see no contradiction between the two interests, as they challenge the notion of effective consent to, hence individual autonomy within, such an act. They argue that women do not choose prostitution in pursuit of their own well-being, but rather are coerced into it through entrenched pressures of economic, political, social, and psychological inferiority. Feminists of more classical-liberal persuasion, however, argue that the empowerment of women lies precisely in their insistence on making their own choices regarding sexual, and economic, conduct. (**see ↦autonomy; self-deception**)

Like palpable harm, putative harm, too, can be caused to a specific, ascertainable person. For example, an unsuspecting passer-by in a park late at night may inadvertently happen upon persons engaging in sexual acts, and may thus feel a sense of outrage not immediately shared by others. However, prohibitions of such sexual acts in public are not

based merely on individual moral outrage, but on a collective sentiment of offence to community values. They are thus properly understood as harm to society as a whole.

2. Harm to Society as a Whole

Many people may gamble, loiter, take drugs, purchase guns, burn flags and practice sodomy their whole lives without harming anyone -- or, at least, anyone in particular. The question is whether these acts may nevertheless legitimately be proscribed on the basis of their intrinsic evil or their overall harm to society. Such acts are not identical, however, with respect to the harm they cause. Acts such as smoking, gambling, loitering, arms possession or drug consumption, although they may be conducted without evidence of palpable harm to some specific, ascertainable other person, are widely believed to entail broader, more long-term, but nevertheless equally material harms. ↦**Gambling** is widely believed to prey on the poor or to attract organised crime. Loitering, particularly among juveniles, is widely believed to promote delinquency and possibly social disorder or petty damage to property. Drug use is also believed to cause socially disruptive, and possibly dangerous, behaviour. Gun ownership, if innocuous on a small scale, becomes daunting when proliferation of firearms numbers in the millions, unforeseen or accidental harms becoming inevitable. (see ↦**gun control**) Other acts, on the contrary, such as blasphemy, are only evil insofar as they violate deeply held moral beliefs.

Ostensibly, such a distinction might appear welcome in a liberal democracy as a basis for distinguishing among putative harms, by promising an objective, value-neutral, empirical standard. Those putative harms for which a sufficiently strong empirical correlation to material harms can be documented would legitimately be subject to proscription, whereas

those lacking any such correlation would not be. For several reasons, however, such a hope is inevitably frustrated.

First, empiricism does not necessarily imply objectivity. A 'battle of the experts' is the norm in most areas of pressing social concern. Different researchers produce different data and disagree about what constitutes proper method, proper results and proper interpretation.

Second, empiricism does not necessarily imply value-neutrality. Until recently there was a widespread consensus that homosexuality did not simply entail moral opprobrium but also psychiatric and socio-pathological illness. Respected, purportedly empirical studies suggested significant correlations between homosexuality and delinquency or criminality. Similar 'empirical' claims have been made regarding ethnicity, class and gender. What purports to be neutral science has often proven to be the mere translation of prevailing values into a discourse of scientific objectivity.

Third, empiricism does not necessarily imply amenability to quantification. Some harms resist measurement. Prohibitions on hate speech, for example, envisage not only the general moral outrage of society, but also some meaningful correlation between hate speech and more material, criminal acts of **↦racism**. It is unclear, however, whether societies maintaining extensive prohibitions on hate speech, such as Germany, enjoy lower levels of criminal racist activity than societies, like the United States, lacking such prohibitions. Some would argue that such prohibitions aggravate, rather than alleviate, racism by pushing it underground, prompting racists to devise ever more insidious means to pursue their aims, whereas freedom in such areas would keep racism in view and thus easier to monitor. Others, then, in the classical liberal tradition, would follow Milton's ideal of truth grappling with falsehood. They would argue, in the famous formulation of United States Supreme Court Justice Louis Brandeis, that 'the fitting remedy for evil counsels is good ones.' (see

↦**speech and behavior** codes) Similarly, some feminists advocate prohibitions on pornography in order to combat long-term harm to women. Here again, however, even if the inferior status of women can be measured in innumerable ways, any demonstrable correlation to pornography is difficult to establish. Violent television programs raise similar concerns, although the specific causal relationship between exposure to violent programs and violent behaviour among children may more readily be submitted to standard methods of scientific analysis.

Fourth, even putative harms, such as that caused by blasphemy, might be said to pose the danger of more serious harm in the long run, for example by leading to social unrest, violence, and thus to palpable harms. Even if such harm can have ensued only from reactions to a putative harm, once the prospect of palpable harm arises, the reason for it might be considered secondary to the desire to prevent it. Fifth, such a standard already presupposes a strong liberalism that many would reject on its face. Many communitarians would advocate proscriptions of certain acts regardless of, and even willingly conceding, the absence of any empirical correlation to material harm to society, harm to morals being as pernicious as harm to a community's physical, psychological, or economic health.

Once harm to society in general is admitted as a grounds for criminal sanctions, practical problems of enforcement also arise. Whereas societies may uphold the ideal of punishing every possible murderer, rapist, armed robber or drunk driver, the punishment of every drug user, pornography consumer or 'sodomite' seems to be of questionable desirability not only in practice but even in principle. As controversy surrounding the US Supreme Court case of *Bowers v. Hardwick* suggested, the enforcement of sodomy laws would either require punishing enormous segments of the population, or must be so random as to be utterly arbitrary. A similar observation can be made of drug consumption, particularly with regard to cannabis or hashish. Effective enforcement is unlikely without the

deployment of massive resources. Many would challenge the commitment of valuable resources to crimes arguably of minor significance. The experiment with prohibition of alcohol in the United States failed because, far from ameliorating social problems, it exacerbated them by removing alcohol production from public view and encouraging organised crime.

3. Harm to Non-Legal Persons

To define palpable harm as possible only to legal persons, and to define these, in turn, as consisting only of human beings or human institutions, is already to presuppose a liberal, secular state. Blasphemy, for example, can be said to cause merely putative harm on the assumption that only those legal persons defined by the liberal state as such are capable of suffering real, effective harm (**see ↦anthropocentrism; humanism**). Other world views would not categorically distinguish harm to humans from harm to other entities. Non-secular world views would typically characterise offence to deities, spirits or other non-human entities to be of equal or greater moment, as suggested by the Rushdie affair and by the harsh, often lethal punishments of homosexuals or adulterers in a number of Islamic states. Even if such Draconian sanctions are, in some states, more politically than religiously motivated, popular support generally invokes religious beliefs.

A similar problem is posed by the concept of **↦animal rights**. If the assumption of rationality as the distinguishing feature of *homo sapiens* is in doubt, then the legal privilege accruing to the human being as an object of legal protections, as the only possible victim of harm, becomes equally doubtful. In Western law, animals have traditionally been regarded only as chattels, i.e., as articles of personal property, not unlike women, children and slaves in earlier times. As such, the law governing the possession, transfer and use of animals has

traditionally imposed only duties applicable to the disposition of personal property generally, e.g., that it not be used so as to create a nuisance or injury to other legal persons. No other restrictions applied. Acts of cruelty or neglect were not actionable. They were legally meaningless, hence victimless, on the theory that only *homo sapiens*, as a rational animal, could constitute a proper subject of law and of rights. (see ↦**speciesism**) Some, however, would not distinguish humans from animals on a principle of rationality, but would instead reconcile them on a principle of sentience, which, moreover, might appear to be the more relevant principle where specific issues of pain and suffering are at hand.

By the 19th century, activists protesting unrestricted rights over animals demanded law reform, which was eventually achieved in many countries. Such reforms often envisaged human as much as animal welfare, for example in the case of laws governing the safe and hygienic processing of animals for food. Still, elimination of needless suffering in animals was at least partially recognised as a good in itself. Understandings of 'needless' suffering, however, tend to diverge. ↦**Animal research** for cosmetics, for example, causes great suffering, but is still lawful in most countries, despite the questionable need for new cosmetics, although initiatives have begun at least to reduce, if not eliminate, such experimentation. ↦**Vegetarianism**, on the other hand, remains the exception rather than the norm, thus the slaughter of animals for food continues to be considered essential, despite the often harsh conditions in which livestock are maintained. Accordingly, even where law reform regarding the protection of animals has occurred, it in no way elevates palpable harm to animals to the status of palpable harm to humans. The desire to reduce animal suffering might also be attributed to human sensibilities *vis-à-vis* the pain of defenceless animals, but not to any recognition of full or partial parity of animals with human beings, comparable to a desire to keep the streets clean without thereby attributing legal personality to them. On this view, animals would simply be beneficiaries of human largesse, rather than holders of rights

or, concomitantly, victims of harmful acts. Whether animals have rights, and can be victims at all thus remains questionable. Still, some schools of ↦**environmental ethics** would extend parity not only to animals but to the natural world generally, or to elements thereof, such as oceans or rain forests, as part of an effort to combat environmental destruction. Under such theories, the victimlessness of all industrial and technological development, even barring demonstrable harm to others, would come into question.

As already noted, an entity with a stronger, yet still highly debated claim to legal personhood is the fetus. To the extent that a fetus is ascribed some measure of legal personhood, harm to it may be culpable, although the harmful act may be treated differently in different circumstances. Abortion, at least up to a certain point in the pregnancy, is legal in much of the world, whereas harm caused through the harmful act of some outside party, as in the case of medical malpractice, or, in some cases, even harm induced through maternal neglect, may give raise to criminal or civil liability.

C. Degrees of Harm

Acts are rarely discrete. Most can in some sense be divided into component acts, and most can in some sense be seen as components of larger acts. There thus arises the question of delimiting acts for purposes of determining criminal culpability. Problems related to alcohol consumption, for example, are generally addressed only in close proximity to some locus of specific, palpable harm, such as on the highways or in schools. Despite the many deaths resulting each year from driving under the influence of alcohol, or the problems of teenage alcoholism, liberal democracies have not, in recent years, responded with outright

prohibitions on the manufacture, distribution or consumption of alcohol. Drug abuse, on the other hand, is assailed not only in close proximity to situations of heightened danger, but on all fronts, from small farmers in less industrialised countries through to Los Angeles street gangs. It is often argued that, given the devastating consequences of drug abuse, not only supply but also demand must be combated. The validity of this distinction between alcohol abuse and drug abuse has been challenged. The result, however, is that some problems are seen as sufficiently urgent to warrant criminal penalties on every act that somehow constitutes a link in the causal chain -- at the 'illness', 'cause', 'root' or 'demand' links as well as the 'symptom', 'effect', 'surface' or 'supply' links. Other problems are confronted only at the stages most proximate to specific, harmful results.

Laws against child pornography offer another 'every-link-in-the-chain' example, albeit a more difficult one, as fundamental rights of expression are at stake. Popular and official opinion in democratic societies overwhelmingly approves of all possible means of eradicating the sexual exploitation of children. The palpable harms involved easily justify punishment of explicit material, such as photographs of children engaged in sexual acts with each other or with adults. Yet these hard-core materials are only part of a continuum. As with drugs, if the desire to eliminate sexual exploitation of children is earnest, even softer materials may be viewed as justifiable objects of criminal sanctions. Questions then arise as to how explicit material must be before it qualifies for criminal liability. These are age-old questions, but urgent ones, as those who produce or distribute such materials may seek to push the law to the limits of what it will allow. What is to be the status of children in 'suggestive' poses but not engaged in sexual acts? What counts as sexual? Nudity? Touching? Kissing? Art work created from the artist's imagination rather than from child models? Or pornographic ('blue') novels using no illustrations at all? (see ↦**censorship; freedom of speech**)

Further questions arise as to the links of production, distribution, possession and consumption. In the case of drugs, punishment can be attached to every link, even private possession. Given the comparable or greater urgency of sexual exploitation of children, should punishment attach to every link as well? Can one legitimately be punished for taking 'suggestive' photographs of one's own children? Or one's friends' children? Or strangers' children running naked on the beach? And if one may take such photographs for personal use, may one show them to others? Sell them to others? Display them in an art exhibition? And, again, what if the pictures are not photographs of live models but artistic images drawn from the imagination, perhaps even doodled on a scrap of paper, yet possibly depicting explicit sexual acts? Rights of free expression under the United States Constitution, for example, have been construed to protect private possession of much pornography that might be punished at the stages of production or distribution, yet recent jurisprudence suggests that some sexually suggestive materials involving children may justify punishment even for purely private possession.

IV. FURTHER RESEARCH

Although there is an abundance of published work on particular victimless crimes, there have been, since the Hart-Devlin debates, few attempts to develop an integrated, systematic theory of victimless crimes as part of a theory of criminal law. Such a theory is no easy task. It cannot avoid established debates between liberalism and communitarianism, law and morals, ethics and politics, rationalism and empiricism, ideals and pragmatics, or left

and right. These categories are themselves subject to ambiguities and internal contradictions. The task is further complicated by the fact that, due to the speculative nature of the issues raised, the law strongly diverges from one jurisdiction or time period to another. It is unlikely that further research can remain committed to any one of the standard theoretical positions. The limits of the standard theories must be further explored if subtler approaches are to be developed.

BIBLIOGRAPHY

Barnett, H. (1996). *Sourcebook on Feminist Jurisprudence*. Sweet & Maxwell. London.

Fish, S. (1994). *There's No Such Thing as Free Speech*. Oxford University Press. New York.

Heinze, E. (forthcoming). 'The Jurisprudence of Morals in the European Convention on Human Rights.'

Heinze, E. (1995). *Sexual Orientation: A Human Right*. Martinus Nijhoff. Dordrecht/London.

MacKinnon, C. (1993). *Only Words*. HarperCollins. London.

Matsuda, M., C. Lawrence, R. Delgado and K. Crenshaw, eds. (1993). *Words that Wound*. Westview Press. Boulder, Colo.

Morrison, W. (1995). *Theoretical Criminology: From Modernity to Post-Modernism*. Cavendish. London.

Norrie, Alan W. (1993). *Crime, Reason and History*. Weidenfeld & Nicolson. London.

Von Hirsch, A. and N. Jareborg. (1991). 'Gauging Criminal Harm: A Living Standard Analysis.' 11 *Oxford Journal of Legal Studies* 1.