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Thomas Søbirk Petersen

Why Criminalize?

New Perspectives on Normative Principles of Criminalization

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Thomas Søbirk Petersen
University of Roskilde
Roskilde, Denmark

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Roskilde, Denmark Thomas Søbirk Petersen
September 2019

Sources

Parts of some of the chapters in this book have appeared in print elsewhere. The following list indicates where. However, all these chapters in this book are, in several ways, significantly different, and I would say significantly improved too, from the following publications.

Chapter 2: Petersen TS (2014) Being Worse Off: But in Comparison with What? On the Baseline Problem of Harm and the Harm Principle. Res Publica: A Journal of Moral, Legal and Social Philosophy 20(2):199–214.

Chapter 3: Petersen TS (2016) No Offense: On the Offense Principle and Some New Challenges. Criminal Law and Philosophy: An International Journal for Philosophy of Crime, Criminal Law and Punishment 10(2):355–365.

Chapter 4: Petersen TS (2011) What is Legal Moralism? SATS: Northern European Journal of Philosophy 12(1):80–88 and Petersen TS (2010) New Legal Moralism: Some Strengths and Challenges. Criminal Law and Philosophy: An International Journal for Philosophy of Crime, Criminal Law and Punishment 4 (2):215–232.

Chapter 6: Petersen TS (2019) A Soft Defense of a Utilitarian Principle of Criminalization. Res Publica: A Journal of Moral, Legal and Social Philosophy https://doi.org/10.1007/s11158-019-09426-3 (First online): 11 March 2019.

Appendix: Petersen TS (2009) What Is It for a Life to Go Well (or Badly)? Some Critical Comment of Wayne Sumner's Theory of Welfare. Journal of Happiness Studies: An Interdisciplinary Forum on Subjective Well-Being 10(4):449–458.

Contents

Chapter 1
Introduction

1.1 What Is This Book About?

I take it for granted that most of us firmly believe, and would indeed insist, that murder, violent attacks on innocents, and rape are kinds of conduct the state ought to criminalize. Living in a society where these kinds of conduct were not criminalized would probably lead to breakdown of civil order and a huge increase in human misery.[1] However, when it comes to practices such as: abortion, alcohol consumption, euthanasia, colouring rabbits and birds, prostitution, selling sex toys, sex between half-siblings, selling and smoking marijuana, wearing a burkini or using reptiles in religious services, public attitudes as well as the attitude of scholars to criminalization are often less firm and generally fall short of a consensus.[2] These observations about what to criminalize, naturally gives rise to at least two normative questions, the first more theoretical than the second:

(a) By what moral principle(s) should criminalization decisions be guided?
(b) What kinds of conduct should be criminalized?

There are some important connections between these two questions, which make it natural to answer both questions, once you begin to answer one of them. For instance, if the state or its citizens have to decide or discuss whether a kind of conduct C should be criminalized (question b), they will usually, as a matter for fact, be guided by some principles that can justify whether C should be criminalized or not. And this requires an answer to question (a). However, to what extent this proposed connection is genuine can only be based on empirical evidence. Moreover, it is at least possible that, in certain cases, there is no such connection at all although there are good reasons, as will be made clearer in Sect. 1.2, for thinking that a state

[1] Duff (2018), p. 8.

[2] For references to the fact that e.g. bird and rabbit colouring and using reptiles during religious services are prohibited in certain states in the US, see e.g. Husak (2008), p. 35.

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will always try to come up with a principled justification of why it wants to criminalize certain kinds of conduct. In addition, when it comes to such important matters as which conduct to criminalize, it seems *morally right* to present a justification for why certain kinds of conduct ought to be criminalized.[3] Furthermore, instead of letting decisions about the criminalization of conduct C be guided by a principle (or several principles), it is also possible that the principle or principles are and should be guided by what the state wants to criminalize. If, for instance, it does not follow from a principle P (or a set of principles) that slavery should be criminalized, one could use this as a counterexample that would disqualify P as a plausible principle of criminalization. In this sense, answers to question (a) can be guided by answers to question (b).[4]

The primary focus of this book is on critical discussion of answers to question (a). So instead of going into detailed analysis of whether or not euthanasia, cannabis or prostitution, for example, should be (or remain) criminalized, which would be a branch of applied ethics, the focus will be on a critical discussion of answers to question (a). In other words, the aim of this book is a critical discussion of some central normative principles of criminalization, rather than a discussion of specific kinds of conduct the state ought to criminalize.[5] That being said, and alluded to above, we shall often see that a standard way of criticizing a principle of criminalization is to focus on the implication it would have for the kinds of conduct that should be criminalized.

Over the last 150 years or so,[6] it has been standard, within criminal justice ethics, to answer question (a) with reference to *versions* of one or more of the following five principles: the harm principle, legal paternalism, the offense principle, legal moralism and the dignity principle of criminalization.[7] These principles, which are here only presented by their names, will be specified and critically discussed at length in this book, with some receiving more attention than others. However, as the literature on principles of criminalization is enormous and ever-expanding, and because furthermore that lierature touches upon many different issues within political science, law, legal philosophy, metaphysics, meta-ethics, moral and political philosophy and

[3] In Sect. 1.3 (on methodology), it will be explained why we ought to justify our criminalization decisions and what characterizes some of the minimum requirements for a plausible justification.

[4] In Chap. 5, for example, we will discuss a reasoning like this where the 'case of the happy slave' is used to argue in favour of the attractiveness of a Kantian Dignity Principle of Criminalization over harm principles.

[5] Concerning terminology, one can also say that the subject of this book is 'theories of criminalization' instead of 'principles of criminalization'. I will not enter a discussion on the possible differences between a theory of criminalization and principles of criminalization. I here follow Duff (2018), p. 11 when he says that the purpose of a normative theory of criminalization it to give 'an account of the principles by which deliberations about what to criminalize should be guided'.

[6] Or at least since the publication of John Stuart Mill's *On liberty* in 1859.

[7] See e.g. Feinberg's four volumes (1984, 1985, 1986, 1988), where each volume contains a specification and critical discussion of one of the first four principles mentioned above. See also Simester and von Hirsch (2011) and Murphy (2007) for this overall categorization of normative principles of criminalization.

applied ethics, it is impossible for one person, in one book, to do justice to it on this important subject. I do hope that the reader will bear all this in mind when reading the book. Furthermore, I believe that the issues I have tried to focus on are in some ways neglected or undeveloped in the literature (at least at the time of writing), and that the following chapters will represent an interesting advance of the field.

One central goal of this book is to argue that all five principles (or, more precisely, standard versions of them) generate important problems that point in the direction of rejections (or at least a rethink or replacement) of the standard principles of criminalization. In the chapters to come, I will argue that one of the reasons why we should reject or revise standard principles of criminalization is that versions of the harm principle and legal paternalism that have been offered so far, are rendered redundant by general moral theories. We should resort to general moral theories in order to give a more plausible and applicable answer to our initial research question. Furthermore, I will argue, that versions of the offence principle can be reduced to harm principles, thus making these principles redundant too. Alternatively, it will be demonstrated how versions of legal moralism and dignity principles either rests on unacceptable assumptions (e.g. that versions of legal moralism are based on speculative and wrong empirical assumptions), or have implausible implications. Therefore, there is reason to move beyond the traditional principles of criminalization, and instead try to investigate alternative principles which the state (or we, the people) should be guided by when we deliberate about which kinds of conduct should be criminalized.

In Chap. 6, I try to defend one such principle, namely a utilitarian principle of criminalization. Since the days of Jeremy Bentham and John Stuart Mill, there have been very few defenders of a utilitarian principle of criminalization. I hope that, by rattling an intellectual orthodoxy from its complacency, this last part of the book is worthwhile, if only to force non-utilitarians to think harder about their positions. If nothing else, I try to take some steps in the direction of showing that the so-called beast of a utilitarian principle of criminalization is not as scary as we have often been told.[8]

1.2 Why Is This Book Important?

I hope it is obvious why the answers that we arrive at, and live by, when it comes to criminalization decisions are very important. To give just two examples. First, for the freedom and well-being of all people in a society, it matters what kinds of conduct are criminalized and what kinds are not. Imagine two societies, which we can call ‘Libertaria’ and ‘Prohibitia’. In Libertaria, only violent crimes like murder, assault, rape, and some lesser crimes like fraud and stealing are prohibited. So, in Libertaria, for example, abortion, alcohol consumption, assisted reproduction,

[8] See e.g. Husak (2008), p. 188.

affirmative action, the cloning of animals and humans, a free market for selling organs, driving without a seatbelt, duelling, euthanasia, gambling, homosexuality, music piracy, nakedness in public spaces, pornography, prostitution, recreational drug production (plus distribution, selling, buying and use), the use of performance-enhancing drugs in sports and in education and research, sex between siblings, sex with animals, smoking tobacco, women driving cars and weapon possession are all legal activities. In Prohibitia, by contrast, all these above-mentioned activities are criminalized.

It is obvious that whether you live in Libertaria or in Prohibitia you will find yourself facing a state-enforced background with a huge impact on your freedom and well-being—affecting not only your opportunities to engage in different kinds of conduct with or without the threat of state punishment, but also concerning the risk of being punished. For the more acts that are criminalized, the higher the risk of transgressing the criminal law will usually become; and a higher risk of being punished will normally follow that. Furthermore, the risk of being a victim of a crime also depends on which kinds of conduct a state decides to write into the criminal law. We must add to this the financial cost to the state and its citizens of enforcing criminal laws like those mentioned in our two imaginary societies.[9] The economic resources required could be used to prevent harm in other areas of our society—for example, in the health care service or programmes for crime prevention.

Secondly, if a type of conduct is criminalized and detected, punishment will usually follow. And when punishment is inflicted, it will have a huge impact on many people's lives. When it comes to imprisonment, for example, the latest figures from 2015 tell us that an estimated 11 million people worldwide are held in penal institutions.[10] In the US, which has the highest documented incarceration rate in the world, there were a total of 1,570,300 adults in federal and state prisons and local jails in 2017.[11] This is about 0.6% of people over 16 years of age in the US resident population. Moreover, it is no secret that life in prison can be very tough. At its best, it might be boring, but assaults from guards and other inmates, e.g. homosexual rape, are not uncommon.[12] Furthermore, ex-offenders face huge difficulties in finding employment, and especially well-paid jobs, at least partly as a consequence of their criminal records, as most employers do not wish to employ them and because ex-offenders are banned from many public jobs (e.g. in the police force, prison service, etc.).[13] Apart from such 'collateral consequences', ex-offenders in some states lose their right to vote and may be excluded from social benefits like public

[9]For example, in 2010 the US spent $261,1 billion on the direct cost of crime including expenditure on federal, state and local correction, police protection and judicial and legal services. See Kyckelhahn and Martin (2013) for these data.

[10]Walmsley (2018).

[11]United States Bureau of Justice Statistics (2019). The same bureau has collected data which show that in 2016 about 6,615,500 adults were under correctional supervision (probation, parole, jail, or prison), equivalent to about 2.8% of the resident adult population of the US.

[12]See e.g. Struckman-Johnson and Struckman-Johnson (2000).

[13]See e.g. Holzer (1996), Thomas (2007) and Petersen (2016).

housing and student loans. Moreover, punishment will not only have a huge direct impact on the individuals being punished; it will, of course, also have an indirect effect on the well-being of relatives, including parents, spouses and children, and the well-being of friends. On top of that, the number of inmates, the kinds of punishment they receive (e.g. community service, prison, being fined or public shaming) and how harshly they are punished (e.g. for how long they are incarcerated) will affect the cost of the criminal justice system.[14] Imprisonment, for example, will also have a direct negative impact on the number of people available to participate in the education system and the labour market.[15]

On the other hand, one might, as a second thought, wonder whether, just as it is obvious that these normative questions are important, their answers are equally obvious. If this is true, not only the whole project of this book but also the field of criminalization theory would be an unnecessary time-wasting academic exercise. But although there might be some immediate and obvious answers to questions like those about what principles or criteria we should apply when deciding whether to criminalize a certain kind of conduct, these allegedly obvious answers, as we shall see in the next paragraph, do not appear to be suited to cover all kinds of conduct when criminalization is properly discussed. In any case, immediate, apparently obvious answers or opinions might not always be the right or best answers.

Take a look at the questions about what the state ought to criminalize and why. As was said at the beginning of this introduction, it seems obvious that most of us have a clear conception that certain kinds of conduct ought to be criminalized by the state. Few would doubt, for instance, that assault, murder, and rape should count as criminal acts. Similarly, nobody would argue that acts like drinking a glass of water in public or counting stars in the sky should normally be considered criminal offences. But when we scratch beneath the surface, we readily see that there are very different opinions about exactly what conduct should be criminalized and punished by the state and why. If we take the differences between Libertaria and Prohibitia as a background, we will see that while some countries in today's world do not prohibit acts such as abortion, alcohol consumption, homosexuality, prostitution, marijuana, and artificial reproduction, others do. Such variation can also be seen across time within many countries. What was once a criminal act, e.g. homosexual sex between consenting adults, is now perfectly legal in states like the UK, the US and the Scandinavian countries. Again, what was once legal in a country may come to be criminalized again, as has happened with homosexual sex in India.[16] So what might be counted as a criminal act in one country might not be so in another country, and

[14]See note 9 above.

[15]For a resent, and very good and critical overview of the collateral consequences of punishment, see e.g. Hoskins (2019).

[16]In India, homosexual sex was legal between 2009 and 2013, then criminalized from 2013 to 2018 and then decriminalized again in September 2018. For the latter claim see https://www.bbc.com/news/world-asia-india-45429664 (assessed August 12, 2019).

what was once criminalized within one country might come to be decriminalized in the very same country, and vice versa.

But even if (as is very unlikely) all states agreed on the kinds of conduct to be criminalized, this would not necessarily show that what they agree over is, morally speaking, the right thing to do. For it is possible that many states (and people) are mistaken. What kinds of conduct the state should punish, and why such conduct should be punished, needs independent argument. It is the primary aim of criminalization theory to provide and critically assess arguments of this sort.

It goes without saying that those engaged in criminalization theory need to develop not just answers, but answers that they can justify. This, at least, is one of the basic methodological requirements imposed in this book. When it comes to important ethical challenges for our society, like those presented by the various parts of the criminal justice system, I take it for granted that we, as citizens, as politicians and as decision-makers, should give arguments in favour of the policy we want to adopt. I imagine most readers of this book would agree with the following view, which we can call the *'justification requirement'*: in support of policy suggestions about important ethical questions, those who suggest such policies must also present a justification (offer an argument or arguments) in support of their views. However, the mere provision of such justification is not the only methodological requirement, for we should also strive to give a justification that is clear and well founded.

However, what does a clear and well-founded justification amount to? How can moral principles be defended in a plausible way? Are not moral opinions, attitudes and the acceptance of normative principles just a matter of taste? To answer these questions in detail would take us deep into the discipline of *meta-ethics*—a discipline which, in broad terms, deals with the ontological, semantic and epistemological nature of moral judgement. However, because this is a book about *normative ethics*, and more precisely normative principles of criminalization, it would be inappropriate to tackle meta-ethics at length.

On the other hand, it does seem like a good idea to provide a thumbnail sketch of the way in which moral attitudes and principles are taken to be justified in this book. For, when one is doing criminalization theory, one is usually trying to criticize or defend normative principles of criminalization; and when we do this we already (more or less consciously) have views about what criticizing and defending moral principles involves. Therefore, in what follows, I will very briefly, and in no sense claiming to do anything original, describe some further methodological requirements of moral reasoning besides the justification requirement just mentioned. These requirements are employed by most other contemporary philosophers working in the field of criminalization theory, at least, within the contemporary tradition that is sometimes called Anglo-American, or analytical, philosophy.[17] However, instead of

[17] See e.g. Kagan (1998), Tadros (2011), Holtug (2010) and Lippert-Rasmussen (2005). However, it is fair to underline that the justification requirement and the four requirements that will be presented in the next paragraphs, are all requirements that any respectable intellectual or scientific enterprise not only should accept but also usually does accept.