

Harm and Wrongdoing in Criminalisation Theory

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Abstract Contemporary theories of criminalisation address, with varying emphasis, themes concerning the harmfulness and the wrongfulness of the conduct. In his article for the present issue, Antony Duff relies chiefly on notions of wrongfulness as the basis for his proposed criminalisation doctrines; whereas in their 2011 volume on criminalisation, Andrew Simester and Andreas von Hirsch invoke both wrongfulness and harmfulness as prerequisites for prohibiting conduct. The present article assesses the comparative merits of these approaches, and argues in favour of the latter, two-element perspective. In this article, the author puts forward a number of reasons suggesting why the two-element approach (of wrongfulness *and* harm) is preferable. These reasons include, firstly, an inductive argument—that the kinds of wrongful conduct for which criminalisation seems a plausible response are those that include an element of harm or risk of harm. Secondly, a defining role for the state is one of resource-protection: of safeguarding the means and resources through which citizens can live good lives. Thus the concept of citizens' living resources—and the related conception of harm—should be made a constitutive and explicit element of criminalisation theory, rather than subsuming resource-protection under a general rubric of wrongfulness. Thirdly, a two-element approach provides reciprocal limiting principles concerning the scope of criminalisation. One can, for example, employ wrongfulness requirements to limit the criminalisation of conduct that has remote harmful consequences; and, conversely, use a harmfulness requirement as means for restricting the criminalisation of wrongful acts.

Keywords Criminalisation · Harm · Harm principle · Interest · Legal moralism · Offensive behaviour · Remote harms · Resource · Wrongfulness

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