Criminalisation in Respect of Public Order: Interests, Setbacks and Wrongs

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To my family, without whom order would be unimaginable in my life:

My father Hangzhou;

My mother Hongmei;

My uncle Xiaolian;

My brother Jinlong;

My sister Lingfang.

Abstract

This thesis sets out an argument as to the principles which should determine the scope of public order crimes. The Preface demonstrates that the definition and scope of public order and corresponding public order crimes are arbitrary. In order to arrive at a clear definition of public order interests which can be applied in limiting the scope of offences against public order, in the first chapter the substantive elements of public order are constructed as categories of life convenience, comfort and peace, while the formal publicness is demarcated as multiple subjects of an interest as opposed to one specified subject of the interest.

Taking Feinberg's moral limits of criminalisation as its starting point, the second chapter restates the concepts of 'harm to others' and 'offence to others' as criminalisation frameworks applicable to public order crimes. In order to justify criminalisation, harm should be an objective, recognisable, imputable and wrongful setback to a physical interest, while offence should be a communicative, imputable and wrongful setback to inner peace based on normative sensibilities. Accordingly, harm/offence to the interests of others in smooth civil life is the moral basis for forming and shaping rules of criminalising disruptions of public order. The third chapter categorises problems of imputing public disorder and public offence and approaches these problems by proposing a formal test of substantial risk and, if necessary, a substantive test of counterbalancing justification.

In order to address the problems of public order law in practice, the final two chapters apply the principles developed in the thesis to a number of typical public order problems. These chapters demonstrate that the valid scope of criminalising typical public order related conduct such as disorderly begging, loitering, indecencies and insults can be sensibly determined by the argued steps of limiting criminalisation. These two chapters identify some categories of truly intrusive and wrongful conduct that correspond to legal interests in convenience and comfort and inner peace.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed name: Zhilong Guo

Signature:

Abbreviations

The following abbreviations for books and statutory laws are used in the text and footnotes.

Books	
BOP	Pamela R Ferguson, *Breach of the Peace* (Edinburgh UP 2013)
CHC	Nina Peršak, *Criminalising Harmful Conduct* (Springer 2007)
CHW	A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (OUP 2011)
HTO	J Feinberg, *The Moral Limits of the Criminal Law*, vol 1: Harm to Others (OUP 1984)
HTS	J Feinberg, *The Moral Limits of the Criminal Law*, vol 3: Harm to self (OUP 1986)
HW	J Feinberg, *The Moral Limits of the Criminal Law*, vol 4: Harmless Wrongdoing (OUP 1988)
Incivilities/IROB	Andrew von Hirsch and AP Simester eds, *Incivilities: Regulating Offensive Behaviour* (Hart Publishing 2006)
LCL	Carl Constantin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Ashgate 2010)
MMCL	Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016)
OL	J S Mill, *On Liberty* (John W Parker and Son 1859)
OTO	J Feinberg, *The Moral Limits of the Criminal Law*, vol 2: Offense to Others (OUP 1985)
RNTC	Dennis J Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate 2011)
SCL	Pamela R Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, Edinburgh UP 2014)
Laws	
Chinese policing law	Chinese Policing Administration Punishments Law
ECHR	European Convention on Human Rights
POA 1936	Public Order Act 1936
POA 1986	Public Order Act 1986

Preface

Public order law has all too often been seen as a matter of expediency or state control, without a coherent or underlying rationale. 'Throughout most of our history, "bad manners" crimes have been called crimes against public order. Today, we call them "quality of life" crimes. The list of quality of life offences is long…'.[1] If the list were consistent and coherent, it may be more desirable that it were long and inclusive than short and under-inclusive. However, disorder is 'regulated differently in different countries, and even under different names'.[2] Even within a single jurisdiction such as England, Scotland or China, as will be shown, 'public order crimes' is undefined as a concept – chaotic as a category – and ambiguous in scope. It performs a residual function, including things that do not fall into other categories. It is not clear whether it is and how it can be an independent category of crimes.

This situation should be of concern to and frowned upon by criminal law scholarship. If public order law were not organised or rational, it is difficult to limit the arbitrary expansion of public order offences, which means the simplification and codification of criminal law cannot be completed.[3] Secondly, even if individual pieces of legislation and judicial practice can avoid categorising an offence as against public order,[4] prosecutorial guidance, crime statistics and textbooks cannot.[5] To fulfil the task of categorisation, public order offences should be put on a more consistent and rational basis. More importantly, restrictions on personal morality and other forms of social authoritarianism, e.g. restrictions on free speech, are often justified in the name of civil peace or public order.[6] People's rights and liberties may be arbitrarily infringed if we continue to see public order law as a 'dumping ground'.

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[1] Joel Samaha, *Criminal Law* (10th edn, Wadsworth 2011) 420.

[2] Nina Peršak, 'Norms, Harms and Disorder at the Border: The Legitimacy of Criminal Law Intervention through the Lens of Criminalisaton Theory' in Nina Peršak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (Ashgate 2014) 22.

[3] See Law Commission, *A Draft Criminal Code for England and Wales* (Law Com No 177, 1989); Eric Clive and others, (Scottish Law Commission, 2003) <www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf> accessed 29 May 2018.

[4] For example, behaving in a threatening or abusive manner in Criminal Justice and Licensing (Scotland) Act 2010 (s 38) is not explicitly classified as against public order.

[5] See CPS, 'Public Order Offences incorporating the Charging Standard' www.cps.gov.uk/legal/p_to_r/public_order_offences/#Harassment> accessed 29 May 2018; Office for national Statistics, 'Other Crimes against Society' <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/2015-04-23#other-crimes-against-society> accessed 29 May 2018.

[6] See Anthony Bottoms, 'Civil Peace and Criminalisation' in R A Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 239. There are a series of provisions protecting 'public order' directly or limiting

Then how should we think about public order law? We should stop thinking of it as a catch-all category of crimes into which every other crime that cannot be put in other categories can be dumped. Legal resources are limited. This category of crimes should have its own goal, task and scope. Public order law should be dedicated to protecting a unique value for people's life. To justify this position I will, in the following three parts of this Preface, look at how the arbitrary scope of public order as a legal interest leads to crimes against public order having a chaotic scope – how principled criminalisation can help to establish a clear and valid scope of public order crimes – and then outline a progressive structure of the whole thesis.

I. ARBITRARY SCOPE OF PUBLIC ORDER CRIMES

Before examining the scope of public order crimes, the relationship between individual crimes and this category should be examined. That is, how can individual crimes be grouped within the same category? It is because they infringe the same kind of interest. The nature of a crime is its infringement of or risk to a legal interest.[7] The protection of interests is a legislative goal. 'All criminal law aims at protecting the interests of individual, collective or public interests, or state interests...'[8] The positive classification of crimes in law is based on the theoretical classification of legal interests.[9] The statement 'Crimes against X (public order)' is based on the perspective of the protected interest. Crimes against the person and crimes against property are enacted to protect individuals' personal and property interests. Crimes against public order should be enacted to protect public order as a protectable interest. Without a clear and coherent definition of public order, public order law cannot have a clear and unique task and scope. That is, the arbitrary scope of public order leads to public order crimes having a somewhat chaotic scope – a prominent feature or aspect of public order legislation, justice and interpretative texts.

In texts, the scope of public order crimes is not consistent or coherent. Blackstone took this category to include 'destruction of any loci, sluice or flood-gate' and 'carrying deadly weapons', as well as 'threatening letters', 'spreading false news' etc., in the chapter 'offences

civil rights for the sake of 'public order' in constitutional laws e.g. European Convention of Human Rights and Human Rights Act 1998 or in the constitution of a jurisdiction.

[7] Legal interests are the foundation of criminal law. See Mingkai Zhang, *Criminal Law* (4th edn, Law Press 2011) 576-577. They are 'material and objective'. See *CHC* 109.

[8] N Jareborg, 'What Kind of Criminal Law Do We Want?' in A Snare (ed), *Beware of Punishment: On the Utility and Futility of Criminal Law* (Pax 1995) 21.

[9] See Markus D Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2008) 53 AJCL 679, 684-86.

against the public peace',[10] a concept which does not seem to distinguish between public safety crimes and public order crimes. The textbook *Scots Criminal Law: A Critical Analysis* places 'public order offenses' (chapter 15) on a par with 'offensive behaviours' (chapter 16), which includes some crimes that are obvious public order crimes such as offensive behaviour at a football match.[11] Because the book does not clarify the unique value of public order as opposed to other legal interests, it provides no clear test for differentiating public order crimes from offensive conduct.

In British legislation, public order crimes are found in a number of different statutes. These statutes claim to preserve or maintain public order, but their names, purposes (as set out in their long titles) and structures do not explicitly define public order, which means the criminal offences they create may not have an organised or rational structure. For example, the purpose of the Police, Public Order and Criminal Justice (Scotland) Act 2006 is 'to make further provision about public order and safety'. This long title adds 'public safety' to the 'public order' already mentioned in the short title. It is unclear which provisions of the Act are public order law and which are not. This problem is even more serious in the Criminal Justice and Public Order Act 1994 in which it is rare that any provision is obviously public order law and the deletion of 'public order' from the title would not affect understanding of any of the contents of the Act. Other examples are the Public Order Act 1936 and Public Order Act 1986, which might lead people to wonder what kind of public order is disrupted by the crimes in this 'public order' legislation. It is a pity that all these Acts of Parliament are said to protect public order, as none of them clarifies what public order is and some of them even increase ambiguity. As a result, legislation may arbitrarily or contingently complement the public order law with various kinds of crimes. The conduct connected with offensive weapons, fireworks, control of sex offenders, obscenity and pornography, political uniforms, quasimilitary organisations etc. in this legislation is apparently a public order problem,[12] but it remains to be seen whether the offences this legislation creates are really crimes against public order.

Decisions of the Scottish courts concerning public order crimes deal mainly with two catch-all offences (breach of the peace and public indecency), which cause questions to define public order and limit public order crimes. Breach of the peace involves a conjunctive test

[10] See Bl Comm 632-36.
[11] See Pamela R Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, Edinburgh UP 2014) 397-446.
[12] For example, Public Order Act 1986 is an act to abolish and create 'offences relating to public order' 'and for connected purposes'.

i.e. we need both that the conduct is likely to cause alarm to ordinary people *and* that it threatens serious disturbance to the community.[13] Alarm to an individual person would not itself be a breach of the peace. But it is not clear why alarm to an individual person can be connected to a disturbance to public order. That is, the relation between these two elements of the test is not clear. As a result, the crime may be arbitrarily used to label some conduct as being against public order. The Scottish crime of public indecency was created in 2005 to replace shameless indecency,[14] but its scope is not clear and its relationship to breach of the peace is obscure. Public decency is no less abstract and broad a notion than public peace.[15] These two crimes exemplify the potentiality of the arbitrary scope of public order crimes. In England, the common law crimes of public nuisance and outraging public decency have been reviewed by the Law Commission as part of its work on the simplification of criminal law.[16] The former is 'endanger[ing] the life, health, property, or comfort of the public or exercise or enjoyment of rights common' to members[17] – while the latter is a lewd, obscene or disgusting act or display outraging minimum standards of public decency as judged by the tribunal of fact.[18] Public nuisance no longer includes outraging public decency, but public decency as a concept of interest itself is no less obscure than the targeted interests by the nuisance. As a result, common law crimes against public order provide opportunities to expediently cover multifarious kinds of conduct.

In prosecution guidelines, 'the criminal law in respect of public order offences is intended to penalize the use of violence and/or intimidation by individuals or groups'.[19] This approach seems to conflate crimes of violence with those against public order. As a result, 'public order offences' may be deprived of their unique remit and scope. However, in so far that prosecutorial guidance offers advice on how to tackle convergence of public order offences and 'violence against the person', 'firearms and offensive weapons' and 'criminal damage', this seems to suggest that public order offences are a different group from personal crimes, public safety crimes and property crimes. Working under such contradictory guidelines,

[13] *Smith v Donnelly* 2002 JC 65.
[14] *Webster v Dominick* 2005 1 JC 65.
[15] It should be clear that breach of the peace is slightly different in English law in Public Order Act 1936, s 5, and consider other offenses such as Vagrancy Act 1824 for indecency.
[16] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010); Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015).
[17] See *R v Rimmington and Regina v Goldstein* [2006]1 AC 459.
[18] See *R v Hamilton* [2008] QB 224.
[19] CPS, 'Public Order Offences incorporating the Charging Standard' <www.cps.gov.uk/legal/p_to_r/public_order_offences/#content> accessed 29 May 2018.

individual prosecutors may be unsure whether the alleged conduct is against public order and whether they are protecting public order or other values.

The problem of the arbitrary scope of public order crimes is also apparent in jurisdictions other than England and Scotland. It is claimed that public order in Chinese criminal law is the orderly and normal status of societal functioning in production, operation, administration and daily life etc.[20] But, it is still unclear what the particular substances of the 'status' are, although the claim lists some social areas to ground these substantive contents. This may explain why Chinese policing law and criminal law, in inconsistent ways, differentiate public order from other interests such as social administration. It can be seen from chapter 3 of the policing law that public order is ranked with social administration, which is different from the pattern in chapter 6 of the criminal law in which public order is a basic sub-category of social administration. These conflicting patterns in the same country may blur the unique value, task and scope of public order law.

II. PRINCIPLED CRIMINALISATION AND VALID PUBLIC ORDER CRIMES

In this part, I will explain why I will take a normative theorizing approach (criminalisation theory broadly; Feinberg in particular) towards the arbitrary scope of public order crimes. This normative approach looks at the scope of public order crimes from a starting point internal to criminalisation, rather than from the perspective of an outwards approach to criminalisation. Admittedly, it is possible and important to take an external socio-legal approach toward criminalisation.[21] In this way, it can be seen that the reason why public order is frequently conflated with policing and public safety/security is that public order law/policy may be regarded as one of the 'particular institutions and practice of regulating' – and as 'an element of the traditional policing power of good governance'[22] – in so far that uncivil/disrespectful conduct is a sign of 'the breakdown of local social order' and a cause of fear of unsafety/insecurity.[23] However, any socio-legal inquiry into public order crimes would reach conclusioins (regarding the scope of public order offences) developed over time, which requires historical and political insights that are beyond the remit of this thesis. More

[20] See Bingzi Zhao and Zhiwei Liu, 'On Basic Problems of Crimes Disrupting Public Order' (1999) 2 Trib PS L 71, 72.
[21] The outward approach to criminalisation is considered by Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016).
[22] Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offence' in Rowan Cruft, Matthew H Kramer, Mark R Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 289.
[23] Ibid 287.

importantly, any such social-legal inquiry would be methodologically pragmatic and empirical of aiming to be value-neutral – and thus may fail to explain why its findings regarding the scope of public order offences might be deemed morally acceptable i.e. how the pragmatic regulation by public order law can be morally constrained.

I would choose a doctrinal approach to the problem of public order law – to morally limit its scope. As a starting point: 'many criminalisation decisions are just and fair because they are reconcilable with objective principles of justice such as the harm/bad consequence constraint…'[24] So, we need to be clear how a theory of criminalisation can principally establish a valid and clear range of crimes and how it has been applied to public order crimes.

It is a long-standing liberal tradition (presuming liberty from interference) that the state should competently justify its interference, especially criminalisation – and scholars have consistently sought to theoretically systemise criminalisation principles. Mill, in *On Liberty*, commended limiting the legitimate use of coercive power to cases where it is exercised to 'prevent harm to others'.[25] Packer researches the nature and justification of the criminal sanction and the constraints of criminal process.[26] Schonsheck prefers 'filtering' (with principles filter, presumptions filter and pragmatics filter) to 'balancing' as a decision-making procedure for justified criminalisation.[27] Similarly, Husak looks at how internal and external constraints on criminalisation can be derived from current criminal theory.[28] All this work provides illuminating perspectives and ideas on the limits of criminal law, but none offers systematic and substantive criteria to morally limit the whole criminal law.

In contrast, Feinberg argued for systematic moral limits of criminal law, basing his theory on the prevention of harm and serious offence to others while rejecting harm to self and harmless wrongdoing as justifications for criminalisation.[29] Feinberg's work has been extensively reviewed,[30] and finds counterparts in a number of subsequent monographs.

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[24] Dennis J Baker, *The Right Not to be Criminalised: Democrating Criminal Law's Authority* (Ashgate 2011) 34.

[25] See J S Mill, *On Liberty* (John W Parker and Son 1859) 21-22.

[26] See HL Packer, *The Limits of Criminal Sanction* (Stanford UP 1968).

[27] See Jonathan Schonsheck, *On Criminalisation: An Essay in the Philosophy of the Criminal Law* (Springer-Science +Business Media, B V 1994).

[28] See Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP 2008).

[29] See J Feinberg, *The Moral Limits of the Criminal Law*, vol 1: Harm to Others (OUP 1984), vol 2: Offense to Others (1985), vol 3: Harm to self (1986), vol 4: Harmless Wrongdoing (1988).

[30] There are many book reviews in journals: Robert Amdur, 'Harm, Offense, and the Limits of Liberty' (1985) 98 HLR 1946; John Kleinig, 'Criminally Harming Others (1986) 5 Crim Just Ethics 3; David A J Richards, 'The Moral Foundation of Decriminalisation' (1986) 5 Crim Just Ethics 11; Joel Feinberg, 'Harm to Others—A Rejoinder' (1986) 5 Crim Just Ethics 16; Gerald J Postema, 'Collective Evils, Harms, and the Law' (1987) 97 Ethics 414; Andrew von Hirsch, 'Injury and Exaperation: 'An Examination of Harm to

Firstly, Narayan elaborates the offence principle mainly by requiring a *good* reason for offence to be taken.[31] Secondly, Baker defends the harm principle as overriding the right not to be criminalised/jailed, but replaces the offence principle with the idea of conventional objectivity of morality.[32] More impressively, Simester and von Hirsch uphold the harm principle and subsume the offence principle into the harm principle: 'significant levels of harm and/or offence' to others being 'a prima facie positive case for state prohibition'.[33] In sum, a wrong based on harm and/or offence to others is a prerequisite for creating a criminal offence. So, in the area of public order the argument of criminalisation should focus on how the harm and/or offence to others will be caused or risked by the conduct.

However, 'public order remains a neglected part of the criminal law.'[34] This observation is also correct in other jurisdictions. Many criminal law textbooks pay scant attention to public order crimes, merely analysing crimes against the person and property. Substantively, 'the application of the criminalisation theory to the area of disorder or incivilities is particularly lacking'.[35] Certainly scholars have researched the criminalisation of specific public order crimes such as begging or breach of the peace[36] – and some of this work does apply criminalisation theory. Invariably, only one specific public order crime will be considered. More importantly, applications do not follow from systematical research into principles of criminalisation. This is problematic because 'discussions of particular cases and issues are never shown to be fully satisfactory until the general framework of which they are a part is articulated and examined'.[37] Notably, there has been an interdisciplinary approach to a

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Others and Offense to Others' (1986) 84 Mich L Rev 700; Judith Jarvis Thomson, 'Feinberg on Harm, Offense, and the Criminal Law: A Review Essay' (1986) 15 Phil & Pub Aff 381; Larry Alexander, 'Harm, Offense, and Morality' (1994) 7 CJLJ 199; R A Duff, 'Harms and Wrongs' (2011) 5 Buff Crim LR 13; Hamish Stewart, 'Harms, Wrongs, and Set-backs in Feinberg's *Moral limits of the Criminal Law*' (2011) 5 Buff Crim LR 47. Besides, Persak analyzes the harm principle and its continental perspective. See Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer 2007). Similarly, impressive differences between German and Australian criminalisation theories are introduced by Carl Constantin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Ashgate 2010).

[31] See Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990).

[32] See Dennis J Baker, *The Right Not to be Criminalised: Democrating Criminal Law's Authority* (Ashgate 2011).

[33] A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (OUP 2011) 189.

[34] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (3rd edn, Thomson Reuters 2010) 868.

[35] Nina Peršak, Norms, 'Harms and Disorder at the Border: The Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory' in Nina Peršak ed, *Legitimacy and Trust in Criminal law, Policy and Justice: Norms, Procedures, Outcomes* (Ashgate 2014) 29.

[36] See Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73 J Crim L 212; P R Ferguson, 'Breach of the Peace and the European Convention on Human Rights' (2001) 5 Edin L R 145; C Stephen, 'Recapturing the essence of breach of the peace: *Harris v HM Advocate'* (2010) 1 JR 15.

[37] J D Hodson, *The Ethics of Legal Coercion* (D Reidel Publishing Company 1983) 151.

criminalisation principle in this area: *Incivilities*[38] – an edited collection, which examines the application of the offence principle to offensive conduct that affects quality of life. But, it does not systematise the application of the offence principle. It is merely a compilation of individual authors' subjective perspectives. As such, it lacks a consistent and coherent articulation of the offence principle and its application to offensive conduct. More helpfully, Ferguson analyses criminalisation through the medium of a 'catch all' common law crime of breach of the peace, including an application of principles of criminalisation.[39] However, there is no systematic application of a criminalisation theory throughout Ferguson's text; otherwise, it would be a useful example of how the scope of public order crimes in the law should be determined.[40]

III. THE STRUCTURE OF THIS THESIS

I will offer a holistic theory of legal interests and criminal 'evils' –comprised of harm and offence – to consistently and coherently limit criminalisation in the domain of public order. Starting with a clarification of public order as a protectable interest based on an examination of Feinberg's theory of interests (chapter 1), this thesis will subscribe to the 'harm' principle and 'offence' principle and aim to restate and elaborate the notions of 'harm' and 'offence' in the criminalisation of conduct against public order (chapters 2-3). In order to delimit the scope of public order crimes, the notions restated will then be systematically (chapters 4-5) applied to public disorder and to offensive conduct.

Firstly, the scope of public order as *legal interests* should directly limit the scope of crimes against public order. Therefore, the definition of public order as a protectable interest is the basis of further research into the criminalisation of conduct against public order. In examining public order as a protectable interest in criminal law, I will firstly argue that public order is an interest – then that it is protectable – and finally that its specific categories can be enumerated. First, order in a general sense can be narrowed, from particular sociological and theoretical perspectives, to be a special kind of order such as life order. This life interest can be confirmed as public order interest because public order laws protect life convenience, comfort and peace. Secondly, I will argue that public order is not a collective interest of a

[38] See Andrew von Hirsch and AP Simester eds, *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006).

[39] See Pamela R Ferguson, *Breach of the Peace* (Edinburgh UP 2013) ch 5.

[40] In comparison, there are critically analyses of the criminalisation of almost all public order offences (ch 15) and offensive behaviors (ch 16) in Pamela R Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, Edinburgh UP 2014), while it still failing to apply the harm principle and/or the offence principle systematically.

community or a society, but individuals' interests in some special contexts and that these interests are not too trivial as to be protectable. Lastly, I will argue for specific categories of public order interest. After delimiting public order, the whole research object of the thesis (crimes against public order) is basically determinate.

After identifying interests in public order, I will look at when it is legitimate to consider criminalisation to protect those interests. I will argue that the notions of 'harm' and 'offence' should be restated as two workable conceptual frameworks of criminalising conduct against public order. Firstly, all types of harm could potentially be claimed as setbacks of interests to justify criminalisation when the notion of harm is ambiguous.[41] But I will argue that the principle requires determinate constituents to filter candidate conducts for criminalisation, which means not all kinds of disruptions of order are 'harm'. Similarly, 'too much legal commentary purports to evaluate something called "the offence principle" without first clarifying the nature of offence itself [as "the central term in the inquiry"].'[42] After articulating the offended interest, the offending mechanism and the normative wrongfulness, offence in the offence principle, which initiates the consideration of criminalisation can be specifically demarcated.

Thirdly, fair imputation should be valued in determining the valid scope of public order crimes. A setback to a public order interest, either harm or offence, may be normatively 'too remote and accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offence'[43] – or its risk may not be normatively linked or associated with the conduct. Feinberg, according to 'the probability of harm', analyses abnormal risk and abstract risk in the conduct itself,[44] and then some remote harm.[45] Rather than providing exact answers, I will offer a systematic identification of three kinds of imputation problems in public order crimes – particularly how offence (as the other kind of setback to interests than harm) affects the whole picture of imputation of disruptions of public order – and suggest a flexible application of a general approach to these kinds of imputation problems.

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[41] See Steven D Smith, 'Is the Harm Principle Illiberal?' (2006) 51 Am J Juris 1, 14-20; *CHC* 49, 77.
[42] Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB*, 94.
[43] American Law Institute: *Model Penal Code* (1985), ss 2.03(2)(b) and (3)(b) <www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf>accessed 29 May 2018.
[44] See J Feinberg, *The Moral Limits of the Criminal Law*, vol 1: Harm to Others (OUP 1984) 192-206.
[45] Ibid Ch 6.

The purpose of chapter 4 will be to clarify trends and problems from criminalising begging and loitering, which cause public place disorder problems, and to consistently identify wrongful harms from the perspective of the restated notion of 'harm', principally unjustified disruption of the normal use of public places. I will firstly summarise and review the selected jurisdictions' legal approaches to criminalising begging and loitering, rebut claimed harms and/or risks, identify real harms, and lastly demonstrate the valid scope of criminalising begging and loitering by balancing conflicting interests and thus identifying the wrongfulness of real harms. The examination of harms of focused offences exemplifies how the scope of public order crimes can be reasonably be determined by a consistent criminalisation principle.

As well as public disorder, some offensive conduct involves a serious breach of inner peace and calls for the application of a restated notion of offence. Firstly, a consistent classification of offence into threats, indecencies and insults will be posited by a critical review of typical theoretical and practical categorisation. More importantly, the principle will be progressively applied to cases of indecencies and insults to determine the valid scope of criminalisation of them. I will look at what kind of serious offence is caused/risked and how to balance the reasonableness of the offensive conduct. In doing so, we can ascertain how and to what extent the restated offence principle can explain and criticise the status quo of public order law.

Finally, the conclusion of this thesis summarises the scope of public order crimes and reflects on the hierarchical limits of criminalisation. It will summarise what public order law looks like and how this version compares with what I have criticised in the Preface. It will also summarise how the criminalisation of disruptions of public order has been structurally limited in four hierarchical steps and will explain how this structural framework has advantages over others.

Chapter 1 Public Order as a Protectable Interest

I. INTRODUCTION

The definition and scope of public order as a protectable interest in criminal law is the starting point for my argument. Generally, criminalisation theory begins by identifying protectable interests. It looks for the 'interest' or 'good' to be protected – such as bodily integrity or property rights in the cases of offences against the person or property – before considering how this might be harmed or wronged. The reason for this approach is that 'prerequisites for criminal liability' 'include interference with … interests'.[46] This premise of protectable interests has been commended in criminalisation research. A typical example is found in the first volume of Feinberg's *The Moral Limits of the Criminal Law*, 'Harm to Others', which starts by constructing a network of protectable interests.[47] Specifically, Feinberg identifies offence categories by the assignation of particular offences to particular interests. The definition and scope of crimes against public order, whether in legislation or textbooks, depends firstly on the definition and scope of public order, identified as a relevant interest. If the definition and scope of public order were unclear, there can be no achievable consensus on whether the category of 'crimes against public order' should include or exclude a specific crime. It follows that an appropriate starting point for the existence of an organised or rational public order law must be to address the question of whether public order can be perceived as a protectable interest.

However, there is little existing work clarifying the definition and scope of public order as a protectable interest. *The Moral Limits of the Criminal Law* avoids developing a rigorous definition of public order as a protectable interest. Although some texts do incorporate a chapter on crimes against public order, they do not discuss what public order is, but proceed directly to discuss specific public order crimes. *Scots Criminal Law: A Critical Analysis* does raise the question: 'What is the comparable value in public order?' (compared to that in other

[46] See Markus D Dubber, *An Introduction to the Model Penal Code* (OUP 2015) 22.
[47] See *HTO* Ch 1.

interests), but without offering an answer.[48] Other notable contemporary texts such as *Smith and Hogan's Criminal Law* do not even mention this issue.[49]

This chapter will look at the definition and scope of public order as a protectable interest: whether it is possible to identify something called 'public order' – and, if so, what this is comprised of – whether this should be understood as a protectable interest for the purpose of criminal law – and finally, what the specific categories of public order are. Firstly, I will look at how public order can be understood as an interest in terms of existing theories of legal interests and relevant laws. My proposition will be that the elements of public order are life convenience, comfort and peace. I will then further consider public order as either a collective interest or interest of individuals – and if it were the latter, how it can be deemed sufficiently serious to be protectable. I will clarify the test of publicness as that of multiple subjects of an interest – as opposed to one specified person in private. Finally, after determining the two basic dimensions of public order, I will argue that there are six core elements to public order.

II. PUBLIC ORDER AS AN INTEREST

After considering certain theoretical issues, I will argue that it is possible to identify public order as a special kind of order interest – and that the core elements of this interest can be identified from theoretical, social and legal perspectives.

(i) The Meaning of Public Order

What kind of order is public order? Considering the notion of order itself may be helpful to define public order as a special kind of order. Order as a sociological concept is described as a 'secure and happy condition'.[50] Without perceived regularities, patterning or association, there is randomness or chaos.[51] Similarly, in criminology, order is 'the operations of society and the ability of people to function efficiently'.[52]

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[48] *SCL* 397.

[49] See David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) 1227. See also ATH Smith, *The Offences against Public Order: including the Public Order Act 1986* (Sweet & Maxwell, 1987); Peter Thornton, *Public Order Law: including the Public Order Act 1986* (Financial Training, 1987).

[50] Dennis H Wrong, *The Problem of Order: What Unites and Divides Society* (Harvard UP, 1995) 12.

[51] Ibid, 11.

[52] See Larry J Siegel, *Criminology: Theories, Patterns, & Typologies* (10th edn, Wadsworth Publishing 2010) 426.

With this notion of order in mind, public order, as one law dictionary suggests, might be 'the smooth running of orderly society'.[53] It has also been defined as the state of peaceful co-existence and quiet living among members of the general public,[54] without which there is a breach of the (king's) peace ('royal authority and the structure of the state').[55] Public order in criminal law would be the ideal state of 'preventing crime and enforcing that law'.[56]

But these explanations are too abstract and broad and actually refer to 'social order' in a general sense. On one view, every crime interferes with the smooth running of orderly society – it is undeniable that single crimes against the person, such as murder, or crimes against property, such as theft or robbery, are disruptions against the operations of society and the ability of people to function efficiently. The problem, therefore, with the above definitions of public order is that they cannot substantively differentiate between public order in criminalisation and (social) order in its more general sense. Lacking substantive content or internal categorisation, they cannot define and limit the scope of crimes against public order.

An alternative approach is suggested by Farmer's differentiation of civil order from order. In so far that order can be viewed from a particular perspective, Farmer argues that criminalisation can be seen as an institutional tool for securing civil order.[57] Following this approach, might we narrow order from another particular perspective to public order, in order to facilitate the understanding of crimes against public order in criminalisation? If so, this is a different dimension of the same sort of argument as Farmer's. There is order in general sense of things being orderly and tranquil – and from that we may identify public order as a special kind of order.

Farmer's account of civil order is socio-legal. Socio-legal civil order resonates with a sociological account, which values the institutional environment of a society. Since sociology looks at 'social organisms and systems',[58] the determination of civil order in law may be drawn from a sociology of social organisms and systems. Given that public order is claimed to be 'stability and peace of life',[59] the perspective to identify public order interests

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[53] Jonathan Law and Elizabeth A Martin (eds), *A Dictionary of Law* (7th edn, OUP 2009) 378.
[54] See David M Walker, *The Oxford Companion to Law* (OUP 1980) 1015.
[55] John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (Routledge & Kegan Paul 1973) 1.
[56] Part of the long title of the Criminal Justice and Public Order Act 1994.
[57] See *MMCL* ch 2.
[58] P Sztompka, 'The Focus on Everyday Life: A New Turn in Sociology' (2008) 16 Eur Rev 1, 1.
[59] See Mingkai Zhang, *Criminal Law* (4th edn, Law Press 2011) 603.

in law may be drawn from another sociological school. It is worth noting that the prevailing ethos in contemporary sociology, rather than merely focusing on institutional elements of a society, has turned to focus on everyday life.[60] Then, can we identify a special kind of order (stability and peace) in everyday life and confirm this special order as public order? In the following section I argue that the turn to respect everyday life situations and factors in contemporary sociology provides a special perspective, which can help us identify a special kind of social order as public order.

(ii) Public Order as a Special Kind of Interest

This section will set out how a public order interest can be derived from a special perspective of everyday life. Firstly, it will review theories of legal interests from the perspective of everyday life in order to differentiate between safety interests for basic living and a special kind of order interest in everyday life. To confirm the hypothesis that this life order should be seen as public order, it will then identify the key elements of public order as life convenience, comfort and peace, by excluding safety interests from the interests protected in English public order laws.

a. Distinguishing Special Order from Safety Interests

To identify public order interests, Feinberg's theory of interests offers a credible starting point because he has considered interests in general and identified specific forms. For Feinberg, an interest which is protected by law should be a realistic and stable condition based on people's wants and be instrumental in attaining ultimate and ulterior life goals.[61] He argues that welfare interests – such as minimum health, resources, assets and political liberty – are minimal, non-trivial and non-momentary conditions of well-being.[62] Accordingly, he identifies welfare interests as central protectable interests.

However, Feinberg's approach omits the identification of interests in everyday life. He argues that instrumental wants such as exercising or working late 'are means to the advancement of more general, stable, and permanent goals like health and financial sufficiency in which we certainly do have an interest'.[63] However, some may exercise or

[60] See P Sztompka, 'The Focus on Everyday Life: A New Turn in Sociology' (2008) 16 Eur Rev 1, 3.
[61] See *HTO* 37-45.
[62] Ibid 37, 57-59.
[63] Ibid 57.

work late for not necessarily physical or financial reason, but to kill time or to get pleasure or for any other everyday aims. These everyday multifarious wants are not inherently instrumental to minimum interests such as health or property, *but* are ends in themselves being the components of everyday life. Everyday life consists of activities which individual members of a society do for the continuation or improvement of their own lives: sport, study, working, leisure, amusement, worship, traffic, religion, politics, etc.[64] Everyday life has its own meaning and is itself worth maintaining. A person's humanity does not manifest itself merely in their existence from a mainly bodily perspective (which can be maintained by welfare interests for basic living); it mainly lies in their everyday life, which 'paints a more realistic picture of the human condition'.[65] Every person needs a kind of life order every day – and 'smooth life' can be literally understood as where relevant life activities progressing comfortably, free of problems, troubles, stresses and disruptions.

This sociological difference between bodily existence and everyday life can be considered psychologically. Maslow's theory of the hierarchical needs of humans suggests that once primitive and basic, physiological needs and safety needs are met, people then pursue high-level needs to actualise their full potential.[66] Low-level needs are mainly met by minimum welfare conditions, while high-end goals are additionally dependent on other conditions such as life order. People firstly need personal safety and property safety – preconditions without which they cannot exist, let alone conduct meaningful life. High-level needs can only be realised in conducting life – and life entails smooth use or enjoyment of life conditions. These further conditions are 'flesh on the bone', which renders the bodily existence meaningful.

Therefore, other interests to be identified should include order interests, which are instrumental to the smooth life. Feinberg's theory of interests only constructs welfare interests as protectable interests for minimum living, failing to identify generalised conditions for smooth life. This new sphere of life order interests in legal theory has not only a basis in sociology and psychology, but can be supported by Chinese scholars' theory of legal interests. This approach to legal interests differentiates safety from order in its narrow sense by the test of whether the interest concerns basic living. Basic living firstly relies on natural living interests, which are mainly individual *safety* interests: personal living interests

[64] See P Sztompka, 'The Focus on Everyday Life: A New Turn in Sociology' (2008) 16 Eur Rev 1, 9 & 11.
[65] Ibid 3.
[66] See A H Maslow, 'A Theory of Human Motivation' (1943) 50 Psyc Rev 370.

of e.g. life, health, bodily integrity and material living interests.[67] In this sense, safety interests do not include special order interests that do not directly concern basic living, such as the internal teaching order of an institution – or the order in a general public place like streets – or the order in social administration areas such as border control.[68] Chinese criminal law and policing law both have separate (sub-)chapters on public order, economic order, and social administration order – and separate (sub-)chapters on personal safety, property safety and public safety.[69] These structural arrangements confirm this categorical difference between safety interests and order interests.

The identification of life order interests also accords with the everyday focus of the police. Policing in Chinese is called Gong An (public An). The main function of policing is to administrate 'An' – that is, 'social order of stability and peace'.[70] 'An' is thus the legal interest in the policing law. But 'stability and peace' themselves are still too abstract a concept for practical application. They need to be specified. As an object for the police to protect, 'An' in its literal sense mainly refers to three categories of interests.[71] Firstly, 'An Quan': safety without endangerment to the person or property of the public or an individual. This is indeed a problem of safety rather than public order. Secondly, 'An Wen': stability of life conditions without inconvenience, discomfort or disruptions. Thirdly, 'An Xin': inner peace without unreasonable annoyance, alarm, distress etc. The last two are life order interests. Disorderly conduct mainly resonates with the 'An' dimensions of stability and inner peace. Similarly, in modern Western policing, 'the idea that the management of minor offenses and disorderly behaviors is an essential function of public police has become well

[67] See Sixin Liu and Zili Guo, 'What Are Legal Interests: Explanations of Legal Sociology and Legal Economics' (2008) 6 *Journal of Zhejiang University (Humanities and Social Science)* 103, 105-06. Natural living interests are safety interests of individuals, but when they are brought into public life, whether general (i.e. general public places) or specialised (e.g. in a factory or bank), private safety interests become public interests in safety (107).

[68] Ibid 107.

[69] Chs 1-5 of Chinese Criminal law respectively prescribe crimes against national safety, public safety, economic order, personal rights and civil rights, property, while ch 6 'crimes against social administration order' includes subchapter 1 ('crimes against public order') and other subchapters (crimes against administrating justice, border control, cultural relics, public hygiene, environmental resources, drugs, prostitution, pornography). In this sense, subchapter 1 ('crimes against public order') not only protect specialised public order, *but also includes some* crimes against social administration that cannot be properly categorized into other subchapters in ch 6 (similar to the Public Order Act 1936, ss 1-2). Chinese policing law has four parts: maintaining public order, protecting public safety, protecting personal and property rights and protecting social administration. This law separates public order from social administration, making it specialised.

[70] See *Modern Chinese Dictionary* (6th edn, Shangwu Press 2005) 1758.

[71] Ibid 1758ff.

established since the 1980s'.[72] Enormous policing resources are put into cases of life order.[73] For example, for the purposes of Part 2 ('Complaints and Misconduct') of the Police Reform Act 2002, 'a person is adversely affected if he suffers *any form* of loss or damage, distress or inconvenience…'.[74] This means that 'any form' of distress or inconvenience is qualified as being a legitimate subject of complaint and worthy of investigation. The heart of disorder policing is to define and regulate the fair use of a public place enumerated by quality of life standards.[75] This policing focus resonates with the contemporary notion of everyday life in sociology.

However, although we have here limited life order interests to stability of life conditions and inner peace, we still do not know what kind of interest public order is. We cannot just assume that these life order interests are synonymous with the public order interest we are identifying. Legal practice might help to refine an account of interests. I will use public order law to help refine the theoretical argument of public order interests – to confirm the hypothesis that public order is the special order for smooth life. If public order laws do protect life order interests, then we can argue that these life order interests are the core elements of public order interest in law.

b. Examining Existing Laws and Confirming Life Order Interests as Public Order

As will be shown, English public order laws relate closely to safety interests, although they also reveal or summarise infringements of public order. Therefore, we can identify interests protected by 'public order' laws and then exclude safety interests from them, before confirming the remaining interests (in life convenience, comfort and peace) as the key elements of public order.

Firstly, public nuisance is commonly recognised as a typical example of a crime against public order.[76] It can be reagarded as a persuasive example illustrating the interests, which

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[72] James J Wills, 'A Recent History of the Police' in Michael D Reisig and Robert J Kane (eds), *The Oxford Handbook of Police and Policing* (OUP 2014) 12.

[73] David Thacher, 'Order Maintenance Policing' in Michael D Reisig and Robert J Kane (eds), *The Oxford Handbook of Police and Policing* (OUP 2014) 135.

[74] Police Reform Act 2002, s 29(5) (emphasis added).

[75] David Thacher, 'Order Maintenance Policing' in Michael D Reisig and Robert J Kane (eds), *The Oxford Handbook of Police and Policing* (OUP 2014) 122-23. Anti-social Behaviour, Crime and Policing Act 2014, s 59, provides the power to make a public space protection order to prevent activities from affecting 'quality of life', and s 43 gives the power to issue a community protection notice to prevent a conduct from being detrimental to the 'quality of life'.

[76] It is a common law offence classified as mainly against public order, see David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) ch 32; David Ormerod and others, *Blackstone's*

public order laws protect. In a landmark decision, public nuisance was described as an offence 'endanger[ing] the life, health, property, or comfort of the public or exercise or enjoyment of rights common' to members of the public.[77] Life, health and property are safety interests categorically concerning living safety while other interests of 'comfort' and 'rights' seem to be public order interests.[78] However, it is not clear precisely what kinds of 'comfort' or 'right' are envisaged here.

Specific interests may be inferred from the potential statutory form of public nuisance as proposed in a 2015 Law Commission report. It was suggested that in a statutory offence of 'public nuisance', 'serious nuisance' should be defined as including 'serious harm', as well as 'obstruction' 'in the exercise or enjoyment of rights': – specifically, '(1) death, personal injury or disease; (2) loss or damage to property; or (3) serious distress, annoyance, inconvenience or loss of amenity; or [where someone] is put at risk of suffering any of these things'.[79] Factors (1) and (2) refer to safety interests: – viz. (1) personal safety: life, body integrity and health interests; and (2) property safety. Then, after excluding safety interests, consideration would be given to what interests are protected as public order interests in (3).[80] Before drawing any conclusion as to defining public order interests from this suggested list, we may need to consider the preexisting body of public order statutory law.

The Public Order Act 1936 and the Public Order Act 1986 also protect public safety interests and other interests – most obviously, public order. In POA 1936, the then section 4 which

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Criminal Practice 2016 (OUP 2015) 664. For legislative reports, see Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010); Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015).

[77] See *R v Rimmington; Regina v Goldstein* [2006] 1 AC 459 in which it was held that 'exercise' means convenient use as distinct from comfortable enjoyment. Similarly, statutory public nuisance protects 'the peaceful passage through, or enjoyment of, a public place by a member of the public', under reference to the Summary Offence Act 2005 (Queensland), s 6.

[78] Inferences from British textbooks support this conceptual difference between safety interests and public order: – considers treating public order as something different from personal and property safety. For example, *SCL* considers public order offences focus on tranquility, free from the offensive and especially the inconvenient, rarely harmful to personal safety or property safety (*SCL* 397-98). Similarly, in a standard England textbook, offences against personal and property safety are analyzed before and independently of 'offences against public order' – David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015).

[79] Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 4.3. Obstructing the exercise or enjoyment of rights is a kind of inconvenience or loss of amenity in item (3) and thus there is no need to list obstruction separately.

[80] The common law crime of public nuisance is argued to be replaced by 'a general offence of doing anything which creates a major hazard to the physical safety or health of the public' – J R Spencer, 'Public Nuisance—A Critical Examination' (1989) 48 CLJ 55, 83-84. In this way, public nuisance is not a crime against public order but against public safety. The Canadian Criminal Code, s 108, defines common nuisance similarly, limiting it to living safety interests. In New Zealand 'criminal nuisance' (Crimes Act 1961, s 145) is analogous.

prohibited offensive weapons at public meetings and processions was preliminarily concerned with public safety, while section 5, which prohibited offensive conduct conducive to breaches of the peace, was concerned with public order.[81] The new offences created in Part I of POA 1986 address harassment, alarm and distress – conduct which is directed against an order interest (life peace) – while part 2 regulates on processions and assemblies to prevent 'serious public disorder, serious damage to property or serious disruptions to the life of the community', which engage both safety interests and public order interests.[82]

Among all the above listed setbacks to public order, the concepts of alarm, distress and annoyance seem to be specific inner states militating against smooth life while obstruction, inconvenience, discomfort, loss of amenity, breach of the peace, harassment, disorder and disruption can be characterised as external setbacks to smooth life. Arguably, the notion of inconvenience should render it difficult or even impossible to use a life condition, including obstruction. For example, the notice 'out of order/use, sorry for the inconvenience'. The notion of discomfort or loss of amenity should worsen the effect of the use of the life condition. Meanwhile, breach/disruption of life peace by distress, alarm, harassment, disorder – disturbs the original stable state, entailing active interference from external factors.

From the above lists of setbacks in public nuisance and public order acts, key elements of protected public order interests can be properly categorised into three types of conditions of smooth life: life peace; life convenience (in use); and life amenity/comfort (in enjoyment). These life conditions are general conditions e.g. the use of public places and public facilities for an individual to conduct his life smoothly i.e. relevant life activities progressing conveniently and comfortably, free of disruptions. The first element of public order interest is convenience, i.e. availability and suitability of use of a life condition. A further element is amenity/comfort, i.e. pleasantness resulting from an agreeable life condition, which is a

[81] The purpose of ss 1-2 prohibiting 'uniforms in connection with political objects' and 'quasi-military organisations' is to protect multifarious social administration order, which is different from specialised public order. See the Chinese theory and legislation of interests in the last subsection.

[82] Parts 3 and 3A seem to protect groups of people from hatred. This will be discussed in terms of not being a problem of a collective interest of the community (III(ii)a), but a problem of inner peace of the public (IV(ii)a).

matter of degree of satisfaction of the access/use.[83] Another one is to keep and enjoy external and inner peace.[84]

In summary, the substantive meaning of public order as an interest is not welfare interests in the sense of basic living safety, but convenience, comfort and peace conditions for smooth life, which are identifiable from sociological, psychological, theoretical, policing and legal perspectives.

III. PUBLICNESS AND PROTECTABILITY OF PUBLIC ORDER INTERESTS

Now that public order has been preliminarily defined as life order interests whose key elements are life convenience, comfort and peace, two further questions should be considered. Firstly, can public order interests be understood not as interests of individuals (i.e. life being convenient, comfortable or peaceful), but as separate collective interests of the community? Secondly, if public order were really an interest of individuals, how can it be serious enough to warrant protection? That is, if the posited public order interests in life convenience, comfort and peace are interests of individuals, are they too trivial to justify protection by the criminal law?

(i) Collective Interests or Interests of Individuals

Can we understand public order as conditions of the community? For example, the Law Commission's proposed framework of statutory public nuisance offence refers to conduct, which harms 'members of the general public or a section of it' – or obstructs 'the public or a section of it in the exercise or enjoyment of rights common to the public at large'.[85] Should public order consist of interests 'common to the public at large' or 'a section of it', e.g. collective interests of the community that are apparently protectable? To take another example, Parts 3 and 3A of POA 1986 protect groups of people from hatred. Does the law

[83] In this sense, the wording 'convenience' and 'amenity' in the report seem more precise respectively than 'exercise of rights' and 'comfort'/ 'enjoyment of rights' in the decision. The 2015 report thinks 'comfort' is wide and vague in everyday speech and even includes trivial pleasure. Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 3.43. But in my thesis, plain language is preferred thus comfort and amenity are not strictly differentiated, but inter-changeable – viz. comfort means amenity.

[84] Judging from the result targeted, three other common law crimes against public order disrupt inner peace: outraging public decency in England; and breach of the peace and public indecency in Scotland. See further on public inner peace as a specific category of public order in this chapter (IV(ii)), the concept of offence to others in next chapter (III) and offensive indecency and insult in chapter 5.

[85] Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 3.48.

protect a collective interest such as mutual cooperation or civility? This section argues that public order consists not of collective interests, but of the aggregated interests of individuals in some cases.

a. Not Collective Interests

The publicness of an interest/crime is a complex and profound question. Duff understands crimes as public wrongs, which require a response by the community.[86] This is to understand all crimes from a political perspective, proposing public wrong as a requirement for calling a citizen to answer for a criminal offence.[87] We should perceive the problem of public wrongs as the nature of crimes, and either public harm to the interests of the community or public wrong committed against the community is 'mistaken in locating the nature of crime in wrongs done to the public' – crimes 'are public wrongs in the sense that they are wrongs that the community is responsible for punishing, but *not* necessarily wrongs against the public itself'.[88] In short, the concept of a public wrong does not refer to public harm *to* an interest of society or the community. It does not understand a specific category of crimes from the perspective of the subject of the concerned interest.

Duff's approach reminds us that there may be a general interest or common good that cannot be reduced to interests of individuals. For certain crimes, the subject of the interests in question may be seen as the community. There are multifarious collective interests identified in offences of hatred (including Holocaust denial in other countries than the UK). In the preamble of the New York Hate Crimes Act of 2000, the legislature finds the identified harm and its severity to be sufficient to justify criminalisation, by '…tear[ing] at the very fabric of free society', disrupting 'entire communities and vitiat[ing] the civility that is essential to healthy democratic processes'.[89] Similarly, in the German Criminal Code, holocaust denial or minimisation is criminalised because of the risk of 'disturbing the public peace'.[90] 'The public peace', as well as its trust and sense, is theoretically understood as general security.[91] The then legislative intention was to prevent 'the poisoning of the political climate by the

[86] See R A Duff, *Answering for Crime, Responsibility and Liability in the Criminal Law* (Hart Publishing 2007).
[87] See Ian Leader-Elliott, 'A Critical Reading of R A Duff, Answering for Crime' (2010) 31 Adel L Rev 47, 47.
[88] See Grant Lamond, 'What is a Crime?' (2007) 4 OJLS 609, 609 (emphasis added).
[89] See NY Penal Law, s 485.00.
[90] s 130(3). See Michael Nohlander, *The German Criminal Code: A Modern English Translation* (Hart Publishing 2008) 115.
[91] See T Hörnle, 'Offensive Behavior and German Penal Law' (2001) 5 Buff Crim L Rev 255, 256.

playing down of the violent and arbitrary rule of National Socialism'.[92] In specific justice, 'the public peace' may include 'the flourishing mutual cooperation between Jews and other groups in the population and … Jews in their feeling of security and in their trust in protection by the law'.[93]

However, recognising these collective interests is problematic. General security and mutual cooperation is 'pointless' when every single crime violates them, while psychological trust in law and the sense of general security are too abstract and hollow to be objectively measured (such claims tend to be merely subjective).[94] It will be argued in the next chapter (II(ii)b), that so-called collective interests of the community are not protectable because their setbacks cannot be recognised consistently. The same is true of the 'fabric' or 'civility' of the community.

Moreover, it is notable that Feinberg denies the existence of a 'large super-person ['the public'] with super-interests of his own'.[95] 'A community is an assemblage of individuals with interdependent interests in the preservation and enhancement of their common possessions [collective interests] taken as an end itself'.[96] Some individuals believe that they, as a community, have 'a personal stake in the preservation of [their] *community traditions*' [collective interests].[97] They conceive collective interests, such as abstract civility of the community, in a *vicarious* stake way:[98] You and I are members of this community and I think that it is in your and my interest to preserve this community tradition or symbol. To preserve the community traditions at the cost of others' interests is to treat other people as means, or rather, as elements of one's own environment.[99] In short, the concept of a collective interest may justify moralistic and paternalistic interference.

After refuting collective interests, Feinberg's theory of interests deconstructs public interests into three situations of assemblage of individual interests mainly 'on the same objects or instrumentalities.'[100] In the following two sections I will argue that this perspective is

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[92] See Markus D Dubber & Tatjana Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 624 (emphasis added).
[93] Ibid 623.
[94] See T Hörnle, 'Offensive Behavior and German Penal Law' (2001) 5 Buff Crim L Rev 255, 257.
[95] *HW* 33.
[96] Ibid 36.
[97] Ibid 37.
[98] Ibid.
[99] Ibid 67-68; *On Criminalisation*, 225-26.
[100] *HW* 36. Liberal theories of super-person interests focus on the determination and protection of *material* public goods, but ignore or refuse the other public goods emphasized by communitarianism i.e. unmaterial conduct (usually referring to virtues that generally emphasize obligation and responsibility). See Jian Jia,

pragmatically sensible, but that the relevant test of an interest being public should be clarified with a holistic definition and specified by reference to standards.

b. Three Situations of Public Interests Deriving from Individual Interests

For Feinberg, there are generally three types of public interest. This structure affects how a safety or order interest can be public. Firstly, when the object of a public interest is 'a collection of specific interests … possessed by a large and indefinite number of private individuals', such as where public safety is endangered by a large bomb being placed in a central station, every individual has an interest in his own safety.[101] The endangered or victimised public interest is a compound of my personal safety, yours and others. This kind of public interest is merely an aggregation of individual interests (usually of the same kind).

Secondly, when the object of a public interest is single, specific and widely shared – such as a sound economy and environment and the maintenance of public services – the subject of the interest is most or even all of the persons in a community. Each person has an interest in the same object.[102] These public interests are 'so widely shared that they can be said to be possessed by the community itself' ['community interests'].[103] 'The harm [if any] to many or all private citizens is direct and [even] serious.'[104]

Although the interest in both of Feinberg's first two types of public interest can be endangered without specific individuals being placed at risk, the second is different from the first in that a shared object can be harmed without harm to specific individuals, e.g. in cases of damage to the environment. In this sense, a community interest cannot be reduced to individual interests, but is expressed as a kind of common good. However, the interests in a shared object such as a public facility, place or a general natural condition still belong to individuals.

In Feinberg's third type of public interest, the direct subject of the interest is not individuals, but an entity such as a government when the object of interests is the operation of government systems of registration, taxation, customs etc.[105] Feinberg argues that

'Images of Humans and Super-Person Legal Interests: Perspectives of Liberalism and Communitarianism' (2015) 6 L Sys and Soc Dev 127, 134.

[101] *HTO* 222-23.

[102] Ibid 223.

[103] Ibid 63.

[104] Ibid 11.

[105] Ibid 63-64.

'governmental interests' are 'ascribed to the government' and an individual is 'not seriously harmed by a single act'.[106] When the harm is to one's fellow citizens, such as in cases of tax evasion, the objectionable conduct is unfair to the public. However, 'like community interest, governmental interests in the last analysis belong to individual citizens'.[107]

Three situations involve understanding public interests as being made up of individual interests. Public interests are 'derivative from independently defined individual interests'.[108] While these situations are labelled public rather than private, this is alongside the idea 'that the public is composed of private individuals standing in complex social and legal relations to one another'.[109] For example, 'the term health of the nation is fictive and only disguises that fact that it concerns the protection of the health of many individual members of the nation'.[110] In the case of a river deteriorating, the public interest consists of my aesthetic comfort, your drinking or watering amenity, her interest in cooling or enjoying fresh air, and so on; in a system of taxation, the public interest consists of my fair competition, your pension acquisition, others' welfare expectations, etc. So in the third and second types above, the 'near ultimate' interest bearers of the Government, the environment etc. all rest on the ultimate bearer of individuals, but the severity of a crime may be hard to determine given that the exact interests or number of individuals affected may not be determinate and that 'the harm to any given individual is highly dilute and unnoticeable'.[111] Given the realities of data availability and analytical complexities, the law expediently only reaches the 'near ultimate' bearer (a shared object).[112] A public interest in this case is a preventative and compound *common good* (a condition of the object), different from eventual individual interests of various types, which rely on the common good.

c. Four Standards of Individual Life Order Engaging Public Order

Following the individualistic approach to classifying interests as public, we can examine public order scenarios. Public order is not an interest generated in governing activities in Feinberg's third type of public interests. In the first type, public order is the convenient use and/or comfortable enjoyment of one's own life conditions by many individuals. In the

[106] Ibid 63.
[107] Ibid 63.
[108] *HW* 35.
[109] See *HTO* 11.
[110] *LCL* 16.
[111] *HTO* 11.
[112] See Victoria A Greenfield and Letizia Paoli, 'A Framework to Assess the Harms of Crimes' (2013) 53 BJC 864, 868.

second type, public order appears to be a general community interest, which is not reducible to individuals' own interests. This kind of public disorder involves harm to a shared public object, normally a public place such as a road, lake, park, or public utility service such as 'garbage collection, street lighting, the provision of electricity power, telephone and postal services',[113] or a general environmental condition. All of these embody general interests, which meet public needs of convenient and comfortable life.

However, Feinberg does not explicitly provide a holistic concept of publicness. So, it is not precisely clear why he sets out these three particular situations of public interests, rather than others, and how he systematises them. Is there a unifying test of publicness? He seems to understand publicness in three situations as requiring that the interest in question is possessed by 'a large *and* indefinite number of private individuals'.[114] This test is stricter than the test in public nuisance which limits public order to cases affecting 'a substantial section of the public'[115] – and which understands publicness with a test of 'widespread in its range *or* so indiscriminate in its effect'.[116] These tests are illuminating in determining the meaning and standards of publicness. I would argue that when the affected (victim) is *not 'single and specified'*, the interest and the crime is said to be public. 'Public' just means *many individuals are actually or possibly affected*, whether or not the exact number of them is clear. It includes, but is not limited to, 'widespread' and 'indiscriminate' cases. Accordingly, four standards can expand the scope of 'public' order (crimes).

As to the number of affected persons, firstly, when the conduct affects life order of many and unspecific persons, it is a crime against public order. The obstruction of a public way creates widespread and indiscriminate inconvenience to multiple persons and is thus a public nuisance.[117] Intrinsically repetitive disorderly behaviour such as intrusive begging would affect many persons.[118]

Secondly, when the class of persons affected is not indiscriminate but is extensive, the conduct remains a crime against the public. The operation of an entertainment venue that

[113] *HTO* 223.
[114] Ibid 222 (emphasis added).
[115] *Rimmington* [2006] 1 AC 459 [36] (emphasis added).
[116] *A-G v PYA Quarries Ltd* [1957] 2 QB 169 (emphasis in original).
[117] *Wesson v Washburn Iron Co* 13 Allen, 95, 102 (1866).
[118] Even if the beggar decides to beg for once, the potential target is indeterminate (see the third standard below).

discomforts many neighbouring dwellers by noise is also a public nuisance.[119] In this case, the dwellers are in a private place, and the effect on them may not be entirely random. Nevertheless, the standard of extensiveness should be considered to determine the case as public.

Thirdly, when the conduct affects an indiscriminately chosen person, rather than an extensive group, it is still public. Exposure to one person in a public place, although targeted at a single person, victimises a random person and this means that many persons are put at risk: other members of the public who are likely located in the same place as the victim are at danger. For example, soliciting an undercover officer for sex on a public highway was still public in circumstances in which it was not only the officer who was likely to be affected.[120] Similarly, in considering the common law crime of outraging public decency, the Law Commission approaches publicness as meaning a public place, which the public can access, view or hear.[121] The crime is based on a risk of offence to many people, but it does not matter whether many people are in fact affected.

Fourthly, when the person affected has been chosen (not indiscriminately), and the conduct is in public, there is nevertheless a public order problem. Life consists of private life and the public life/sphere.[122] When there are bystanders – witnesses to an event who are not direct participants – the event is public rather than private.[123] This sociological idea has normative implications. The common law crime of breach of the peace in Scotland requires discoverability by, and thus potential alarm to, a third party.[124] The existence of a third party (even a hypothetical one) renders the disorder public. There is not only one 'victim' in particular, but inconvenience, discomfort caused or risked to other people.

However, if the conduct takes place in private, when there is only one victim, and the victim is specifically targeted, it is not a public order problem. The opposite of 'public' is 'private'. 'Private' literally means concerning a particular person or group. A telephone call to an individual person is private, and thus hundreds of calls made to thirteen different women

[119] *People v Rubenfeld*, 172 NE 485, 254 NY 245 (1930). The case is similar to sending suspected anthrax in a letter that led to the evacuation of many staff at the target address. The defendant was not convicted of public nuisance given the absence of *mens rea*. See *Regina v Rimmington; Regina v Goldstein* [2006] 1 AC 459.
[120] For the case, see *DPP v Fearon* [2010] 2 Cr App R 22.
[121] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 4.11.
[122] See P Sztompka, 'The Focus on Everyday Life: A New Turn in Sociology' (2008) 16 Eur Rev 1, 9.
[123] Ibid 9, 11.
[124] See *BOP* 111.

deemed were still private.[125] In private there is no third party or other victim, either actual or potential, to render the act public. Typically, the POA 1986 excludes 'private dwellings' from the scope of public order. No offence is committed under sections 4, 4A and 5 when the actor is 'inside a dwelling' and the victim is 'also inside that or another dwelling'.

In short, when many persons – including an indiscriminate person, or one person in a public occasion – are adversely affected in terms of their life convenience, comfort or peace, the interest can be labelled as public. Public order interests principally, but do not merely, exist in civil life. An aggregation of private life interests can also collectively amount to public order. It is only in cases of the life order of 'one specified' victim being disrupted in private that it can be definitively stated that no question of public order is raised.

(ii) Triviality Is Not a Problem for Individual Life Order Interests

Once we accept that public order interests are conceptualised in terms of life convenience, comfort or peace, a problem may arise. Are these interests too trivial to warrant the protection of the criminal law? First, if we apply the test of publicness outlined above, we can see that the interest is generally not trivial. Where more than one individual's life convenience, comfort or peace is affected, the seriousness of the evil tends to be sufficient for the criminal law to intervene. For example, when the effects of the disorder are widespread or indiscriminate, public prosecution is required: 'it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large'.[126]

However, the standards of publicness I propose are not limited to those in public nuisance ('widespread in its range or so indiscriminate in its effect').[127] If the life order interest were not public enough – or if it were the interest only of an individual in private (not 'public' order interest), would it be too trivial to be protectable? I will argue here that the principle of *de minimis non curat lex* is not absolute in limiting criminal legislation and that there are alternative mechanisms to solve the problem of triviality, even if an individual life order interest seems trivial.

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[125] See *Johnson* [1996] 2 Cr App R 434.
[126] *A-G v PYA Quarries Ltd* [1957] 2 QB 169.
[127] Ibid.

a. 'De Minimis' Not Always Necessary

There seem to be good reasons to limit the scope of breach of the peace so that it may be regarded as a 'public' (locus) disorder crime.[128] That is, the formal label of 'public' may have a substantive role to play in identifying what should or should not be protectable by the criminal law. Such a role, however, has not been articulated. I will argue that publicness may signify the necessity of criminal law from two perspectives, which are not absolutely right.

Publicness can, firstly, signify the seriousness of the crime. For example, Feinberg argues that regular indecent behaviour by a neighbour on his lawn or the exhibition of obscene signs or pornographic displays on his external walls constitute a private nuisance, which 'does annoy or inconvenience someone or other' under civil law – while criminal law (public nuisance) requires them to occur in open places to concern the general public, because a resultant criminal sanction amounts to 'such massive interference with liberty'.[129] Feinberg requires a level of seriousness of the nuisance in criminal law because he considers criminal penalties so severe.

However, Feinberg regards the appropriate penalty for serious offence to others to only be a fine or, at most, modest imprisonment, for a matter of days.[130] These penalties do not necessarily interfere with liberty as substantially as other parts of the criminal law – or clearly outweigh civil liabilities. Lenient penalties in criminal law allow legislators to target nuisances of low-level seriousness.[131] Thus, the divisions between private/individual and public/general may not be that important in the drafting of legislation. Differences in gravity of offending can be assessed and valued not so much when deciding whether to criminalise an activity, but in setting penalties or in criminal sentencing.

A challenge to this idea may be that there are degrees of blame and a quantum of blame under a given threshold is not criminal blame at all.[132] But how should that threshold be determined? More importantly, the condemnation effect can also be regarded trivial when the public can readily consider the special procedure involved, the relevant offence name

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[128] See *BOP* 91.

[129] See *OTO* 9-10.

[130] Ibid 4.

[131] On the contrary, severe penalty is contingent on there being a serious result. Public nuisance can be punishable up to life imprisonment – and this is a reason why its restatement should require public and serious adverse effect. See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) paras 4.2-4.3.

[132] See Douglas Husak, 'The De Minimis 'Defence' to Criminal Liability' in R A Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (OUP 2011) 350.

and the applicable penalty in a case deemed to be only 'trivial'. For example, section 13 of the Chinese Criminal Law provides that extremely trivial harm should not be dealt with criminally. That is, the conduct can be dealt with as an administrative violation under the Chinese policing law where the penalty is only custody for a very short period (days) or fines determined and administrated by the police. But this is similar to Feinberg's suggestion of penalties for offensive conduct. Therefore, administrative violations in China are similar to violations in some Western countries where blame is considered trivial (notwithstanding the violation may still be included in a 'criminal' code/law).[133]

It may also be reasonable to require this notion of publicness when private disruptions *may be* better resolved by alternative social mechanisms or by private law remedies.[134] A private disruption may 'cause or threaten the harm or evil sought to be prevented by the law' 'only to an extent too trivial to warrant the condemnation of conviction' ('thus the Court should dismiss the prosecution').[135] But the exercise of the principle of *de minimis non curat lex* in the operation of Model Penal Code is a judicial guideline, and not a guide to legislative activities.[136] Even if it were, its function is to avoid unnecessary criminal condemnation. But civil measures *may not always be* effective and the victim may have insufficient resources to fund a civil action.[137] For example, offensive 'one on one' messages should still be criminally prosecutable and punishable.[138] Thus, the division between public disorder and private disruption may not matter that much in deciding whether to criminalise the behaviour.

b. Criminalisation Discretion Solves the Problem of Triviality

On the problem of *de minimis*, I do suggest that life order interests in convenience, comfort and peace should be considered protectable by the criminal law, but it is not necessary that all specific cases of a category of such interest should be so protected. The criminalisation theory (of legal interests) is just one factor in the whole project of criminalisation. The

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[133] See American Law Institute, *Model Penal Code* (1985, hereinafter referred to as *MPC*), s 1.04(6) <www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf>accessed 29 May 2019.

[134] See *CHW* 133.

[135] *MPC*, s 2.12.

[136] A similar provision can be found in the Chinese Criminal Law. See s 37.

[137] See Council of Europe, *Report on Decriminalisation* (European Committee on Crime Problems, Strasbourg, 1980), 52.

[138] See Malicious Communication Act 1988, s 1.

criminalisation process involves a range of factors: legislative, reporting, policing, prosecuting and decision-making.

Firstly, recognising an interest as protectable does not necessarily mean that all infringements of that interest must or should be protected. Property ownership is a protectable interest, but criminal law does not protect it by generally prescribing that any conduct harming ownership is punishable – rather, it specifically proscribes several behavioral types: such as robbery, theft, fraud, vandalism or misappropriation. Criminal law selects some, but not necessarily all behavioral types, which infringe against a protectable interest, based on a series of considerations, rather than a single one factor such as triviality. In particular, relevant factors will be whether a given type can be properly prescribed/described (so as to meet the requirements of predictability and fair labelling)[139] – whether it is of high frequency and thus of high priority – and whether it is of high severity and thus of high priority. Therefore, although all the interests in life convenience, comfort and peace, in the sense of a category, are protectable interests for life quality, in practice they are not always protected from any infringements, as will be shown in chapters 4-5.

Further, the victim will apply discretion in deciding whether to report the life inconvenience, discomfort or breach of life peace. He will gauge the seriousness of the disruption of his life, the implications of reporting to the authorities and the availability of other alternative solutions. Even if he were to make a report, the police have discretion in deciding how to respond. Similarly, the prosecutor may exercise his discretion and decide not to prosecute and the court/jury may decide not to convict. All of these actors shape the substantive criminalisation in action.

The exercise of these various forms of discretion is indeed a reflection of the costs of targeting trivialities. But the costs are unavoidable in practice. It is rarely possible to *ex ante* prescribe that which is not trivial, as Feinberg arbitrarily lists some, albeit not others, as significant welfare interests.[140] Nor is it possible at the same time to avoid excluding the necessary protection of some interests in specific cases. In short, it is hard to set a clear line as to what is sufficiently serious and such a clear line could sacrifice or compromise specific

[139] For 'considerations in labelling offences', see J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 239-45.
[140] See *HTO* 57-59.

justice. Therefore, a theoretical alternative of an inclusive concept of life convenience, comfort or peace is necessary.

IV. CORE SPECIFIC INTERESTS IN PUBLIC ORDER

Contemporary smooth life requires traditional and new conditions. Legislation must assume a creative role in establishing and developing a flow of new desires, values and rules conditioned and demanded by social developments of technology, industrialisation and a new way of life.[141] After establishing the contents of public order interests as life convenience, comfort and peace – and specifying the standards of publicness of an interest, the following sections will show how *typical* specific categories of convenience, comfort and peace for contemporary life quality can be socially and normatively identified as the interests of public order.[142] I will specify which particular dimensions or aspects of these interests engage public order, by linking the specific life order interest to one or more standards of publicness.[143]

(i) External Convenience, Comfort and Peace of the Public

Smooth life requires a variety of different external life conditions. This section will argue that external life conditions include the use of life places and facilities; the communication and acquisition of information; the enjoyment of general environmental conditions – and external peace of life. These conditions become public order interests in some cases.

a. Public Use of Life Places

Firstly, public order is the public use of life places without unreasonable disturbance. Life places are generally static. Of course, public transport will be a moving public place. Even if it is not a public place in the traditional sense of being an unmovable space, the use of

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[141] Albin Eser, 'The Principle of ''Harm'' In the Concept of Crime: A Comparative Analysis of The Criminally Protected Legal Interests' (1965-1966) 4 Duq UL Rev 345, 398.

[142] It is difficult to deduce specific categories of convenience, comfort and peace, just as Feinberg has not clearly rationalised why he lists categories of minimum welfare interests such as 'emotional stability, the absence of groundless anxieties and resentments' and 'a tolerable social and physical environment'. See *HTO* 37. He even has not explains what he means by these two eluding categories. However, specific categories can be inferred from typical legislative and judicial practice. I will provide intuitively and empirically summarised typical categories of life order interests, not all the possible contents of public order (similar approach is adopted in finding typical wrongful affronts to sensibilities. See *CHW* 97). More importantly, each category's rationale and meaning will be enunciated in this part.

[143] It should be stated that which exact standard of publicness is chosen or preferred for a specific life order interest is up to a series of considerations such as jurisdictional tradition, which is beyond discussion here.

public transport is an instance of civil life. For example, the hindrance of a ship from leaving a harbour will be public disorder.[144]

Many civil life activities – such as assemblies, processions or demonstrations, cultural events, sports or any other large-scale activity – exist in general public places such as streets, parks and squares and other places, which the general public can readily access. For example, the law on processions and assemblies leads inevitably to the following question: can (and if so, how) group activities be related to public order?[145] Both could be analysed from the perspective of reasonable use of public places. To block a door to prevent persons entering a place may constitute an offence of preventing public meetings – and to throw or propel an object that may disrupt a sporting event would be an offence in a public place.[146]

Civil life activities exist also in special semi-public places such as (private owned) factories. This perspective of internal life order is important to protect the order internal of some institutions, which do not directly engage with general public life. Smooth work, production, teaching and scientific researches of a unit/institution are protected as public order.[147] While only internal order can be disrupted in such cases, this disruption is still a disruption of the life order of a section of the public.

Disturbance to the public use of a life place may, however, also interfere with a kind of personal right called freedom of movement, which in public places takes the form of normal traffic mobility.[148] In cases of aggressive begging, chasing or intercepting, the prohibited conduct harms personal freedom and privacy. But the conduct seems too minor to be treated as crimes against personal rights. It substantially affects convenient use of public places and can be tackled as a crime against public order.[149] For legislators, it is mainly a nuisance issue, which makes it inconvenient and uncomfortable to attend and enjoy one's work or life in a public place.

[144] See *James Falconer* (1847) Arkley 242.
[145] See POA 1986, Pt II.
[146] See *Summary Offences Act 2005* (Queensland), ss 20 & 24.
[147] See Chinese Criminal Law, s 290.
[148] See Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offense' in Rowan Cruft, Matthew H Kramer, Mark R Reiff (eds), *Crime, Punishment and Responsibility* (OUP 2011) 287.
[149] 'Offences about quality of community use of public places' such as disorderly begging, urinating and being intoxicated are the first concern of the Summary Offences Act 2005 (Queensland).

b. Public Use of Life Facilities

Secondly, public order entails the convenient and comfortable public use and operation of life facilities – e.g. water, heat, power, telecom, radio, television and internet facilities – without unreasonable interference. For example, a provision on public nuisance aims to prevent the lawful 'enjoyment of a facility of a public place' from being 'interfered with by the unlawful activities of another'.[150] Even if the life facility is not of a public place, it may still engage public order when it is connected to many private life places. For example, turning off a city's electricity supply would amount to disruption of the life order of the public.

The life of the general public may be indirectly interfered with. There are public institutions or services that are necessary extensions and direct components of the civil life of the public, such as post offices and hospitals.[151] When we examine public institutions from their own perspective, they have both an internal order and external order to be protected. If someone interferes with the institution's staff's use of life facilities such as a canteen or gym or office, their own life order is disrupted, and they may as a result be prevented from serving the public whose life order is thereby disrupted (indirect interference). For example, Goldstein put salt in a letter which leaked on the hands of a post office worker, and was suspected to have been anthrax, leading to the evacuation of 110 employees and the cancellation of the second postal delivery for that area.[152] He objectively disrupted both the post office's internal working order and the external life order of the public in using the postal service.

c. Public Enjoyment of General Environmental Conditions

Thirdly, public order is the public enjoyment of general, natural and sensory conditions e.g. sound, light, temperature, humidity or odor, without unreasonable disturbance. It is personal comfort/amenity based on sensory responsiveness to external stimuli.[153] Environmental nuisances tend to constitute the offence of public nuisance. 'Smells, noises, waste deposits and water pollution all have the potential to constitute nuisances which may be sufficiently

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[150] See *Weekly Hansard*, Queensland Parliament (28 Sep 2004), col 2397.

[151] Criminal Justice and Immigration Act 2008, s 119, targets 'a nuisance or disturbance to an NHS staff member who is working there or is otherwise *in connection with work'*. (emphasis added) The connection can be activities such as recreation, canteen or cleaning.

[152] See *Regina v Rimmington; Regina v Goldstein* [2006] 1 AC 459.

[153] John Bates, William Birtles and Charles Pugh, *Liability for Environmental Harm* (Tottel Publishing 2004) 17.

widespread and indiscriminate in their effect to amount to a public nuisance.'[154] In particular, making a noise could be an offence of preventing public meetings (starting or continuing),[155] because public enjoyment of a general environmental condition is disturbed.

This aspect of public order can be sufficiently comprehensive and flexible to cover cases, which may not be properly covered by property and personal rights in criminal law.[156] The expression of 'prejudice to health or a nuisance' means that environmental law adequately regulates both safety and order problems.[157] For example, smoking is believed to be harmful to health and smoking in public places harmful to public health.[158] However, the harm occasioned by a single act of smoking in public places is not significant enough to be regarded as a safety crime (against health); rather, it is more proper to be seen as an offense against public life order in comfort.[159] The harm is to sensory amenity, something which is not negligible by most people because it hinders them benefiting from interesting and enjoyable aspects of life.

d. Public Communication and Acquisition of Information

Fourthly, public order includes the public communication and acquisition of true information without impediments or lies, because the convenience of communicating and receiving true information itself is a must for our smooth life that bases decisions and choices on information.

In the information age, typically exemplified by the internet as the information highway, the convenience of accessing true information is even more important. Some criminal activity bullies widespread and indiscriminate cyber users by forcing or tricking them into visiting websites. This 'traffic hijack' causes inconvenience to information acquisition from the

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[154] Neil Parpworth, 'Public Nuisance in the Environmental Context' (2008) 11 JPEL 1526, 1531.

[155] See *Summary Offences Act 2005* (Queensland), s 20.

[156] Public nuisance is useful in a civil case or 'for egregious environmental crimes'. See John Pointing, 'Public Nuisance: Beyond Highway 61 Revisited?' (2011) 13 Env L Rev 25, 25.

[157] Environmental Protection Act 1990, s 79(1).

[158] Pamela R Ferguson, ''Smoke Gets in Your Eyes…': the Criminalisation of Smoking in Enclosed Public Places, the Harm Principle and the Limits of the Criminal Sanction' (2011) 31 LS 259, 261.

[159] Similarly, 'dust falling on vehicles' 'might be an inconvenience to their owner' or users, and 'dust in the eyes or hair even if not shown to be prejudicial to health would be an interference with personal comfort'. See John Bates, William Birtles and Charles Pugh, *Liability for Environmental Harm* (Tottel Publishing 2004) 40.

perspective of users and to communication from the perspective of content providers.[160] It is an internet version of blocking others' freedom of movement in a traditional public place.

True information facilitates and guides our life and moods, but a false message can cause 'annoyance, inconvenience or needless anxiety'.[161] Communication only works when people are assumed to be normally saying the truth, and lying and rumors considered abnormal – otherwise, society would degenerate separate non-communicating entities.[162] False information adulterating truth or mixing impurities makes this interest in accuracy unavailable or discounts it, particularly in cyberspace where rumors are not limited by space or time and have nearly unlimited resending with low costs and threshold.[163] Therefore, 'certain lies in certain circumstances should be made criminal'.[164]

Different jurisdictions have previously criminalised the propagation of fraudulent rumours (without reference to specific victims) in order to protect public order.[165] Blackstone says 'the vice of lying is not taken notice by our law, unless it carries with it some public inconvenience, as spreading false news …'[166] It is an offence in Queensland to advertise or place a notice in a newspaper or by radio, television or on the Internet false information of birth, death, funeral, engagement, marriage, employment.[167] Although this offence is limited to important personal information and the mass media, it still illustrates the harmed interest to the convenience of the public in accessing information. This approach of restricting the scope of false news follows Blackstone's ('concerning any great man of the realm').[168] He alternatively limited the result ('to cause discord between the king and nobility').[169] Similarly, the ninth amendment of Chinese Criminal law passed in 2015 enlarges the scope of the targeted rumours in the subchapter of crimes against public order, but still requiring

[160] See Zhigang Yu, Zhilong Guo, *Logics and Experience of Cyber Criminal Law* (China Legal Publishing House 2015) 238-41.
[161] Communication Act 2003, s 127.
[162] See Law Reform Commission of Canada, 'Limits of Criminal Law—Obscenity: A Test Case' (1975) Working Paper 10, 21 < www.lareau-law.ca/LRCWP10.pdf> accessed 29 May 2018.
[163] The Internet has changed mechanisms of information production and communication. See Zhigang Yu, Zhilong Guo, *Logics and Experience of Cyber Criminal Law* (Beijing: China Legal Publishing House 2015) 206-08.
[164] Bryan H Druzin & Jessica Li, 'The Criminalisation of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?' (2011) 101 J Crim L & Criminology 529, 530.
[165] See Xilei Cai, 'Comparative Examination of Criminal Regulation of Rumors' (2015) 2 Journal of National Prosecutors College 81, 86-87.
[166] See Bl Comm 600.
[167] See Summary Offences Act 2005 (Queensland), s 21 (in pt 5 'Other Offences').
[168] See Bl Comm 634.
[169] Ibid.

the result of serious disruption of social order.[170] All public rumours are against public order in the sense of setting back people's interest in the convenient communication and acquisition of information.

e. Public External Peace

Public order includes other stable conditions for smooth life of the public, e.g. external life peace free from disruptions by harassment.[171] Harassment allegations can be credibly or plausibly true yet consist of junk information that actively appears in front of one's eyes and thus preempts attention, disrupting life peace. Such harassment is different from the rumors discussed above which disturb the convenience and comfort of acquiring information by passively appearing when, for example, a person searches the Internet.

When the conduct does not consist of physical contact but only troublesome disturbance, it may not be assault, but disorder. The risk of attacks and fear, if any, exist in the early phase of violence, but the direct result of harassment is harm to life quality.[172] That is, even in cases of continuous or frequent following or contacting, violence may not be threatened or feared, but the victim suffers because of mind being occupied, attention called and thus their everyday life is disrupted.[173] Harassing acts such as unwanted letters or telephone calls, even if not threatening, abusive or insulting, are disorder in the sense of affecting another person's normal life: harassing letters or calls make it inconvenient for the recipient to identify and deal with legitimate letters or calls; the time and effort involved in dealing with this problem it itself a breach of the life peace of the recipient.

The disorder may be against only certain specific individuals. However, when harassment against one person happens in public, such as the sending of unwanted gifts or attempts to contact a person at their workplace, it is still a *public* order problem. More importantly, new technological developments make it much easier to disturb the life peace of the general

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[170] See s 291a. This expansion is partly based on breach of inner peace of the public (annoyance or anxiety) and will be further analysed in next section. This offence in China is punishable with at least public surveillance of 3 months and at most imprisonment of 7 years.

[171] Harassment can be caused by threatening, abusive or insulting words, behaviour or display that can also cause alarm or distress (thus also a problem of breaching inner peace below), but harassment can also be caused by *disorderly behaviour* that may not at the same time cause alarm or distress (thus external peace should be protected by itself). See POA 1986, ss 4A and 5.

[172] See Hans-Joerg Albrecht, 'Stalking-National and International Legal Policy and Legislative Development' Kui Jia tr (2015) 44 CCrim LRev 429, 440.

[173] See S van der Aa, 'New Trends in the Criminalization of Stalking in the EU Member States' (2017) Eur J Crim Policy Res (forthcoming).

public than before, e.g. by causing stubborn 'pop up' advertisements to appear on users' computer or mobile-phone screens, as well as the sending of spam emails on a massive scale. When the conduct disrupts the lives of many individuals, it is a public order problem, even if every individual experiences this disruption in the privacy of their home.

(ii) Public Inner Peace

Smooth life is also referable to non-external conditions. I have argued that external life peace can be a part of public order. Here I will argue that inner peace is the other dimension of life peace by looking at how inner peace can be a kind of interest, which engages public order – and then analyse its protectability in terms of constitutional consistency.

a. Public Inner Peace as a Public Order Interest

It is claimed that transient unpleasantness – including emotional unpleasantness – are neither in nor against one's interests.[174] The focus of interests is on the minimum conditions necessary for long-term various life goals: 'welfare interests' include durable 'emotional stability, the absence of groundless anxieties and resentments'.[175]

However, the absence of emotional unpleasantness, even momentary sensations, is necessary for quality of life. 'Don't we all of us have an interest in tranquility? In peace of mind?'[176] Emotional unpleasantness tends to be fleeting, but the need or desire to be free from it is durable and stable. For individuals, 'functional integrity' includes protection from both physical and psychological losses such as momentary pain, discomfort or anxiety in the colloquial sense.[177] I would call the psychological stability *inner peace*, as opposed to external peace. Inner peace is psychological tranquility without unreasonable distress, fear, alarm, disgust, annoyance etc.[178]

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[174] See *HTO* 45-46, 55-56.

[175] Ibid 37.

[176] 'I do not think Feinberg has been as clear about these matters as he should have been.' Judith Jarvis Thomson, 'Feinberg on Harm, Offense, and the Criminal Law: A Review Essay' (1986) 10 Phil & Pub Aff 381, 386.

[177] See Victoria A Greenfield and Letizia Paoli, 'A Framework to Assess the Harms of Crimes' (2013) 53 BJC 864, 869.

[178] Inner peace is not a natural extension of the person because it rarely affects body rights such as integrity or health. Neither is it necessarily related with personality rights such as dignity and privacy.

Both Continental and Anglo-American legal theories acknowledge the possibility of emotional or psychological states being protected by criminal laws against victimization.[179] In particular, severe breaches of inner peace, such as intentional infliction of emotional distress,[180] are proposed as candidates for criminalisation, corresponding to their regulation in tort law.[181] Moreover, criminal law should 'permit everyone to go about their daily life without fear of harm to persons or property'.[182] Fear is a very typical breach of inner peace, which makes civil life uncomfortable and other life activities inconvenient and even impossible.[183] As an intense unpleasant feeling with strong physical demonstration because of a threat,[184] fear is an emotional state based on defined risk while anxiety is on unidentifiable stimulus or failure of coping attempts.[185] Therefore, alarm is more like anxiety in uncontrollable states.[186] Conduct which makes people worried or causes them to suffer from pain or anxiety and weakens their ability to deal with life is also 'harmful' (in colloquial sense).[187]

I am merely suggesting the possibility of targeting public emotional unpleasantness, refuting Feinberg's claim that offended mental states are not infringements of our interests. When the inner peace breached is that of the public, i.e. the subjects are many, unspecified or present on a public occasion, it becomes a part of public order. In particular, spreading terror hoaxes, throwing fake dangerous substances, threatening to set fire, to blast or to throw dangerous substances, are all to the alarm of the public.[188] Besides, public indecencies and

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[179] See *CHC* 114.

[180] Grief is elicited by an individual's interpretation of an involuntary loss situation. See Kathy Charmaz and Melinda J Milligan, 'Grief' in Michael Lewis and others (eds), *Handbook of Emotions* (3rd edn, The Guilford Press 2008) 516-17. Intense grief 'elicits considerable mental and physical distress' (519).

[181] See Leslie Yalof Garfield, 'The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress' (2009) 5 AUCLBrief 33, 40.

[182] *R (McCann and Others) v Crown Court at Manchester and Another* [2003] 1 AC 787, 806 (Lord Steyn).

[183] 'Fear may drive a burdened man for a mile, but it is only freedom that makes his load light for the long carry.' Stephen Vincent Benét, 'Freedom from Fear' *The Saturday Evening Post* (Indianapolis, 13 March 1943).

[184] A threat by itself is *not* even preparatory conduct risking *personal* safety.

[185] See Arne Öhman, 'Fear and Anxiety: Overlap and Dissociations' in Michael Lewis and others (eds), *Handbook of Emotions* (3rd edn, The Guilford Press 2008) 710.

[186] For anxiety, see Robert M Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Bodley Head 2017) 34-35.

[187] See Law Reform Commission of Canada, 'Limits of Criminal Law—Obscenity: A Test Case' (1975) Working Paper 10, 18 < www.lareau-law.ca/LRCWP10.pdf> accessed 29 May 2018.

[188] This kind alarm is not a real public safety concern and thus the actor cannot be convicted of a public safety crime. The real criminality of the conduct lies in creating unreasonable fear among the public and thus breaching of the peace of the public. See the contamination of or interference with goods with intention of causing public alarm or anxiety (POA 1986, s 38).

insults, may disgust,[189] annoy,[190] alarm or distress viewers: sexual activity in a public place,[191] insulting the national flag or emblem in public,[192] publishing or stirring up hatred, discrimination or insult against an ethnic group, etc.[193] A further problem is that the categories of unpleasant states and corresponding acts need to be clearly defined to determine an unacceptable threshold of disrupting inner peace (see chapter 5).[194]

b. Constitutional Consistency of Inner Peace

Inner peace is an interest instrumental to smooth life. However, 'we must be aware of the moral, cultural, and socio-economic nature of the interests recognised in a particular system'.[195] Accordingly, there are three steps/elements for a certain social or individual want or need to be a criminally protectable interest: 'there must be a socially founded factual interest'; 'this interest must be socially recognised'; 'its consistency with the constitutional value order must be demonstrated'.[196] Although the first sociologically factual element has been shown – and the second socially recognised dimension can be seen in relevant laws – there are explicit disputes on whether the right to inner peace is consistent with the constitutional framework. It is contended that a 'right not to be offended' should not be recognised by the law otherwise the right to expression would be limited because of the unpopularity of the idea, although the right can be limited when it does not contribute to public debate or harms identifiable rights such as dignity, privacy or reputation.[197] This idea

[189] In emotional knowledge, there are nine lists of possible stimuli of disgust: 'food, body products, animals, sexual behaviours, contact with death or corpses, violations of exterior envelope of the body (including gore and deformity), poor hygiene, interpersonal contamination (contact with unsavoury human being), and certain moral offenses.' Paul Rozin and others, 'Disgust' in Michael Lewis and others (eds), *Handbook of Emotions* (3rd edn, The Guilford Press 2008) 757. Also see Robert M Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Bodley Head 2017) 41-42.

[190] Irritation or annoyance is a milder variant of anger while fury or rage is an intensified variant, see Scott Schieman, 'Anger' in Jan E Stets and Jonathan H Turner (eds), *Handbook of the Sociology of Emotions* (Springer 2006) 494. Anger is commonly elicited by e.g. insults, inequity, unfairness, verbal or physical aggression (495).

[191] SC Deb (B) 18 September 2003, col 289.

[192] See Chinese criminal law, s 299. This would be protected speech in some jurisdictions. But as will be argued in next subsection, this is not a problem of inner peace being a protectable interest.

[193] See POA 1986, Pt III.

[194] See Avlana K Eisenberg, 'Criminal Infliction of Emotional Distress' (2015) 113 Mich L Rev 607, 647-49.

[195] Letizia Paoli and Victoria A Greenfield, 'Harm: a Neglected Concept in Criminology, a Necessary Benchmark for Crime-Control Policy' (2013) 21 Eu J Crime CL CJ 359, 369.

[196] See Albin Eser, 'The Principle of ''Harm'' In the Concept of Crime: A Comparative Analysis of The Criminally Protected Legal Interests' (1965-1966) 4 Duq U L Rev 345, 413.

[197] See Aatifa Khan, 'A ''Right Not to Be Offended" under Article 10(2) ECHR? Concerns in the Construction of the "Rights of Others''' [2012] EHRLR 191, 199-201.

does not acknowledge that even if it were not 'gratuitously offensive' – viz. it is of public concern – the right can still be limited.

To recognise the right not to be offended is not to outlaw every offence to inner peace, just as to recognise the right to dignity, privacy or reputation is not to protect those rights absolutely, and the same is true of the right to expression. Inner peace can be protected when the exercise of the right is an abuse of the right. Abuses of a right or liberty conflict with the constitutional spirit in fairly determining orderly co-existence and co-operation. Liberty limited by the rule of reciprocity 'is the mother of order'.[198] A liberty or right of person or group should be balanced with the same liberty or right of others and with the adverse consequences caused or risked by its exercising. The French Declaration of the Rights of Man and of the Citizen 1789 classically shows this relation. Article IV and V together state that adverse consequences of actions and fair enjoyment of others can justify limiting freedom.[199] Therefore, the right to free expression should not unfairly interfere with others' right to free expression (there is other commercial solicitation, political and social communication), and other rights such as inner peace as well as the convenient and comfortable use of a given public place.

Therefore, the recognition of the right to inner peace accords with the constitutional recognition of the right to expression. The core problem lies in how to thoroughly elaborate upon when the appeal to the 'rights of others' such as inner peace can override the right to expression – and not in refuting the recognition itself of inner peace. The law should not be expected to refuse to recognise inner peace as a legal interest just because the recognition challenges the protection of established rights. Instead, the law should focus on how to solve the potential conflicts between rights in a proportionate framework as suggested in chapters 2 and 5.

In summary, for facilities and places, comfort is the higher level of meaning for life quality, based on the convenience of use. For general conditions, the value is mainly the comfort of enjoying. For information, the focus is the convenience of access. Freedom from harassment and breaches of inner peace is another kind of comfort in achieving passive peace. These

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[198] See Herbert Spencer, 'Co-operation: Its Laws and Principles' 1885 1 THE SUN 1, 3-4.

[199] Article IV - Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law.
Article V - The law has the right to forbid only actions harmful to society. Anything which is not forbidden by the law cannot be imped(ed), and no one can be constrained to do what it does not order.

cases may converge in the same case of disruption. For example, attaching a leaflet to a public facility such as a bus timetable amounts not only to aesthetic harm – an eyesore making the view less comfortable – but also causes inconvenience to effective acquisition of useful information of a public life facility. Its own content may be threatening, abusive or insulting and thus cause further harassment, alarm or distress.

V. CONCLUSION

Public order as a protectable interest is an important criterion for determining a consistent and rational scope of crimes against public order. It should be narrowed to a consistent and rational scope. This chapter has argued, firstly, that public order can be narrowed as an interest. From the special perspective of everyday life, Feinberg's theory of minimum welfare interests neglects a kind of interests for smooth life. Socio-legal perspectives make it clear that safety interests, which directly concern basic living, do not include various kinds of order interests – and thus life order interests in convenience, comfort and peace, separated from safety interests that are protected by English public order laws, can be construed as the public order interest.

Secondly, in order to argue that the identified public order interests are protectable, I have refuted the idea of viewing public order as a collective interest, which cannot be reduced to interests of individuals – and then adopted Feinberg's individualistic approach to analysing public interests in three types of case – but further clarified the test of being public as many individuals are actually or possibly affected in four cases. The *de minimis* problem may be solved by adhering to one or more standards of publicness of the life order interest. More importantly, *de minimis* is not absolutely binding in criminal legislation and the problem of *de minimis* can and even should be alternatively solved by the exercise of discretion within the criminal justice process.

Lastly, the chapter has identified public order's typical categories as life interests in using life places, facilities, enjoying general conditions, communicating and acquiring true information and maintaining exterior and inner peace. These life interests can be public order interests when the subject is multifold, indiscriminate or appear in a public context, rather than a particular one in private.

Chapter 2 Harm and Offence in Public Order Crimes

I. INTRODUCTION

Having identified interests in public order as life convenience, comfort and peace in some public occasions or contexts, this chapter considers *what kind of infringements of these interests* can justify criminalisation. I shall argue that the concepts of harm and offence in particular assist identifying infringements of public order interests: that is to say, such infringements should be either harmful or offensive in order for criminalisation to be justified. In developing my argument about harm and offence, I draw on the work of Feinberg, who has systematically analysed the moral limits of the criminal law.[1] While Feinberg's work is primarily organised around the harm principle, he argues that this should be supplemented by an 'offence principle' – particularly in the area of public order law – to allow the criminalisation of forms of conduct that, while not necessarily directly harmful, are nonetheless disruptive.[2] I shall argue, however, that while these concepts provide a useful starting point, if they are to assist in developing and refining principles of criminalisation in respect of public order law, they will require further development in several key respects – not least to take account of public order as a protectable interest, as set out in the previous chapter.[3]

This chapter will restate the concepts of 'harm' and 'offence' as two frameworks of criminalisation, which can be applied in identifying the scope and limits of public order crimes. I will argue that both harm and offence in public order need to be understood as *setbacks to public order interests* – and that such setbacks must be *both factual and normative*. Part II explores the concept of harm in public order. I will firstly examine the concept of a factual setback to interests (in the sense of physical 'harm to others' in public order crimes). Secondly, I will examine normative setback (wrongful harm in public order crimes). In this explanatory structure, not all disruptions of order will be deemed 'harmful', and thus we can limit the use of the harm principle in maintaining public order. Feinberg's

[1] See J Feinberg, *The Moral Limits of the Criminal Law*, vol 1: Harm to Others (OUP 1984), vol 2: Offense to Others (1965), vol 3: Harm to Self (1986), vol 4: Harmless Wrongdoing (1988).
[2] See *OTO* 10-22.
[3] It is necessary for us to examine what, exactly, is meant by 'harm' and 'offence' in this context. Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offence to Others' (1986) 84 MiL 700, 700.

offence principle requires the commission of wrongful serious offence to others.[4] The articulation of 'wrongful' 'serious offence' is superficially simple – but ambiguous and consequently multifarious types of offence to others may be asserted as justifying criminalisation in public order cases.[5] I will argue in Part III that the concept of 'offence' to others for the purpose of the offence principle in criminalisation should firstly be limited to communicative affronts to others' sensibility of inner peace – and secondly be normatively wrongful.

II. HARM IN PUBLIC ORDER CRIMES

This part will explain what the concept of harm is – on whose work it is based – and then consider why it is important in limiting and defining the scope of public order offences. It begins with a literature review, setting out the key elements of the concept in two dimensions: factual and normative. It then explains how 'harm' might be defined in these two dimensions for the purpose of public order law.

(i) Introduction of Key Elements of Harm

The origins of the harm principle are to be found in Mill's *On Liberty*. Mill argued that:

> 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 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.[6]

For Mill, only the harm principle justifies criminalisation (at least in respect of competent adults). For Feinberg, it is one of several alternative justifications for criminalisation:

> It is always a good reason in support of a proposed criminal prohibition that it is probably effective in preventing (eliminating, reducing) harm to persons other than the actor (the

[4] See *OTO* 1-2.
[5] 'The scope of … quality-of-life prohibitions ['against 'offensive' conduct'] is potentially so broad, it is essential to develop principles that define and limit the scope.' *IROB* Preface.
[6] *OL* 21-22.

one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.[7]

But for both, the prevention of harm to others is at most a necessary, and not a sufficient condition for criminalisation. Feinberg's question regarding the existence of other means is part of the legislator's cost-benefit analysis – not an inherent part of determining the scope of harm itself.[8] The problem of assessing 'other effective means' will, therefore, not be discussed in this chapter, which instead focuses on the meaning of harm.[9]

The harm principle has proved popular because of its simplicity of expression.[10] But Mill did not define harm – and it is difficult to apply a principle when the meaning of its core element is unclear. Accepting that harm is a pre-requisite for criminalisation, people tend to falsely assert harm where none exists, in order to justify their instinctive feelings that something should be criminalised.[11] Feinberg attempts to address some of the shortcomings of Mill's classical account of the harm principle by defining harm firstly as a factual 'setback to interest' (non-normative simple harm)[12] – and secondly as an unjustifiable and inexcusable setback (normative wrongful harm).[13] The first step is intended to ensure that the harm principle protects people's interests and the second to ensure that the protection is morally defensible. However, these two steps are still abstract and imprecise. All types of adverse effects could potentially be described as 'setbacks' by someone seeking to justify criminalisation[14] – despite it being unclear whether they are normatively wrongful. Nonetheless, 'the harm criterion is worth defending and developing because in the real world most criminal laws target genuine harm'.[15] I will examine how the concept of harm can be defended and developed as an element of a test of justifiable criminalisation.

Instead of focusing on whether harm is present in a given case, we should focus on the types of factual harm that the harm principle can recognise and society's willingness to bear such

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[7] *HTO* 26.
[8] See Steven D Smith, 'Is the Harm Principle Illiberal?' (2006) 51 Am J Juris 1, 39-41.
[9] Although Feinberg's harm principle and offence principle both require the necessity of criminalisation i.e. the lack of other 'equally effective' means 'at no greater cost to other values', Feinberg has *not* articulated the constituent in depth. In *CHW* pragmatic considerations are in a separate chapter (ch 11).
[10] See Steven D Smith, 'Is the Harm Principle Illiberal?' (2006) 51 Am J Juris 1, 6-9, 35-38.
[11] See Avani Mehta Sood and John M Darley, 'The Plasticity of Harm in the Service of Criminalisation Goals' (2012) 100 CLR 1313, 1320.
[12] See *HTO* 33-34.
[13] Ibid 34, 109.
[14] See Steven D Smith, 'Is the Harm Principle Illiberal?' (2006) 51 Am J Juris 1, 14-20; *CHC*, 49, 77; C McGlynn and E Rackley, 'Criminalising Extreme Pornography: A Lost Opportunity' [2009] Crim LR 245, 257-58.
[15] *RNTC* 30.

harms (because there may be a competing claim of interest/harm).[16] That is, we should look at the kinds of factual setback to an interest that can be recognised as harm for the purposes of the harm principle and the kinds of normative setback, which are morally unacceptable. I will argue that not all interests can be set back in the sense of being harmed. I will then contend that the concept of a normative setback should be interpreted as a wrongful setback in the absence of a justification of sufficient weight.

(ii) Factual Setback

This section looks at what kinds of factual setback to a public order interest constitute the harm of a public order offence. Feinberg limits the types of harm, which can justify criminalisation to setbacks to minimal welfare interests.[17] But this section argues that they should be limited to objective setbacks to *physical* interests, and that setbacks to an interest should be consistently *recognisable*.

a. Harm as Physical Setback to Interests

As for the kind of interests that can be harmed, Feinberg limits such interests to those which are of sufficient importance for the setback to be of sufficient seriousness to justify coercion ('restricting the liberty' of others).[18] For Feinberg, the concept of harm should be limited to setbacks to minimal welfare interests. In this way, the harm principle does not extend to non-serious setbacks. Feinberg argues that unpleasant experiences – such as physical pains (pangs or aches), nonpainful forms of physical unpleasantness (chills or extreme heat), mental suffering ('wounded' feelings) and forms of offence, are generally not serious enough to qualify as 'harm', because they are not setbacks to welfare interests. It is only when they are 'intense'/'severe', 'prolonged', 'recur continuously' ('constantly repeated'/ 'constant and unrelenting') or 'occur at strategically untimely moments' that they should be regarded as harmful.[19] His concept of harm does not encompass either emotional setbacks or minor physical setbacks. As a result, aggressive conduct, which causes physical pains, such as

[16] See Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 Crim L & Criminology 109, 113-14.
[17] See *HTO* 51.
[18] Ibid 51.
[19] Ibid 46-47.

pangs, or disorderly conduct which causes physical discomforts, such as chills, is not harmful.[20]

Obviously, if we continue to define harm after assessing its seriousness, the life order interests identified in chapter 1 cannot be harmed in the sense of Feinberg's harm principle. They are not minimal welfare interests and so setbacks to them cannot be criminalised via the harm principle; other criminalisation principles must be relied on. As Feinberg argues, there is (typically) no interest in the avoidance of such states of minor physical discomforts and such states are evils of a kind different to harm.[21] However, Feinberg only accepts harm and offence as evils that can justify criminalisation – and clearly setbacks to life convenience, comfort and peace (except inner peace) do not constitute offence. I have argued in chapter 1 that public order is life convenience, comfort and peace and I will argue here that setbacks to these interests constitute harm.

Given the difficulty of the narrow scope of harm in Feinberg's theory, it is important to qualitatively define harm before assessing its seriousness. Interests that can be harmed have a special qualitative feature. 'Harm involves a diminution of our resources, of the means and capacities that we can draw upon to pursue good lives.'[22] The resources, means and capacities recognised by the harm principle are empirically physical ones. In my argument, 'physical' does not refer only to bodily aspects.[23] It should be understood from a negative perspective as non-psychological. More specifically, physical conditions are typically tangible capacities such as life, health, body integrity, freedom of movement and property. Non-typical physical conditions may include economic assets, mental health,[24] general natural conditions, information, etc. – which are intangible, yet still appropriately characterised as physical, rather than psychological.

[20] Feinberg does admit that they are generally evils of their own kind, and could be interpreted as offence in offence principle, or other evils in alternative and similar liberty-limiting principles e.g. legal moralism. Ibid 48-49. However, it will be argued that physical discomforts cannot be offensive under the operation of the offence principle (see III(ii)a).

[21] Ibid 215-16.

[22] A P Simester, Andreas von Hirsch, 'On the Legitimate Objectives of Criminalisation' (2016) 10 Crim LP 367, 378.

[23] 'Physical' here means the same as in a dictionary: relating to the body, material existence, material things or the sciences dealing with matter and energy (such as gravitational wave), rather than psychological or spiritual.

[24] In *R v Ireland* [1998] AC 147, the House of Lords held that where A made repeated silent telephone calls to B, and B suffered psychological damage (illness) because of that, B could be said to have suffered 'bodily harm' for the purposes of the criminal law.

Setbacks to these interests can be objectively analysed. In particular, tangible capacities include mental health and with it the ability to address certain problems and situations. Psychiatric injury or mental illness may be caused by 'a sudden assault on the senses' in the sense of 'shock' or by 'a more drawn-out process'.[25] Harmful mental disorder or illness – even if cannot be subjectively sensed by the victim himself when he is deprived of his mental functioning – can be objectively assessed by medical professionals. This judgement is itself sufficient to reach a conclusion of harm. In contrast, unpleasant feelings generally are not objective setbacks that exist independently of the individual subject's own awareness. They are felt instantly.

In sum, the 'harm' in the harm principle does not include purely emotional setbacks, but encompasses all objective setbacks to all physical interests. In the particular context of my account of public order as a protectable interest, this means that harm in public order should firstly be understood as objective disruptions to physical interests in life order.

In order to develop this account, it is necessary to determine the kinds of order interests that are physical interests for the purposes of the harm principle. The objects of convenience and comfort in civil life include physically-visible facilities and places, invisible general conditions and information and external life peace (that is neither material nor energy but still physical). Physical inconvenience and discomfort is a kind of harm. Mobbing, riot or affray in public objectively interferes with people's convenient use of a public place or facility, causing obstruction etc., and thus is obviously harmful disorder. The harmful dimension of disorderly begging or loitering will be examined in chapter 4. In this physical paradigm of harmed interests, Feinberg's 'disliked but not harmful' experiences should be re-examined.[26] For example, non-painful physical unpleasantness, e.g. chills, stiffness, extremes of heat and cold, may be caused by public order crimes which are harmful to physical life comfort.

Secondly, the requirement that a setback can be objectively analysed means that 'mere sensuous assaults'[27] – or affronts to physical senses – such as visual discomfort from seeing clashing colours, auditory discomfort from nails scratching loudly across a slate tablet or a portable radio emitting screeching sounds at maximum volume,[28] should be re-examined as

[25] See Scottish Law Commission, *Discussion Paper on Damages for Psychiatric Injury* (Scot Law Com DP No 120, 2002) 2.
[26] See *HTO* 46-49.
[27] *OTO* 15.
[28] Ibid 10-11.

harmful disruptions of life order. They all objectively set back physical comfort in general conditions of life. Noise harms us by its objectively measurable physical character of sound, volume or intrusiveness.[29] Stenches, as another form of physical nuisance, are harmful affronts to olfactory comfort. As will be argued in the next part on offence, these affronts to senses do not constitute offence for the purposes of the offence principle.

b. Legally Recognisable Setback

The above objective setbacks to interests should be legally recognisable i.e. they should be clearly and consistently identifiable in legal practice, otherwise ambiguity and arbitrariness conflict with due process and fair warning.[30] In the absence of any recognisable setback to protectable interests, there should be no enactment of offences against public order.[31]

Setbacks to interests should be recognised in a special way when they are factually causal phenomena.[32] To set back an interest 'is to reverse its progress, to put it in a worse condition than it was formerly in'.[33] We need, therefore, to find a starting point or baseline to analyse and explain the direction of advance or retreat.[34] The counterfactual baseline should be adopted: the interest is set back when the subject is worse off regarding well-being than he would have otherwise been had the act not occurred.[35] The baseline of the physical life conditions specified in chapter 1 can be consistently identified. For example, it is claimed that environmental laws exist either to 'further the public health and safety' – or to 'protect the environment itself, for its aesthetic, recreational and other values'.[36] Here, infringing on people's life convenience and comfort by setting back an aesthetic or recreational condition of the environment can be recognised as harmful disorder. The baseline of such a life condition can be identified by environmental measurements. In short, to objectively set back

[29] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 59.
[30] Fair labelling requires the 'harm' denounced be differentiable in types and degrees. See *BOP* 127. This requirement cannot be fulfilled if the setback itself is not consistently identifiable.
[31] For example, on the effect of the common injury of public nuisance, four questions should be answered: '(1) injury to whom (or to how many)? (2) what type of injury? (3) how great an injury? (4) for how long?' See the Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010), paras. 2.19-2.35.
[32] See M Zhang, *Preliminarily on Legal Interests* (CUPLP 2000) 165.
[33] *HTO* 53.
[34] Ibid.
[35] See Thomas Søbirk Petersen, 'Being Worse Off: But in Comparison with what? on the Baseline Problem of Harm and the Harm Principle' (2014) 20 *Res Publica* 199, 208.
[36] See Daniel E Hall, *Crminal Law and Procedure* (6th edn, Delmar, Cengage Learning 2012) 223.

public order is to render life inconvenient or uncomfortable by influencing a baseline of a condition of an interest.

Disruptions of public order can, however, sometimes be unclear. A notorious Taiwan case was when a protesting student who threw a slipper at the 'premier', which fell a meter away from him, was charged with having violated section 85 (1) of the *Social Order Maintaining Law* ('using obviously inappropriate language or behavior towards an official on duty, although it does not reach the degree of violence or insult') – and her lawyer argued that the law should not protect official authority in itself (the quality of having others' belief and the freedom from doubt).[37] Can setbacks to the official authority be recognised as harming public order? If yes, how should the baseline of the interest be identified? If setbacks to the official authority are not recognised as harming public order, is there another recognisable setback to a specific public order interest?

I will argue that because setbacks to abstract collective interests such as official authority are difficult to recognise legally when in circumstances in which it is difficult to identify the baseline of the interest, setbacks to them do not constitute harm (to public order). However, the conduct which has an impact on authority or administration in some cases may involve recognisable setbacks to a public order interest of a type not specified in chapter 1.

To identify a baseline of a condition of an interest such as the convenient use of a public place, we need firstly to find an embodiment or representation of the interest – for example, a public place such as a public square – and then identify a condition of this embodiment, such as its spacious capacity, and finally identify the baseline of the condition – such as the original capacity before the harmful conduct – to determine whether there is a setback. Therefore, the articulation itself of interests should not be obscure, otherwise the interest 'is certainly unenlightening'[38] – and its setbacks are 'not preventable as a practical matter by the law'.[39] For a collective interest such as respect for official authority, the specification of relevant setbacks is difficult and arbitrary because there is no further embodiment or representation of the interest.[40] That is, the setbacks cannot be presented by ascertaining a baseline of a condition of an influenced or changed object such as a public facility, place or

[37] See Wenlei Ding, 'Female Student Fined for Throwing a Slipper to Taiwan Premier, Appeal Denied' Chinese New Site (Beijing, 27 April 2014) <www.chinanews.com/tw/2014/04-27/6109978.shtml> accessed 29 May 2018. Assault is not criminalised in Taiwan.
[38] *HTO* 56.
[39] Ibid 62.
[40] See Yongqian Wang, 'On the Criminal Law Protection of Collective Legal Goods' (2013) 4 *GL Rev* 67, 75, 78.

environmental element. The affected official authority is not a specific embodiment itself. Even if it were, it is difficult, if not impossible, to clearly determine the original authority of an official position or organisation to consistently recognise relevant setbacks. In short, setbacks to collective goods such as authority itself are too obscure and arbitrary to measure, and so cannot be recognisably harmed. The harm principle thus should not recognise social harm to a collective good e.g. official authority as a justification for criminalisation.[41]

That said, conduct which has an effect on such collective goods may involve recognisable setbacks to physical public order interests. Chapter 1 identified public order as life convenience, comfort and peace in general and set out six typical life order interests. There are other specific life order interests, setbacks to which may also be recognised as harm to public order. To return to the example of throwing a slipper at the 'premier', the conduct can be perceived as causing or risking disruptions to the continuation of the civil life activity at which that person is speaking.

Persistently defying police order by, for example, repeated vandalism or naked rambling, leads to another question of how affecting legal authority or policing administration might disrupt public order. Persistent vandalism not only harms the convenient and/or comfortable use of a public facility or place, but also disrupts administrative work. That is, the conduct may cause not only the harm to the public, but its persistence forces the public authority to devote resources to its prevention, thus disrupting the work of the agency. Can this disruption, therefore, be seen as another kind of harm to public order? This question is even more complicated when we consider the example of naked rambling in which the obvious criminality is offence to others, but the further criminality is a risk of harm:

> … the applicant's arrest, prosecution, conviction and imprisonment can be seen to have pursued the broader aim of seeking to ensure respect for the law in general, and thereby preventing the crime and disorder which would potentially ensue were the applicant permitted to continually and persistently flout the law with impunity because of his own personal, albeit sincerely held, opinion on nudity.[42]

For the naked rambler's conduct to amount to a public order crime, it must recognisably set back a public order interest. The decision of the European Court of Human Rights, from

[41] Social harm has been rejected as a useless circular argument – see *SCL* 64.
[42] *Gough v The United Kingdom* (2015) 61 EHRR 8 [158].

which the above quote is taken, was not based solely on the need to protect respect for law: the naked rambling itself occasioned alarm to others and thus its discontinuation by the police prevented offence, while *the persistence* of such behaviour may provoke harmful disorder or crimes, and so its discontinuation may have prevented harm. Whether there is a normatively unacceptable risk of offence or harmful disorder, to be prevented by the specific policing activity, is a problem of imputation, to be discussed in the next chapter. Here, I will assume that the risks associated with the behaviour are normatively unacceptable – and therefore that the specific policing activity in question is a civil life activity to be protected from disruption.

Defying public administration can recognisably set back a physical public order interest – specifically the smooth continuation of a specific policing activity. Public administration has the social function of protecting various interests of the public and thus has its own value in maintaining the agency's smooth continuation of work or activities.[43] Persistent defiance of policing causes not only a risk of alarm, disorder or crimes, *but also harmful* disruption to the specific police activity of preventing the risk of alarm, disorder or crimes. If people do not cooperate with the public agency by, for example, disregarding police warnings to disperse,[44] or entering officially banned or restricted areas,[45] the specific policing activity, as a civil life activity, is recognisably disrupted.

Similarly, reporting false information to a public agency causes difficulties for that public agency in organising its work. A false allegation to an emergency service generally wastes or diverts personnel or resources. A false statement to any person who may wrongly believe they need help from an agency not only causes a risk of offence to the victim, but also a risk of harmful disruption to the activities of the agency.[46]

In short, abstract authority or administration itself cannot be recognisably set back, but the smooth continuation of a specific administrative activity aimed at the prevention of offence, disorder and crimes can be recognisably disrupted. The activity is a civil life activity and

[43] Public disorder, if left uncheck(ed), seems possibly or even likely to threaten personal and property safety *and* it was historically associated with a power to disperse. See Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008) 278.
[44] See Anti-Social Behaviour Act 2003, s 30(4).
[45] See Chinese policing law, s 50(4).
[46] See Summary Offence Act 1981 (NZ), s 24. Threats may disrupt civil administration activities, see Crimes Act 1961 (NZ), s 307A(2)(c).

needs to operate without resistance or disturbance. This is important in identifying the scope and limits of some public order crimes.[47]

(iii) Normative Setback

Although we can factually recognise an objective setback to a physical interest, this simple harm would not necessarily be normative harm for the purpose of the harm principle. Feinberg argues that in the case of a non-normative setback to interest (simple harm), if it is also indefensible (unjustifiable and inexcusable), then the harm is wrongful.[48] So for Feinberg, there are three separate elements of harm – 'harming [in the sense of setting back an interest], wronging, and being at fault'.[49] Wrong is 'narrow' and 'normative' harm.[50] I will argue that a normative setback must be both wrongful (unjustifiable) and culpable (inexcusable), but I do not discuss culpability here. An objective setback must be normatively wrongful to limit the scope of harm in public order.

There can be different possible approaches to the wrongfulness of harm. It has been argued that balancing conflicting interests is inherently not a part of determining harm.[51] But another approach is to argue that wrongful harm is simple harm that cannot be justified by a counter-interest. Invasions of interests 'might well inflict harm in the non-normative sense of simple setback of interests' – and the existence of objective harm to a physical interest is itself sufficient to presume the existence of a wrong, but the harm may be 'justified by the priority rules' so as not to be a legal wrong.[52] The wrongfulness is considered in the balancing test – reasoning in the concept of being 'bare[ly] wrongful' – the reasons to do it being defeated by those not to.[53] The opposed interests of the parties to an activity are to be balanced in deciding whether the setback is wrongful: how vital these interests are; the degree to which each is reinforced by other interests; and the inherent moral quality of each.[54]

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[47] This is a way to justify the criminalisation of obstructing a police officer in the execution of duty (Police Act 1996, s 89(2)). The criminalisation of obstructing emergency workers (Emergency Workers (Obstruction) Act 2006, s 1) should be similarly justified. In Chinese Criminal Law, disrupting (specific) public service/function is the first crime against public order (s 277).

[48] See *HTO* 34.

[49] See Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offence to Others' (1986) 84 Mich LR 700, 702.

[50] See *HTO* 33-35.

[51] See Steven D Smith, 'Is the Harm Principle Illiberal?' (2006) 51 Am J Juris 1, 39-41. The problem of wrongfulness may not be just the absence of a recognised justification, but broader than this (involving assessments of permissible conduct in civil order). Here I am replying to Feinberg's argument of justification, not bringing in a new perspective of civil order, although this idea is really worth trying in another writing.

[52] See *HTO* 35.

[53] See J R Edwards, A P Simester, 'Wrongfulness and Prohibitions' (2014) 8 Crim LP 171, 171.

[54] See *HTO* 204-06. Feinberg says some interests are inherently unworthy such as the interests of peeping tom or sadist (see *HTO* 205-06). However, it is not a problem of immorality, but of generality. As he recognises

This normative wrongfulness of the objective setback concerns 'larger debates in ethics, law and politics' and 'larger social, political, cultural and historical factors'.[55]

Wrongfulness thus concerns itself with justifications. When the defender harms the attacker, the setback to the attacker's personal interests is not wrongful because of the justification of self-defence. Excuses that affect the actor's culpability or fault may not be relevant to whether the harm is wrongful. Feinberg has articulated 'harming as wronging' separately in chapter 3 of *Harm to Others*.[56] But as von Hirsch notes, Feinberg 'briefly lists the elements of culpability… then he has nothing more to say about these elements… Culpability must be addressed separately to have the visibility that it needs for adequate analysis'.[57] For example, attacks by an insane person or a child are still wrongful, unjustifiably violating others' personal rights. In such cases, those attacked can justifiably defend themselves; whether the actor can be excused is a separate question.[58]

In the area of public order, therefore, not all factual disruptions of order are normatively wrongful. There may be a good reason to interfere with others' smooth life – the normal use of a life facility, life place, regular enjoyment of general conditions, acquisition of information or general enjoyment of peace. This reason is about actions 'reasonably to be expected in the normal course of life' e.g. exercising freedom of expression or freedom of assembly and association.[59] While major events may affect an individual's normal use of a public place such as a square or a park, this factual harm may be justified by public interests in exercising, for example, the right to protest or freedom of assembly – meaning that there is no wrongful harm.[60]

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in his accompanying note 8, there is difference between protectable interests and mere wants. Some rare persons' inclusive ends in their own chosen happiness (see *HTO* 56) – such as the naked rambler's belief in neutrality of public nudity – are not legally protectable because the law can and should only cater to generally/commonly recognised categorical interests, rather than subjectively claimed wants or ends, thus they naturally cannot compete with protectable interests in privacy, dignity etc.

[55] See Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 J Crim L & Criminology 109, 140, 183. That is, wrongfulness engages with political and legal culture's accounts of rights' value. See Hamish Stewart, 'Harms, Wrongs, and Set-backs in Feinberg's *Moral Limits of the Criminal Law*' (2001) 5 Buff Crim L Rev 47, 67.

[56] This conception of wrong focuses on 'other-regarding violations'. See Antje du Bois-pedain, 'The Wrongfulness Constraint in Criminalisation' (2014) 8 Crim LP 149, 149-60.

[57] See Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offence to Others' (1986) 84 Mich LR 700, 702.

[58] See R A Duff, 'Harms and Wrongs' (2001) 5 Buff Crim L Rev 13, 19.

[59] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) paras 3.60-3.61.

[60] Particularly on the defenses of human rights in public protests, see the legal guidance of prosecution: CPS, 'Public Protest' <http://www.cps.gov.uk/legal/p_to_r/public_protests/#a05> accessed 29 May 2018.

Assessing the opposed interests of two sides is complex,[61] and the process of balancing opposed interests should be a structured one,[62] as will be further shown in applying the harm principle (see chapters 3 and 4). In this case, the justification offered by the actor may not be compelling enough to override concerns of disorder – and thus insufficient to resist the imposition of conditions or prohibition in cases of e.g. public processions or assemblies.[63]

To sum up, the harm principle should focus on objective, recognisable and wrongful setbacks to physical interests. A good reason to consider criminalisation exists when there is an objective, recognisable setback to a physical-style protectable interest without a competent justification. This structured conception of harm can potentially limit the general scope of harm in public order crimes. This concept will be further elaborated in chapter 3 (fair imputation) and applied in analysing the criminalisation of specific public disorder cases such as begging and loitering in chapter 4.

III. OFFENCE IN PUBLIC ORDER CRIMES

This part will examine the concept of offence and how it is important in limiting criminalisation in public order. Beginning with a literature review which sets out the key factual and normative elements of the concept, it will explain in detail how 'offence' might be defined in these two dimensions for the purposes of public order law.

(i) Introduction of Key Elements of Offence

Many types of conduct might be considered offensive. The problem in this area is that defining offence in terms of the reactions of others may be overly broad – and it may be proper to preserve some space that allows individuals to challenge the scope of criminalisable offence. These issues can be particularly acute in relation to public order as it is frequently in public space or in relation to the forms of public conduct where these disputes occur.

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[61] For civil law 'defences in a nuisance action' that can be illuminating to criminal defenses, see John Bates, William Birtles and Charles Pugh, *Liability for Environmental Harm* (Tottel Publishing 2004), 22-25. On the other side, governments may administer public places such as streets to promote mobility and city prosperity (see Ron Levi, 'Loitering in the City That Works' in Markus D Dubber and Mariana Valverde (eds), *Police and the Liberal State* (Stanford General 2008) 199.

[62] For opposed interests in a nuisance activity, the balance of relative reasonableness to respective possessor, see Michael M Berger, 'Nobody Loves an Airport' (1970) 43 S Cal L Rev 631, 637-38.

[63] See Public Order Act 1986, ss 12-14A.

One approach is to regard offence as sufficing in itself to justify criminalisation. Feinberg argues that 'it is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offence to persons other than the actor and would be an effective means to that end if enacted'. [64] But Feinberg's account seems to equate offence with affronts to sensibility.[65] According to his account, the greater the scope of people who regard the conduct as offensive, the weaker the case to allow it.[66] More importantly, it is not clear how exactly the scope of affronts should be limited or their seriousness judged.

In contrast, von Hirsch does not consider the offence principle to be separate from the harm principle and suggests that immediate offence and 'eventual harmful consequences' be conditions of criminalisation.[67] He provides 'more a set of (valuable) tools for applying the Harm Principle in the context of offensive conduct rather than a truly distinctive principle'.[68] That is, he requires that criminalisable offence must risk remote harm such as prejudice to a person's chances of employment or actual violence in the case of racial insult, or reactive harm such as restricted access to and enjoyment of public places in the case of public exhibitionism.[69] The reason is that offence tends to be insufficiently serious to justify criminalisation by itself, particularly as freedom of expression requires a degree of social tolerance.[70] I do not agree that to justify criminalisation, offence must risk harm. This is not, however, to argue for the criminalisation of all offensive conduct. Such criminalisation should be limited to serious offence.[71] As argued in the next chapter, the imputation of remote harm of offence is not as obvious as assumed by von Hirsch.[72] As for freedom of expression, it does call for some social tolerance, but I will suggest considering it in terms of limiting wrongful offence (see section (iii)), rather than as a factor inherent in determining the seriousness of the offence itself.

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[64] *OTO* xiii.
[65] See *CHW* 95; J D Hodson, *The Ethics of Legal Coercion* (D Reidel Publishing Company 1983) 144.
[66] See J Feinberg, ''Harmless Immoralities'' and Offensive Nuisance' in Care and Trelogan (eds), *Issues in Law and Morality* (The Press of Case Western Reserve University 1973), 102.
[67] See Andreas von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Crim LP 245, 252.
[68] James Chalmers, 'Review of *CHW*' (2013) 17 Edin LR 279, 280.
[69] See *CHW* 114-18.
[70] Ibid 118, 120-22.
[71] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 78. In the cases of naked rambling and the Taiwanese insult (II(ii)b), I did not argue that offence should necessarily risk remote harm if it is to be criminalised, Remote harm might be imputed to aggravate the offence and that is another problem addressed in the next chapter (II(ii)b).
[72] See *CHW* 115-17. It is important to note that in Public Order Act 1936, s 5, there *was* 'prohibition of offensive conduct (threatening, abusive or insulting words or behaviour) conducive to breaches of the peace' – while in Public Order Act 1986, ss 4A and 5, the target is (likely) harassment, alarm or distress.

More importantly, the seriousness of offence is not a problem for present purposes. Determining the scale and threshold seriousness of criminalisable offence is mainly a question to be addressed in further studies (see chapter 5).[73] Before assessing the seriousness of offence, it is necessary first to establish the qualitative criteria for identifying, and assessing the scope of, 'offence'. 'Too much legal commentary purports to evaluate something called "the offence principle" without first clarifying the nature of offence itself as 'the central term in the inquiry'.'[74] The common feature of all modes of offence is the causing of an unpleasant inner state that is inconvenient for the enjoyment of work or leisure.[75] This unpleasant state sets back an interest:

> 'If harm is to be understood as a setback to one's interests or one's well-being, there is no good reason to exclude unpleasant feelings from the idea of harm. For unpleasant feelings erode well-being, and one *has* an interest in not experiencing them.'[76]

In this quote, Tadros explicitly argues that offence sets back a protectable interest. Although he makes offence part of the harm principle that includes setbacks to all interests, this may be on the hypothesis that 'unless a rather special and implausible objective list theory of well-being is accepted, the Offence Principle should be subsumed in the Harm Principle'.[77] If such a list theory of interests is arguable, we should separate offence from harm and not regard all setbacks to interests as constituting harm. Feinberg, in the first chapter of *Harm to Others*, defines harm as setbacks to interests – distinguishes between harms, hurts and offences – and finally introduces the concept of an interest network and identifies the object of harm as welfare interests.[78] However, in *Offence to Others* he does not indicate what interests are legally protectable against offence. Harm and offence are two different evils that set back different protectable interests. I have argued for a list of physical conditions as objects of harm in Part II(ii)a and will now argue for non-physical conditions as objects of offence.

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[73] It is claimed that no social tolerance is suggested 'if it gets to the point of adversely affecting many people's lives', see A P Simester, Andreas von Hirsch, 'On the Legitimate Objectives of Criminalisation' (2016) 10 Crim LP 367, 371. This seems to suggest that public offence is intolerable. But it is still possible to regulate offensive conduct which only affects one individual. Psychological affront itself can affect people's life in some way, and there can be corresponding criminal regulation, at least in the name of other regulatory or administrative violation with a lesser label and sanction.

[74] Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB* 94.

[75] See *OTO* 15-23.

[76] Victor Tadros, 'Harm, Sovereignty and Prohibition' (2011) 17 LT 35, 39 (emphasis added).

[77] Thomas Søbirk Petersen, 'No Offence! On the Offence Principle and Some New Challenges' (2016) 10 Crim LP 355, 355.

[78] See *OTO* 55-61.

There are, of course, other key elements of offence, although the exact number and understanding of these elements might well be different.[79] This part will discuss how the concept of 'offence to others' should be interpreted and applied to offensive conduct. I will firstly define offence as a factual setback to inner peace. Secondly, this factual account of offence will be normatively examined by looking at when the offence is wrongful.

(ii) Factual Setback

I will argue in this section that as a factual setback to a protectable interest, offence is a breach of inner peace that is based on and mediated by normative sensibilities, the breach being caused by communication. I will then examine how these sensibility and communication mechanisms of offending others can shape the scope of offensive conduct.

a. Inner Peace's Mediated Affront

Feinberg defines offence as a 'disliked state of mind',[80] which might be taken to imply that liked states of mind are the interest to be protected from offence. However, he states that 'there is (typically) no interest in the avoidance of' 'disliked states of mind',[81] while asserting that 'generalized' and minimally necessary 'welfare interests', including 'emotional stability, the absence of groundless anxieties and resentments', once 'blocked or damaged', are 'seriously harmed'.[82] I will consider whether momentary anxiety or resentment is a harm to emotional stability or is an offence to something. The concept of welfare interests is understood in 'an interest network' as having 'the characteristics of bare minimality, stability, and durability'.[83] Thus emotional stability's setbacks are harm to a welfare interest only when they are sufficiently continuous; momentary interference does not constitute harm. However, it is still not clear what kind of interest is set back by a momentary interference.

In Part I(ii)(a), it was argued that the scope of the harm principle is limited to physical interests. Here, for the purposes of the offence principle, non-physical inner peace is the

[79] See OTO 2; Andrew von Hirsch, 'Injury and Exasperation: An Examination of HTO and OTO' (1986) 84 Mich LR 700, 709-14; *CHW* 95-98.
[80] *OTO* 2.
[81] *HTO* 216.
[82] Ibid 37.
[83] See *OTO* 55-57.

interest set back by momentary interference.[84] As argued in the previous chapter (IV(ii)a), every individual requires protection not only of their physical interests, but also the non-physical conditions required for smooth life. Inner peace is a stable inner state without unreasonable annoyance, distress, alarm, fear, etc. This is the interest people have against offence. If offence does not setback this socially founded and recognised interest (inner peace), the offence principle would be thought of as hollow and thus unable to bear the substantive wrongfulness of offence.[85]

Inner peace is breached on the level of internal sensibilities. The offence principle sees '[conduct] norm violations as legitimate sources of punishable offence'.[86] So the internal mechanism of how offence occurs is that the a person receiving a communication, by virtue of 'normative sensibilities' of safety, comfort and values,[87] experiences a reaction to the communication, in the form of certain recognised mental states – fear, revulsion, disgust, shock, shame, embarrassment, anxiety, annoyance, boredom, frustration, resentment, humiliation or anger, as listed by Feinberg.[88] These sensibilities are based on and thus mediated by 'certain beliefs about an otherwise self-concerning action in order for the effect to be generated'.[89]

This sensibility mechanism of offence can serve as an analytical framework for understanding the relationship between morality, decency, religion and public order, or rather when inner peace as an order interest can be found in and supported by *social norms* of morality, decency and religion.[90] In particular, it can provide a possible means of understanding that a gross violation of morals and decency in public constitutes an offence,[91] and a possible means of assessing the claim that the criminalisation of bestiality and of

[84] In this sense, defining harm as setbacks to 'interests' is not sufficiently precise since interests here should be understood as *all* the conditions needed for well-being of individuals. The object of offence needs to be separated from that of harm.

[85] See *RNTC* 196-98.

[86] See Larry Alexander, 'The Philosophy of Criminal Law' in Jules L Coleman and others (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 864.

[87] Andwew von Hirsch and AP Simester, 'Penalizing Offensive Behavior: Constitutive and Mediating Principles' in *IROB* 123. For example, 'we are taught to be disgusted by given stimuli through social referencing – that is, by watching and mimicking the reactions of adults.' Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB* 106.

[88] See *OTO* 11-13.

[89] M J Mulnix, 'Harm, Rights, and Liberty: Towards a Non-Normative Reading of Mill's Liberty Principle' (2009) 6 J Mor Phil 196, 210.

[90] It is a legal policy for political values (drawn from morality, decency or religion rules) to be transformed into legal categories (such as sensibilities of inner peace). See Mauro Zamboni, *The Policy of Law: A Legal Theoretical Framework* (Hart Publishing 2007) ch 4.

[91] Wolfgang Wohlers, 'Criminal Liability for Offensive Behaviour in Public Spaces' in A P Simester and others (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014) 249.

cruelty to animals is justified by virtue of the offensiveness to social values associated with such conduct.[92]

As argued in Part II(ii)b, criminal law can and should only directly protect specific and substantive legal interests (such as inner peace) – rather than an abstract collective good (such as a social value). However, 'some protection against offensive immorality may be achieved as a by-product of legislation that aims directly at something [such as affronts to sensibilities of inner peace] other than immorality'.[93] This is because of the normative sensibility that connects morality and the law protecting inner peace. Inner peace is based on and mediated by sensibilities – and sensibilities may be in line with morality. When immoralities take place in public,[94] they may result in affronts to sensibilities that are in accordance with morality, thus breaching others' inner peace.

Sensibilities may also align with decency. Decency is the quality of following accepted social propriety in public occasions.[95] Mill believed that self-injury, if done publicly, was a violation of good manners, and this indecency caused offence to others and might rightfully be prohibited.[96] He seems here to exceptionally accept offence based on indecency as a reason for prohibition.[97] In this case the offence is affronting others' sensibilities by indecency. For example, conducting any indecent act in any place intending to insult or offend any person is a crime of 'disorder' in Canada.[98] Another example is the notorious naked rambler, who was punished for fear and alarm resulting from 'his naked state in public'.[99] Further, the State may protect people from inadvertent offensive displays of sexual behaviour and eliminate cruelty to animals.[100] Offensive displays cause offence to the inner

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[92] See *R v Malmo-Levine* [2003] 3 SCR 571 (Supreme Court of Canada).

[93] Louis B Schwartz, 'Morals Offenses and the Model Penal Code' (1963) 63 Colum L Rev 669, 673.

[94] 'Publicness rather than immorality is the heart of the concern.' David Brown, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press 2015) 83. In this sense we can support a suggestion of the1957 Wolfenden Report of 'a realm of private morality and immorality which is, in brief and crude terms, not the law's business'. See Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) para 61.

[95] Decency crimes refer to matters intending and likely to shock and disgust others. See *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010) para 3.21.

[96] See *OL* 108-09.

[97] 'Mill, however, did not distinguish harm from offense. He spoke of ''other-regarding'' and ''self-regarding'' acts.' Judith Andre, 'Review Essay / Regulating Offensive Acts' (1986) 5 *Crim Just Ethics* 54, 55. Specific disruptions of order by public duel can be identified. The indecent act could be offensive when the act happens in public and causes another unreasonable 'fear for his personal safety', or fear of 'unlawful violence'. Public Order Act 1986, ss 1 (Riot), 2 (Violent disorder), 3 (Affray), 4 (fear or provocation of violence).

[98] Indecent acts and nudity are a 'disorderly conduct' rather than 'offences tending to corrupt morals' in the code. See Canadian Criminal Code 1985, ss 173-174.

[99] See *Gough v The United Kingdom* (2015) 61 EHRR 8 [158].

[100] See *Commonwealth v Bonadio* 490 Pa 91, 415 A 2d 47 (1980).

peace of individuals, and cruelty to animals is offensive to others when it takes place in public.[101]

Religious doctrines are another set of social rules on which sensibilities may be based. Some 'crimes against religion' still exist for a reason such as the apprehended offence to others' sensibilities of inner peace. Blasphemous libel (or blasphemy) is an example of a crime against religion that still exists in some countries such as New Zealand. Section 123 of New Zealand's Crimes Act 1961 punishes blasphemous libel – though a bona fide opinion on a religious subject that is expressed in decent language cannot constitute a blasphemous libel.[102] That assessing good faith and decent language is deemed to be 'a question of fact' in this law suggests that the crime exists not so much to uphold any religious value but a sociological interest. It is not the biblical authority that is to be protected. Rather, it appears that the inner peace (of the public) is being protected here. Affronts to sensibilities at the time of the conduct may be linked to public order and thus be regulated criminally. If 'published matter' in bad faith or in indecent language is not curbed, people in good faith may be reasonably offended. In this case the offence to the sensibility of the inner peace of the public arises from the indecency in civil life.

In short, so-called offenses against morality, decency or religion should either be classified as public order crimes (breaching others' inner peace) – or decriminalised if they cannot be justified as public order crimes and when no alternative justification for criminalisation exists.[103]

Having shown how offence is related to social norms, it is necessary to consider how the scope of offensive conduct is further limited. It follows from the mechanism of affronting sensibilities based on social norms that offence does not include affronts to senses or setbacks to other physical interests. Feinberg believes 'offence' to be all 'universally disliked

[101] Private cruelty to animals cannot, therefore, be criminalised on the basis of the offence principle; an alternative justification for criminalisation will be required.

[102] The statute provides: '(1) Every one is liable to imprisonment for a term not exceeding 1 year who publishes any blasphemous libel. (2) Whether any particular published matter is or is not a blasphemous libel is a question of fact. (3) It is not an offense against this section to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion whatever on any religious subject.'

[103] In a modern democratic society, respect for morality and religion is no longer considered a good reason to criminalise such conduct as a separate crime category. See T Hornle, 'Offensive Behavior and German Penal Law' (2001) 5 Buff Crim LR 255, 278. Supporting blasphemy as a crime against religion is unrealistic and unjustified in a democratic multi-faith society. See Kimmo Nuotio, 'Theories of Criminalisation and the Limits of Criminal Law: A Legal Cultural Approach' in R A Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 251. The English crime of blasphemy was abolished by statute in 2008, and Scots law should do likewise. See *SCL* 446.

mental states',[104] and even to include 'affronts to the senses'.[105] However, most of the behaviour targeted by ASBOs – e.g. noise – has little to do with offence.[106] Noise is a physical nuisance. This is 'distinguishing offence from [physical] nuisance'. [107] Offence is a nuisance to life not because of any physical characteristic, but of the affront to inner normative sensibilities.[108] It is in this respect that affronts to senses are immediate, while affronts to sensibilities are mediated (by inner normative processing of communication) – the former 'can of course be harmful'.[109] Audio or visual discomfort is an immediate harm to physical senses, rather than a mediated offence to sensibility.

Nonetheless, harm, if instantaneously perceived by the victim, can simultaneously cause offence.[110] A noise may be a harm to physical comfort; while at the same time leading to annoyance (if inconsiderate) or fear (if threatening), just as an assault primarily causes harm and secondarily causes offence. If a person only recognises the second evil caused by the conduct, he may characterise the conduct as offensive.[111]

b. Communicative Affront

After articulating the inner sensibility mechanism of offence, to further recognise how inner peace is offended, the external communication mechanism of offence 'to others' should be assessed. Simester and von Hirsch argue that offence is communicative and expressive.[112] The offender communicates with the affected by his conduct or language. It is the communication that results in offence.[113] This direct external offending mechanism is an absolute requirement because, for the actor to be responsible for the offence, it should be the

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[104] See *OTO* 1.
[105] Ibid 10.
[106] Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB* 95.
[107] *CHW* 104-05.
[108] This is why 'the source of the dislike makes it a harm [offence exactly] in one case and not in the other'. Jonathan Wolff, 'Mill, Indecency and the liberty Principle' (1998) 10 Utilitas 1, 5.
[109] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 59.
[110] 'Offended states of mind … are sometimes symptoms or consequences of prior or concurrent harms.' *HTO* 49.
[111] Ibid 60-61.
[112] See *CHW* 111, 120.
[113] There is criticism of the communicative feature (in the sense *personal* offence) whereby one can take offence for others – pornography may say something about, rather than to, women, and a racist speech may be delivered to an all-white audience, rather than directly to a black victim. See Tony Ward, *'Review Crimes, Harms, and Wrongs'* (2012) 1 Aus & NZ J Crimino 138, 138-139. It depends on what is said about women in pornography to determine whether it is still direct offence to the male viewers. Racist speech to an all-white audience can still be directly offensive to the audience. In the 'Danish cartoon crisis', 'the cartoons were considered offensive by many Muslims and non-Muslims, for many reasons' (Thomas Søbirk Petersen, 'No Offence! On the Offence Principle and Some New Challenges' (2016) 10 Crim LP 355, 357). One reason may be that all people share some common basic values and thus all people are directly offended.

actor who initiates the communication to another. The communicative feature of offence determines the cases that can offend for the purpose of the offence principle, and the cases that cannot.

Firstly, the communicative mechanism of offence determines the possible scope of offensive conduct in general. Feinberg's 'bus journey' experiment is said to evidence his idea that the criminal law should only be concerned with offence when that offence occurs in public.[114] However, although 'there are norms about proper conduct in public that are sources of offense',[115] 'its being of public concern is a question of whether it harms [or offends] others'.[116] Receiving a communication is 'part of the very reason for objecting to the conduct'.[117] Private conduct directed at *another* person, but without any other member of the public being present, can still be offensive to the person at whom the conduct is directed and thus legitimately criminalised. For example, 'one-on-one' offensive or false messages are still criminally punishable despite the wrongful conduct lacking any public element.[118] It seems wrong to conclude that offence must be experienced in a public space in order for the community as a whole to have a substantial interest in regulating it,[119] although offensive conduct against public order may have to take place in a public space for criminalisation to be justified.

Publicness has many possible definitions. Here, I limit 'public' to 'to others' in the context of offence. After identifying the possible scope of offence in general, it is necessary to identify the kind of offence that is relevant for public order. If the offence were to be a public order problem (see public indecencies and insults in chapter 5), the offended should comprise an unspecified person, many persons or one specified person in a public occasion – according to the standards of publicness set out in the previous chapter (III(i)c). However, not all kinds of public communicative affront is going to be public order related. For example, spreading false rumours might be offensive, but only a matter of private wrong (slander) – or a criminal wrong to an individual (libel) – or it might be a matter of public order (hoaxes). The distinction is whether the public inner peace is set back directly or as a sub-effect of harm (to reputation for example). In the case of slander or libel, the individual may be

[114] See *SCL* 85.
[115] Larry Alexander, 'Harm, Offence, and Morality' (1994) 7 Can JLJuris 199, 211.
[116] Jonathan Wolff, 'Mill, Indecency and the liberty Principle' (1998) 10 Utilitas 1, 6.
[117] Andrew von Hirsch, 'Injury and Exasperation: An Examination of HTO and Offence to Others' (1986) 84 Mich LR 700, 712.
[118] See Malicious Communication Act 1988, s 1; Telecommunications Act 1984, s 43(1).
[119] See J Tasioulas, 'Crimes of Offence' in *IROB* 151.

offended (distressed), but that is an incidental effect of the direct harm to reputation – while in the case of hoaxes, the direct effect is offence (alarm) to the public inner peace.[120]

Secondly, the communicative mechanism means mere thoughts of private immorality or knowledge after the fact cannot offend in the sense required by the offence principle.[121] Immoral conduct may be initially private but later become a matter of public knowledge and thus a public concern. However, the communicative mechanism of offence does not operate in respect of mere thought or knowledge. With the mere thought of private immorality, even if the immoral event were happening at the same time, there is no communication by the actor – in mere knowledge after the fact, the communication does lead to immediate offence, though there is no communication by the actor at the event. It is the imagination of the affected party, or the subsequent revelation, that leads to a loss of inner peace.

This mechanism excludes from the scope of the criminal law private conduct which is disliked by some sections of the community. That is, people do have a right to inner peace for smooth life, but offence from others' private behaviour cannot justify criminalisation because those 'others' do not communicatively cause the loss of inner peace. For example, same-sex sexual conduct in private,[122] private incestuous behaviour and private possession or use of cannabis should not be regulated via the offence principle.[123] In a Scottish case of breach of the peace, 'simulating sex with a bicycle in the locked bedroom of the hostel' did

[120] Admittedly, being publicly communicative may not be the exclusive feature of public offence, but that case exists in transmitting information that causes harmful mental breakdown or sets back the interest of secrecy or reputation.

[121] Knowledge after the fact is bare knowledge that 'neither [directly] sees nor hears' 'what other people do in private', see *SCL* 85. Feinberg considers this to be a problem of abnormal susceptibilities (*OTO* 33), again in the problem of profound offence (*OTO* 60).

[122] 'No harm [or offence] to the substantive interests of the community is involved in atypical sex practice in private between consenting adult partners.' See American Law Institute: *Model Penal Code*, s 207.5—Sodomy & Related Offenses. Comment <www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf> accessed 29 May 2018.

[123] These evil-less (neither harmful nor offensive to others) wrongdoing are also believed that they need not to be criminalised based on a utilitarian cost/benefit analysis of consequences of enacting and enforcing a prohibition. See Jonathan Schonsheck, *On Criminalisation: An Essay in the Philosophy of the Criminal Law* (Springer-Science +Business Media, B V 1994) 220-25.

not communicate offence[124] – in contrast to 'simulating sex with an inanimate object' in a public street or 'in front of a crowd of people'.[125]

After relating private immorality to the nature of offence in general, we need to consider cases involving a public element. Dealing with different kinds of public communicative affront is a more difficult question. For example, if the offence to the public were caused by third party' revelation of the private incivility, then the public offence leads to an imputation problem of remote offence (see the next chapter, V(i)b).

(iii) Normative Setback

Factual breaches of inner peace do not necessarily constitute normative offence. To further limit the scope of offence, this section will examine how the communication mechanism of offence may lead to a normative problem of offence and how this problem can be progressively approached.

Unlike physical harm, which could itself principally constitute the existence of a wrong, the determination of wrongfulness of offence is more complicated when the offence to others is committed by communication, with its frequent challenges being argued based on the reasonableness of the offensive conduct, mainly that the conduct is an exercise of freedom of expression. 'There is a conceptual link between offence and expression.'[126] This is how the communicative mechanism of offence may lead to a normative problem of offence.

There are different understandings of the wrongfulness of offence. Feinberg requires the caused offence to be 'wrongful' i.e. 'whenever an offended state is produced in another without justification or excuse'.[127] 'In this respect [of defining wrongfulness] there is a parallel with the harm principle.'[128] As I argued in respect of wrongful harm, wrongfulness should concern itself only with justification, while excuse only affects a further question of

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[124] See 'Bike sex man is placed on probation' *BBC News* (London, 14 November 2007) <http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7095134.stm> accessed 29 May 2018. But the accused was ultimately convicted. Whether there was a significant risk of his conduct being discovered by people entering his room is another problem of abstract risk addressed in the next chapter (IV(ii). It may have been determinative that cleaners were permitted to open residents' rooms (*BOP* 112), but he was at most reckless.

[125] See 'Bike case sparks legal debate', *BBC News* (London, 16 November 2007) <http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7098116.stm> accessed 29 May 2018.

[126] *CHW* 122.

[127] *OTO* 2.

[128] Ibid.

culpability. However, even for 'justification' Feinberg has not explicitly set out how 'unjustifiable' should be understood in determining the wrongfulness of offence.

In similar vein, others have argued that the wrong of offence should be seen in the feature of lack of consideration or disrespect for others, typically in cases of insulting conduct or exhibitionism.[129] According to this theory, emphasising this lack of consideration is an effective way of limiting the scope of criminalisation.[130] However, this unifying feature of 'a failure to treat others with due consideration and respect' is too obscure to consistently determine the scope of wrongful offence.[131] There is no specific approach to assess the due consideration and respect which should be taken in exercising freedom of expression. Among typical cases of wrongful conduct,[132] firstly, not all insulting conduct will be wrongful and worthy of criminalisation. Insulting 'particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents' is not prohibited or restricted in England.[133] To take another example, section 5 of the Public Order Act 1986 had previously also targeted 'insulting' conduct as do sections 4 and 4A, but this word was deleted by section 57 of the Crime and Courts Act 2013. The test of 'due consideration and respect' cannot provide a clear reason for this change. Secondly, not all public behaviours that pre-empt others' attention, such as exhibitionism, is wrongful.[134] Consider events such as naked bike rides.[135] How can the unifying but abstract idea of communicating disrespect and inconsideration clearly and consistently explain whether the offence in these cases is wrongful or not?

Identifying the wrongfulness of offence requires the development of a framework of balancing interests. The wrong of criminal conduct should be understood as an unjustifiable negation of the interests of others. 'A central premise for an adequate theory of criminalisation should be that the law must only regulate interpersonal relations.'[136] The view taken by the actor is therefore not enough to deny the wrongfulness of the offence. For example, 'unrestricted freedom of expression is neither essential of the quality of one's life

[129] See *CHW* 97-100.
[130] Ibid 95-97.
[131] Ibid 100.
[132] Ibid 97.
[133] POA 1986, 29J.
[134] See *CHW* 98.
[135] See W Noble, 'In Pictures: London's World Naked Bike Ride 2018', *Londonist* (London, 6 June 2018) <https://londonist.com/london/art-and-photography/in-pictures-london-s-world-naked-bike-ride-2018> accessed 15 June 2018.
[136] T Hörnle, 'Theories of Criminalisation (Comments on CHW)' (2016) 10 Crim LP 301, 307.

nor is it convincing as a moral right or as a legal right'.[137] Similarly, the right not to be offended is not absolute. For example, 'in the case of simple insulting, offensive remarks, freedom of speech can be of high importance as a possible justification'.[138]

However, the framework is complicated. Many mediating factors are relevant to the seriousness of the offence or to the reasonableness of the conduct, as Feinberg articulates.[139] Identifying two clear lists of factors affecting the wrongfulness/acceptability of offence, and to attempt to balance them, is a significant step. However, Feinberg's two lists of factors (see paragraphs below) that affects either the seriousness of the offence or the reasonableness of the conduct may be arbitrary: 'there is … no clearly enunciated rationale explaining why his mediating principles [i.e. factors] are given the particular weight and interpretation he would prefer'.[140] Moreover, the lists are too cumbersome to be applied consistently. I will argue that only some of the factors listed by Feinberg are relevant to a principled determination of wrong and that the lists should be restructured accordingly.

On the seriousness of an offence, firstly, the magnitude of the offence is relevant to wrong.[141] That is to be balanced with the value of the conduct. It includes, as Feinberg suggests, intensity, duration and extent.[142] But firstly, the meaning of 'extent' should be clarified: it is not the degree of the offensiveness, but the seriousness of the offence. A racist remark against a majority racial group is not 'more seriously offensive' conduct than one against a small racial minority.[143] However, the resulting offence may be more serious because of its greater extent – involving more people – if the intensity of the offence is the same. Secondly, duration and extent are mainly quantitative criteria, while intensity is essentially qualitative. Nonetheless, an assessment of qualitative intensity may need to consider the category of offence reaction (see chapter 5).[144]

Secondly, reasonable avoidability is, as Feinberg suggests, relevant to the assessment of wrongfulness.[145] This relevance is because of social toleration – there should be reasonable

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[137] Ibid 309.
[138] T Hörnle, 'Criminalising Behaviour to Protect Human Dignity' (2012) 6 Crim LP 307, 318.
[139] See *OTO* 34, 44.
[140] Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offence to Others', (1986) 84 Mich LR 700, 709.
[141] See OTO 26-31.
[142] Ibid 27-32.
[143] See Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990) 162.
[144] The seriousness may also consider the strategic timing (such as during important ceremonies that may affect intensity) – as well as frequency. *HTO* 46-47.
[145] See *OTO* 32.

toleration towards others' conduct most obviously by ready avoidance. Whether it is easy or difficult for the affected person to avoid the offence may affect the balance of interests of parties. When offence is easily avoided at no greater cost than the offence otherwise taken, there is no wrongful conduct.[146] However, when it is difficult to avoid the offence, the wrong is not excluded and should be further examined. For example, in a case of a Nazi party demonstrating in a 60% Jewish community,[147] 'the objective circumstances are such that the target group is inescapably exposed to that offence'.[148]

Thirdly, applying the *volenti non fit injuria* principle may result in the conclusion that there has been no setback to interest – or rather, no wrongful setback.[149] In cases where conduct has been agreed to, there is either no setback to interest – or this setback is not wrongful because the affected party has voluntarily assumed the risk of offence, thus justifying the actor's conduct.

Fourthly, abnormal susceptibility on the part of the affected person is also relevant.[150] When a reasonable person would not be offended, the actual reaction should be regarded as abnormal and no basis for a conclusion of offence. But when a reasonable person would be offended, but not as offended as an actual person was, the 'seriousness is to be discounted'.[151] Abnormality will not be analysed here because, as the name suggests, only in exceptional cases will this problem be relevant in the determination of wrongfulness. It will be analysed in detail in the next chapter (III) as an initial problem of fair imputation.

After considering the seriousness of the offence, the reasonableness of the offending conduct should be considered to determine the wrongfulness of the offence. The first factor of reasonableness is the personal importance of the conduct – that is, the extent to which the conduct was meaningful to the living and development of the actor.[152] This is to assess the importance in his whole interest network. Although the specific meaning and value belongs exclusively to the actor, it should be generally recognised by others as morally unproblematic,[153] e.g. the pursuit of truth, goodness and beauty, property, reputation and

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[146] 'Ready avoidability' is a threshold limit, see *CHW* 129.
[147] See *OTO* 86.
[148] Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Palgrave 2001) 22.
[149] See *OTO* 32-33.
[150] Ibid 33-34.
[151] Ibid 35.
[152] Ibid 37-38.
[153] Ibid; Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990) 166.

power. If the conduct were only seen as important by the actor, the meaning of the conduct is a subjectively arbitrary claim of the actor, not socially recognised as important, such as the naked rambler's personal value in expressing that public nudity is morally neutral[154] – or an individual's advocacy of the sexual freedom of school children.[155] The conduct is normatively of little personal importance in his network of interests – and so the personal importance cannot override others' protectable interest in avoiding offence. Further, extremism pursuits of violence, prejudice, hatred etc. are normatively of no personal importance.[156] In contrast, personal importance in some cases could mean fundamental human rights that would operate as a competent justification. Fundamental rights here correspond with welfare interests that are necessary for basic living.[157] Therefore, when the conduct – such as a beggar's exposure of deformity in seeking help has personal importance to the actor to the degree of fundamental human rights, the personal importance could override the interests of another person in avoiding unpleasant mental states.[158]

Secondly, social value, when high, could be a justification.[159] Social value in this context should be understood as referring to cases where the conduct is of 'social and political' value to other citizens.[160] Social value means the conduct is valuable for others' life and development, and thus its commonality of recognition is more obvious than that of personal importance. It means the personal importance is reinforced by others' relevant interests – in this respect the 'personally valuable conduct' is part of the activity of 'great deal of public value'.[161] Freedom of expression is of this quality of advancing other interests. Its social value can be sufficiently enough to serve as a justification. 'There exists a strong public interest in enabling such groups and individuals, outside the mainstream, to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.'[162] Even 'activities or modes of life that at first repel us might be worthwhile, although we would not engage in them ourselves'.[163] However, in

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[154] 'Having regard to the absence of support for such a choice in any known democratic society in the world.' *Gough v The United Kingdom* (2015) 61 EHRR 8 [184].
[155] See *Turner* v *Kennedy* (1972) SCCR Supp 30.
[156] ECHR, art 17, absolutely prohibits abuse of rights and thus some expressions ('aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention') are ousted from possibility of protection in s 10 (free speech).
[157] See Chapter 1 (II(ii)a).
[158] But we may need to further consider the third factor below of alternative opportunity.
[159] See *OTO* 38-40.
[160] See Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990) 166.
[161] See *OTO* 38.
[162] *Gough v The United Kingdom* (2015) 61 EHRR 8 [166].
[163] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 66-67.

exceptional cases such as racial insults, the social value of extreme ideas being freely expressed by a very few groups and individuals cannot be recognised given 'our firmest ['moral'] convictions of 'political equality and human dignity'.[164]

Thirdly, the existence of alternative times and places for the conduct could be relevant to justification as Feinberg argues[165] – or relevant to culpability. When the actor has no option but to choose the given means, time and place, he may be excused. The law does not force or expect anyone to do the impossible. When the actor has a choice, at no great cost, of another manner of expression which would avoid offence, but still chooses the offensive manner, the offense is unnecessary and thus wrong.[166] Wrong in the context of the offence principle means on balance that the conduct unnecessarily breaches inner peace to which others have a right to. Consideration, as well as toleration, towards fellow members of the community is a necessary component of social civility. 'In the specific context of the development and meaning of different types of public space' we can determine 'the appropriate uses of that space' 'and appropriate forms of conduct'. [167] This is a perspective of judging whether there are alternative opportunities, although not a standard itself of whether there is.[168]

Fourthly, malice and spite themselves are not factors that affect the determination of wrongfulness of offence as suggested by Feinberg,[169] but subjective aggravating factors of crime seriousness or constitutive culpability element of the crime.[170] It may be claimed that because some categories of offence, or even all of them, are very minor, we should limit criminalisation to instances where the actor acts out of malice or spite. This is, however, unpersuasive if the objective seriousness is already recognised as very trivial – just as it is unreasonable to suggest that because a person's subjective state is so evil that his trivial killing of an ant is to be punished. Wrongfulness is the normative conclusion that the

[164] See Robert Amdur, 'Review: Harm, Offence, and the Limits of Liberty' (1985) 98 HLR 1946, 1958-59.
[165] See *OTO* 40.
[166] 'The offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts.' *OTO* 44.
[167] Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offence' in Rowan Cruft, Matthew H Kramer and Mark R Reiff (eds) *Crimes, Punishment and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 289.
[168] Generally, offence is a problem of public place order and policing, but sometimes also happens in private space. But 'the specific context' is always a core angle to judge the nature or quality of the conduct.
[169] See *OTO* 41-42.
[170] Bad motives or nefarious intents may justify increased sentence in justice or increased punishment in legislation. See *BOP* 49.

justification, if any, is not weighty enough to counterbalance the seriousness of the breach of inner peace.[171] It does not engage subjective malice or spite.[172]

Fifthly, the nature of the locality means that, from the perspective of the actor, others act similarly in a given neighbourhood.[173] Although the conduct is common there, this fact itself cannot justify the act, just as the fact of many people spitting in a slum does not mean that spitting is not wrongful. However, the fact that the act is 'widely known to be common' there could mean the reactor has voluntarily assumed the risk of the unpleasant mental state if he has a reasonable opportunity to avoid it but chooses not to. This situation does not apply a corollary of alternative opportunities of the actor as Feinberg suggests,[174] but that of reasonable avoidability of the offence and the *volenti* maxim.

Therefore, only magnitude, personal importance and social value, avoidability and alternatives of the offensive conduct are relevant general considerations in assessing wrongfulness. Magnitude and avoidability should be balanced with personal and social meanings and the alternatives available to the actor. In particular, I have sought to combine the ready avoidability backed by social tolerance and the alternative opportunities backed by social consideration, in order to provide a more principled proportionality framework of balancing affronts to sensibility and freedom of expression.[175] Their more structured interaction will be set out in chapter 5.

After articulating the offended interest, the offending mechanisms and the normative dimension, it can be concluded that offence, for the purposes of the offence principle, is a breach of others' protectable inner peace without weighty justification, by communication processed by the reactor's sensibilities based on social norms.

IV. CONCLUSION

This chapter has restated concepts of harm and offence and has argued how they can be applied to limit public order crimes. Firstly, the harm principle and offence principle can be grounded by a clear, consistent concept and scope of harm and offence. Harm should be

[171] Malice or spite may aggravate the seriousness of setback to inner peace only when the offended feels it.
[172] See J D Hodson, *The Ethics of Legal Coercion* (D Reidel Publishing Company 1983) 145.
[173] See *OTO* 42-44.
[174] Ibid 44.
[175] The ideas of social consideration (by the actor) and social tolerance (by others) towards communicative and expressive offence have thus been valued, holistically, by being embodied by specific factors (alternatives by the actor and avoidability by others) that can be balanced against each other.

understood as objective, recognisable and wrongful setbacks to physical interests and offence as communicative and wrongful setbacks to inner peace based on normative sensibilities.

Obviously, harm and offence can and should be compared and contrasted in aspects of the interest which is set back – the way of setting-back – and the way of justifying. They will be discussed similarly with reference to rules of imputation in chapter 3. This parallel mode of discussion hopefully reveals more issues and leads to a more consistent approach to criminalisation than analysing the concepts of harm and offence separately. Based on the restated 'harm' and 'offence' in terms of criminalisation principles, a clear, consistent framework for limiting criminalisation can be identified: only when there is an evil (harm or offence) setting back a legal interest in a wrongful (i.e. unjustifiable) way, can criminalisation be justified.

Accordingly, harm/offence to others' interest in smooth life is the moral basis for forming and shaping rules of criminalising disruptions of public order. Inconvenience or discomfort or breach of life peace without competent justification is the factual and normative harm/offence of a public order crime. Arguments which seek to justify criminalisation in respect of public order should identify specific setbacks to public order interests (i.e. legally recognisable physical and non-physical nuisances against interests in quality of life), before moving to normatively balance the possible conflict of interests in social interaction. This position will be developed further in Chapter 3 and applied to disorderly conduct in Chapter 4 and offensive conduct in Chapter 5.

Chapter 3 Fair Imputation in Public Order Crimes

I. INTRODUCTION

The previous chapter argued that the state may criminalise conduct if it causes harmful disorder or offence in the absence of a justification of sufficient weight. It was assumed for the purposes of that chapter that if the disorder or offence were directly and necessarily caused by the conduct then there is no difficulty with imputing the result to the conduct. However, conduct may not be virtually certain to cause the result in every case although it does to some extent risk the result. That is, harm or offence may be 'too remote and accidental in its occurrence to have a bearing … on the gravity of his offence',[1] or the risk of causing harm or offence may not be normatively linked to the behaviour. It is necessary to address the question of how we should assess the fairness of imputing harm/offence, or its danger to the conduct.[2] What I mean by imputation here is not mere factual causation, but instead normative causation. What conditions are required to move from identifying a factual cause to recognising it as a normative cause?

The theoretical problems of imputation in this context can be classified into three types. Firstly, the disorder or offence may have in fact been caused, or likely to have been caused, by the putative victim being unusually vulnerable to this type of conduct. In a case of the victim's vulnerability the risk of the conduct causing disorder or offence may not be fairly imputable to the conduct. For example, if a passer-by were upset by viewing a 'naked rambler', can the alarm which they experience be fairly imputed to the naked rambling, or is it better explained by the abnormal vulnerability of the 'victim'?[3] In the second type of case, we might take the view that certain conduct is categorically harmful or offensive, but in a specific case the conduct might not have harmed or offended anyone, perhaps because others have not noticed it, or are not actually affected. For example, it may be that a naked rambler was recorded by a CCTV camera while walking through a small town at midnight and not actually observed by any passers-by. This type of case raises a problem of imputing

[1] American Law Institute: *Model Penal Code* (1985), s 2.03(2)(b), (3)(b) <www.icla.up.ac.za/images/un/use-of-force/western-europe-others/UnitedStatesofAmerica/Model%20Penal%20Code%20United%20States%20of%20America%201962.pdf>accessed 29 May 2018.

[2] See *HTO* 192. Hence it may not be fair to criminalise the conduct.

[3] See *Gough v The United Kingdom* (2015) 61 EHRR 8 [173].

liability to the accused person on the basis of an abstract or hypothetical risk of disorder or offence, rather than any actually caused disorder or offence. Although we may recognise that naked rambling is generally offensive, it offended no others in this instance. Should the rambler be exempted from liability? Finally, if it were argued that conduct is only disorderly because it risks future disorder as a result of further conduct by oneself or others, should that disorder be imputed to the prior conduct? An example of this is a Scottish case of a transvestite walking in a red light area in Aberdeen, being found guilty of breach of the peace because the court held that his conduct created a risk that others might respond in a violent or disorderly way.[4] In the case of the naked rambler, his conduct was considered to have been aggravated by 'the crime and disorder which would potentially ensue' because of the persistent offence to others.[5] Is this kind of criminalisation or aggravation, which is based on imputation of remote disorder, fair or unfair?

In developing a general approach to the problems of imputation which arise in public order cases of abnormal, abstract or remote risk, I will set out a new two-step process for dealing with problems of fair imputation based on Feinberg's doctrines of dealing with cases of risking harm.[6] In the first step, it is necessary to restate the formal rules for assessing whether the risk of causing disorder or offence is substantial. Then in the second step, it is necessary to substantively balance the risk against any related justifications for the conduct. I will then develop and illustrate this two-stage approach through an examination of each of the three problems of imputation set out above.

Before doing so, it is necessary to briefly explain how this two-step process for fair imputation is different from the argument presented in chapter 2. We can see, after all, that the second step of fair imputation of the disorder/offence seems to overlap with the identification of wrongfulness of the conduct in terms of the justifiability of the conduct. At both stages (identification of the harm/offence and imputation), two steps are applied to determine whether we should attribute liability to the actor. In every case it will be necessary to ask the substantive question, but in some further cases it will also be necessary to consider the question of imputation – which is not focused on general questions, but instead on whether a particular individual created a particular risk and whether that was justified.

[4] See *Stewart v Lockhart* 1990 SCCR 390.
[5] See *Gough v The United Kingdom* (2015) 61 EHRR 8 [158].
[6] See *HTO* 216.

II. A TWO-STEP APPROACH TO PROBLEMS OF IMPUTATION

Two main approaches have been suggested in the existing literature for addressing imputation problems, but I will argue that these are not sufficiently consistent and clear. Feinberg argues that because statutes must 'be formulated in general and simple terms' – and protected people must 'be presumed to have standard vulnerabilities' – 'other people's vigorous but normally harmless activities' can only be limited when they are 'deliberate and malicious'.[7] However, his general approach is not strictly applied in his analysis of specific cases. Feinberg offers two examples of this pragmatic approach to the problem of normally innocuous conduct causing harmful disorder. When a person suffers from the ringing of a church bell, the 'convulsions' of 'a hypersensitive individual' cannot be imputed to the ringing because that 'is harmless to persons of normal susceptibility', 'has social value (or at least no disvalue)' and its performance is 'normal and faultless' – but in contrast, 'ringing bells' 'all over New England' would be harassment if it were done 'for no respectable purpose' and was 'deliberately malicious'.[8] Feinberg in these two specific cases weighs the formal regularity of the reaction, the substantive value or purpose of the conduct and even the subjective state of mind of the actor.

The identification of some specific factors may assist in determining imputation. But, although each factor seems itself clear in its meaning, Feinberg's account contains no coherent articulation of how one or more of these different factors should consistently affect the imputation process. It is not clear why he arbitrarily considers some factors – such as the formal regularity of the reaction in the former case of ringing a church bell – and then other factors, such as the subjective state of mind of the actor who rings bells 'all over New England'. There is no general concept that can consistently and coherently unify and structure these factors.

A second kind of approach gives rise to similar problems of inconsistency. Simester and von Hirsch base their approach on a general and abstract requirement of wrongfulness[9] – and further consider some classes of endangerment offences (such as offences of abstract risk), mediation interventions (by further conduct) and conjunctive harms and their respective particular governing principles of imputation.[10] The general concept of wrongfulness is

[7] Ibid 192-93.
[8] Ibid 192-93.
[9] See *CHW* 71.
[10] Ibid 75-88.

supplemented by three particular principles that deal with the different types of problems of imputation. That is, for imputation in cases of abstract risk, an 'obligation of cooperation among participants in mutual activity' can account for the wrongfulness requirement;[11] in imputing further risks, 'some types of normative involvement' of advocacy, encouragement and imitations and assistance can account for the wrongfulness requirement[12] – and in imputing conjunctive harm, 'a scheme of cooperation requiring joint effort' may account for the wrongfulness requirement.[13]

In short, in every kind of case of imputation there seems to be a different principle at work in flexibly judging the wrongfulness of the risky conduct, but the different principles are not specific and clear in themselves. Each is too abstract to be applied consistently. Moreover, it is not clear how the general requirement of wrongfulness is embodied in Simester and von Hirsch's three particular principles. In the absence of a clear basis for embodying this general requirement by particular principles, there is no clear guidance on how abstract wrongfulness should be assessed in the context of other problems of imputation. For example, it is not clear how the particular principle of judging wrongfulness should be in the imputation of abnormal risks. Last, but not least, this approach of imputation seems to consistently emphasise the requirement of wrongfulness, and thus underestimate the requirement of assessing the risk itself, though in specific cases of imputation Simester and von Hirsch explicitly admit that 'of course, the probabilities *also* count'.[14]

I would argue that both the assessment of the risk itself and the wrongfulness of the risky conduct are relevant factors that affect imputation – and that we should account for the risk itself before moving to the assessment of wrongfulness. This argument is based on, and is a development of, Feinberg's approach. Although he did not propose a clear and consistent approach to the imputation of abnormal risks – as shown above – Feinberg has nevertheless identified the correct general approach. In assessing the criminalisation of risky conduct – that is conduct that is 'neither perfectly harmless nor directly and necessarily harmful' – Feinberg proposes that 'the greater the *gravity* of a possible harm' and/or 'the greater the *probability* of harm', 'the greater the *magnitude of the risk* of harm' and thus the stronger the case for prohibiting the conduct; meanwhile, 'the more *valuable* (useful) the dangerous conduct, both to the actor and to others, the more reasonable it is to take the risk', and 'the

[11] Ibid 78.
[12] Ibid 79-85
[13] Ibid 86.
[14] Ibid 83 (emphasis in original).

more *reasonable* the risk of harm (the danger), the weaker is the case for prohibiting the conduct that creates it'.[15] I will instead structure Feinberg's serial rules into two tiers – suggesting that in some cases it is unnecessary to consider the rules in the second tier. My main contribution, therefore, is not to suggest an approach substantively different from Feinberg's general approach (that considers a series of rules at the same time) – but to show how the serial rules should be considered in a clear and efficient way.

In the first tier, the higher the level of the risk, the stronger the case for imputing the result to the conduct. Whether there is more or less risk is determined by the *seriousness* of the disorder/offence and the *probability* of the disorder/offence being realised.[16] The factors affecting the level of the risk are, therefore, principally seriousness and probability. However, in each of the three problems of imputation identified above, a different emphasis may be put on different factors, with the way the two factors interact in determining the level of the risk being variable in different cases. Typically, if the probability were very low – such as in cases of abnormal vulnerability and offensive conduct provoking disorder – there seems to be no need to assess whether the risked disorder/offence is very serious, because it is fair to say that the negligible risk (e.g. of one being offended by common conduct of approaching to beg or another being provoked to act violently or disorderly in a case of coming across a transvestite) should not be imputed to the conduct. In other cases of imputation, both the seriousness and probability factors will be analysed to determine whether the level of risk is substantial enough to arrive at a preliminary conclusion of imputation.

In the second tier, even where the risk of disorder is substantial, it may still be unfair to impute the result to the conduct because it may depend on the acceptability of the risk or rather, the justifiability of the conduct. This is to say that the value of the conduct may exclude the imputation of the result to the conduct. This second step requires a balancing of the *personal importance* and *social value* of the conduct, if such value were asserted, and the substantial risk of the disorder/offence. The value/use of the conduct, as will be shown, may appear in different forms in each of the three imputation problems set out above. In cases of vulnerability in particular, it will take the form of an overriding constitutional value such as equality in some cases of homosexuals' public kissing that offends a passer-by or a Christian's barbequing that offends a Hindu vegetarian neighbour, while in other cases of

[15] See *HTO* 216 (emphasis in original).
[16] Ibid.

imputation the value of the risky conduct may be insufficient to outweigh the substantial risk of the conduct.

In this filtering structure, the relationship between the formal test of substantial risk and the substantive test of value can be examined step by step. When the level of risk is not substantial – because of low probability and/or trivial seriousness – it cannot reasonably be imputed. On the other hand, when the level of risk is substantial, it may still be not imputable, for failing the substantive test of personal value and social meaning of the conduct. In short, the formal test of substantial risk is a necessary, but not a sufficient, condition for imputation – in some cases there may be no need to further consider the substantive test to deny the conclusion of imputation. This general two-tier approach is clearer than von Hirsch and Simester's approach of emphasising abstract wrongfulness – and more efficient than Feinberg's approach of indiscriminately considering a range of factors in the case of abnormal vulnerability e.g. the convulsions of an individual hypersensitive to the ringing of a church bell. In the next three parts, I will illustrate how this approach can be applied in to each of the problems of imputation identified at the start of this chapter.

III. ABNORMAL VULNERABILITY

A person's life activities may cause or risk disorder or offence to vulnerable people. Abnormal vulnerability gives rise to a problem of imputation because the disorder or offence results from the personal characteristics of the victim. Legal systems may develop their own approaches for dealing with this kind of problem. The problem of imputation in cases of abnormal vulnerability may be dealt with by the conventional test of a 'reasonable person'. I will argue that this test should be replaced by the two-tier approach set out above.

An illustration of the application of the reasonable person test can be seen in a Scottish case of a breach of the peace committed by approaching people to beg. The court used an objective test to determine, upon the facts, the likelihood of alarm being caused:

> In assessing whether conduct [approaching people to beg] is capable of being classified as breach of the peace the court must apply an objective test to determine whether, upon the facts, the conduct was likely to cause alarm or fear. Of course, if such alarm or fear is actually caused, that may be strong evidence that the conduct meets the test but it cannot

> be conclusive, since the subjective reactions of the alleged victims may vary according to their temperament and are thus merely indicators.[17]

The court asked whether a reasonable person in that situation would have been alarmed by the conduct of the accused and, having concluded they would not have been, quashed the conviction. The Scottish test for breach of the peace focuses only on the formal characteristics of the conduct. That requires a judgment to be made on the part of the fact-finder. However, it does not provide an insight on how to judge a reasonable person's reaction. This ambiguity will lead to inconsistent decision-making.

It seems this test adopts conventional reasoning that if the reaction of others is to be imputed to the conduct, the reaction of the affected person should be that of a reasonable person,[18] as the reaction of 'the normal person in his position'.[19] That is, when a reasonable person would react as the victim, the reaction of the actual victim is reasonable and can be fairly imputed to the conduct in question. Besides, the crime can be committed without there being any victim who was alarmed, provided that a reasonable person would have been. An English example of applying a 'reasonable person' test is the use of 'a person of reasonable firmness at the scene' in riot, violent disorder or affray.[20] However, the 'reasonable person' concept is too vague to be consistently applied.

Gardner has argued that the notion of 'a reasonable person' 'used to set standards in so many corners of the law' has 'many faces'.[21] It may adopt 'customary standards' ('prevailing social norms')[22] – or 'specialised standards' 'that are specific to particular trades or professions or (more generally) roles'[23]– or it may personalise the impersonal by considering the particular condition of a particular defendant (as exculpatory or sympathetic).[24] These standards of reasonableness are problematic – not readily workable in some imputation scenarios identified above.

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[17] *Donaldson (James) v Vannet* 1998 SLT 957, 959.
[18] See Michael G A Christie, *Breach Of the Peace* (Butterworths 1990) 105.
[19] *HTO* 50.
[20] POA 1986, ss 1-3.
[21] See John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 564. For more references, see Alan D Miller & Ronen Perry, 'The Reasonable Person' (2012) 87 NYUL Rev 323; Frédéric G Sourgens, 'Reason and Reasonability: The Common Necessary Diversity of the Common Law' (2015) 67 MeL Rev 73.
[22] See John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 575.
[23] Ibid, 576.
[24] Ibid 578.

When ‘reasonable’ is used in the sense of ‘customary’ (one of the ‘faces’ identified by Gardner), it refers to a prevailing social norm. In the present context, this would mean identifying a majoritarian group of people (normally the general public) who are likely to react in the same way to the conduct in question.[25] However, in favouring majoritarian social norms, this approach may fail to protect minorities. If the conduct in question affects the life convenience, comfort or peace only of a particular group of people, that group’s reaction may not be regarded as reasonable because their response differs from the majoritarian one. This version of the ‘reasonable person’ is, therefore, under-inclusive of comparator groups, and so we may have to consider the other ‘faces’ of a ‘reasonable person’.

When ‘reasonable’ is used in the sense of ‘specialised’, it adopts a social norm of a special section of the community. This does not require the identification of a majoritarian group, and so this standard is more inclusive of particular comparator groups than the ‘customary’ face. However, this standard is designed ‘for more or less specialized pursuits calling for more or less specialized competence’, such as civil engineer, neurosurgeon, etc.[26] The standard refers only to social norms which are specific to a trade, profession or other general social roles. This does not mean that there is a legal rule for every specialised pursuit. Some social roles are probably not sufficiently general as a trade or profession and thus it is not ‘tolerably clear that there is one’ ‘legal rule’.[27] As a result, it is not clear how the witnesses should be expected to react. That is, this standard still does not cover some comparator groups. The law has to find other standard of reasonability.

Lastly, when ‘reasonableness’ is used in the sense of ‘personalised’, the liability may or may not be imputed to the actor because of his special characteristic. Feinberg might argue that because the naked rambler, from his previous arrests, must know that others would be alarmed such that he can easily avoid the alarm, the reaction of others should be imputed to him – just as he argues that if a waiter knows the allergy of a customer to salt but still serves the customer with salty food, the allergic reaction should be imputed to the waiter.[28] The conclusion in these cases seems correct, but the reasoning is not and it may lead to unreasonable conclusions. If the imputation of a reaction depends on whether the actor knows the likelihood of the reaction and he can readily avoid it, then if anyone tells the transvestite about the likelihood of alarming others, the transvestite should limit his choice

[25] Ibid 575-76.
[26] Ibid 577.
[27] Ibid.
[28] See *HTO* 192-93.

because he could easily avoid transvestitism in public places where it may alarm others. However, imputation of the response should be objective and 'impersonal', not bending to 'the varying personal characteristics of those who are judged by them',[29] because otherwise there would be no steady but only arbitrary or contingent imputation.

In short, the 'customary' test seems clear and objective, but too limited in imputation – while the personalised test tends to be subjective and arbitrary. Comparatively, the 'specialised' test seems more appropriate, but is still insufficiently inclusive of comparator people and should be optimised on the basis proposed in the following section. It is also burdensome to choose one particular standard, rather than another, of the reasonable person in a given case.

Alternatively, I will argue for an approach which I will call 'structured imputation', comprising a formal test and a substantive test. Firstly, I will suggest the objective test of 'parallel people' to assess the social reasonability of imputing the abnormal reaction. The test is mainly used to make the decision of no imputation, not of definite imputation. We should first judge whether the reaction is reasonable on the basis of the relevant social norm i.e. whether the objective risk of disorder/offence is substantial or very low. If low, it is not imputable. If so, there may be a further step to determine whether imputation is reasonable: I will substantively assess the result of the formal test against constitutional values to finally determine the normative reasonability of imputation.

(i) Formal Test of Parallel People

The reasonable reaction should be within the bounds of what is socially reasonable. Reasonableness in this context should be assessed on the basis of social norms – by the method of assessing the reaction of a hypothetical group of people if they follow relevant social norms. In this way, legislators and judges need to imagine positioning themselves within this group of people in order to determine what a reasonable reaction would be. This group of people who observe the same kind of social norms in a given occasion can be described as 'parallel people'. This test is drawn from that used for judging subjective

[29] John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 578. The actor's special characteristic is a standard of imputing liability, not of imputing reaction. The objective imputation of the reaction is a part (premise) of imputing the liability (culpability) to the actor. When the reaction can be imputed to the act, if the actor should have known or been aware of this probability, liability can be imputed to him. A person who kills his wife because he thinks that would help her go to the paradise should still be imputed the consequence of her death and the liability of culpable crime, though his liability may be mitigated. These two are separated and progressive imputation problems. But Feinberg seems to mix fair imputation of reaction and that of liability.

negligence and recklessness in Chinese law, where a court must ask whether the parallel people of the actor could have predicted and controlled the result of the actor's conduct.[30] But the rationale of this test has not been previously articulated.

a. Social Rules and the Formal Reasonableness of Parallel People

The notion of parallel people is objective and workable because it refers to norms of social interaction in deciding whether the risk of the disorder or offence reaction is substantial or very low.[31] The manner in which social norms develop and operate explains why the parallel people test is socially reasonable. 'Interaction generates habits; perceived, they become reciprocal expectations; in addition to their purely predictive and anticipatory nature, sensitivity to them endows them with a constraining or even an obligatory character.'[32] As it is probable that parallel people would be harmed or offended in a context of social interaction, it is reasonable for the reactor to react according to the established social rule.

However, there may be cases where the reaction is abnormal. These might include, for example, cases where the social rule was not binding on the conduct of others; was not flouted; or was violated, albeit not as significantly as the reaction implies.[33] In these cases, the possibility of others being harmed or offended in the same context is very low and the reaction is not objectively predictable according to the social rule. The reactor has no parallel people who would react similarly, and thus this reaction should not be imputed to the conduct. Otherwise, there would be no consensus on how a person could plan his conduct to avoid harmful or offensive results, and behavioral freedom would be restricted arbitrarily and substantially. Moreover, it would be morally unacceptable to punish people for unpredictable and uncontrollable results.

Therefore, when disorder or offence is caused or risked, we need to consider whether the reactor has a group of parallel people who would react in the same way according to a social rule of that group. For example, in the case of approaching to beg,[34] the approach is carried

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[30] See Mingkai Zhang, *Criminal Law* (4th edn, Law Press 2011) 266.
[31] This version of a reasonable person is similar to conventional objective understanding of 'a communally situated human being'. See *RNTC* 205-06.
[32] Dennis H Wrong, *The Problem of Order: What Unites and Divides Society* (HUP 1995) 48.
[33] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 63.
[34] *Donaldson (James) v Vannet* 1998 SLT 957.

out with the obvious motivation (to beg) that is conventionally predictable and innocuous, and objectively unlikely to cause alarm or fear.

Parallel people exist in all cases of social interactions with a social rule. To return to the naked rambling case, at that time it was possible to know the social rule in that area: when the conduct was 'in or near one of the main streets of a busy town' 'in a brazen fashion' with 'no obvious explanation or reason' but 'children and vulnerable old people' and there was evidence that some were alarmed,[35] it was socially probable that a group of comparable people would be alarmed. Thus the reaction could reasonably be imputed.[36]

b. Complicated Cases of Applying the Test

In applying the parallel people test, the key is to judge the probability of a group of comparable people reacting similarly. This may be complicated in some cases. Firstly, it should be observed that changes of objective life conditions affect the possibility of harm and offence, thus changing the social norms of parallel people. Fellow members of a community can develop adaptability in civil life. Thus the effect of the conduct on a general life condition may no longer be physically adverse. For example, with urban living, people become used to increased noise in traffic,[37] construction, amusement and other life aspects without their life convenience being unbearably affected.[38] The possibility of a circumstance causing harmful disruption has changed. In this example, harassment or discomfort caused or risked to a sensitive person by noise would now be seen as abnormal, despite having been normal some decades previously.

Similarly, the possibility of a particular behaviour causing offence to a group of parallel people may change significantly. An offensive act may come to be considered neutral or even desirable. For example, in the case of the transvestism previously mentioned, there might have been a substantial risk of offending others at that time.[39] Nowadays it might be

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[35] See *Gough v The United Kingdom* (2015) 61 EHRR 8 [80].

[36] And the actor knew this, so culpability can be imputed to him. The individual subjective belief may deserve sympathy and relieve liability: a court may consider the particular belief of the actor that public nakedness is neutral and thus mitigate his liability.

[37] See Michael M Berger, 'Nobody Loves an Airport' (1970) 43 S Cal L Rev 631, 707.

[38] The Scottish Government, 'Review of Antisocial Behaviour Noise Regime: Call for Evidence' (May 2014), 10-11 <www.gov.scot/Resource/0044/00449775.pdf> accessed 29 May 2018.

[39] As will be argued in next part, even if the reaction were reasonable, the decision may still be wrong because of the second (constitutional) factor affecting the reasonability. There is another problem of remote harm of offence if we are to impute the irritated conflict. This concern of pandering to violence will be discussed later on (IViii).

difficult to discern the social rule prevailing three decades previously in that district of Aberdeen. However, in today's diverse society, social reactions have changed significantly and this kind of act would not be likely to lead to such offence to the parallel people there.

Another problem in applying the parallel people test may arise in public administration. A group of parallel people such as the police tend not to be genuinely offended by behaviours that usually offend the general public, though they may profess otherwise in evidence at a criminal law. A group of people such as police officers, compared with the general public, may tolerably endure levels of harassment, alarm or distress caused by threatening, abusive, insulting words or behavior or disorderly behavior,[40] because they are specifically tasked with and should be focusing on tackling disorder. It seems that in normal circumstances they would not be or should not be expected to be offended by swearing where an ordinary member of the public might. It seems appropriate for the court to hold that truculently using bad language while refusing to cooperate with officials is not by itself a breach of the peace.[41] However, officers might still consider the conduct harmful or offensive – and thus there is an imputation problem of whether harassment, alarm or distress caused or risked to an officer can be reasonably be imputed to a threatening, abusive or insulting words or behavior or disorderly behavior.

The offender may still be liable even if the specific officer has not been alarmed, provided that the parallel people test is satisfied. When the group of parallel people are less likely to react in the normal or expected way because of their experience of performing their function, it is still possible to apply the parallel people test to argue that the original hypothetical reaction should be imputed. Admittedly, we may treat public officials differently from ordinary citizens because 'the distinction between public and private action is crucial to an understanding of the scope of constitutional rights and the protection they afford to citizens'.[42] But this does not justify treating police as being exempt from protection against disorderly or offensive conduct by citizens.[43] Officials, even highly trained ones, are human beings. When facing conduct which is threatening, abusive or insulting to an ordinary person, if not for carrying out their tasks, the police would still have a reason to react as fellow

[40] Mere insults are mainly name-calling. See Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 U Queensland LJ 123, 142.
[41] See *Smith v Donnelly* 2002 JC 65 [20].
[42] Malcolm Thorburn, 'Two Conceptions of Equality before the (Criminal) Law' in Francois Tanguay-Renaud and James Stribopoulos (eds) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart Publishing 2012) 20.
[43] Some defence agents believed that *Logan v Jessop* 1987 SCCR 604 gave 'individuals carte blanche to swear at the police with impunity'. *BOP* 28.

citizens. It is not implicit in their service that they must accept groundless or improper harm or offence. The police may have high endurance for concentrating on policing tasks, but not for simple tolerance of incivilities. Therefore, even though in fact the conduct does not disrupt or offend the police, we should still presume the normalcy of causing disruption or offence to the police. In this way, the behaviour or language directing solely at police officers may still be considered likely to cause harassment, alarm or distress. It should not be the law that 'a police officer [is] not to be regarded as a person liable to be affected by disorderly conduct'.[44]

(ii) Substantive Test of Constitutional Values

Decision-making based on the social rule of parallel people makes for an efficient test – there is probably a group of parallel people, whether majoritarian or not, who would react in that way in that context. However, the formal test is self-regarding because the parallel people are inside the same group as the person observing the conduct. So, the problem is this: if it is judged that a group of parallel people is likely to be harmed or offended by e.g. transvestitism or homosexual intimacy, then such a reaction may always be imputed to the conduct of other groups of people and the scope of criminal liability may be too broad.

In the following sections, I will discuss how the reaction of parallel people may be normatively not imputable because the social rule on which this reaction is based is constitutionally invalid. I will argue that if the conduct has a substantive constitutional value, the reaction of the parallel people may be normatively unreasonable and thus not imputable.

a. Offence to Parallel People

Offence may result from cultural diversity and sensitivity. A Hindu vegetarian may be offended by a Christian neighbour's barbequing meat in his backyard.[45] Homosexuals publicly kissing may offend some passers-by. The formal rule of parallel people would appear to suggest that offence should be objectively attributed in such cases because there is probably a group of parallel people who would react in the same way.

But even if a consensus supporting such a reaction exists, the reaction may be based on prejudice, assumption, personal aversion, parrot-like repetition, insincerity or

[44] *Saltman v Allan* 1989 SLT 262, 264.
[45] See David W Shoemaker, ''Dirty Words'' and the Offense Principle' (2000) 19 L Phil 545, 554.

inconsistency.[46] A group of people labels the conduct offensive and then engineer its criminalisation.[47] This formal labelling may lead to illegitimate criminalisation. Referring solely to a specific moral or religious sensibility is not a legitimate way of establishing imputation.[48]

I would argue that it is not enough for there to be a reason to take offence – instead, an acceptable reason to take offence is required.[49] Legislators must provide a good reason to turn an emotional reaction into a legal position.[50] The parallel people test determines whether the offence is socially reasonable, but it is then necessary to decide whether it is normatively reasonable for that offence to be imputed to the conduct. That is, the social rule (of sensibility) is necessary but not sufficient for imputation; in cases where the validity of the rule is disputed, we should further consider whether it should be legally supported. A legislator should try to 'enforce a distinct, and fundamentally important, part of his community's morality'.[51] But it is a problem to identify the form of morality that is arguably appropriate in a multicultural, pluralistic society.[52]

'The law rests upon diverse reasonability paradigms',[53] such as welfare maximization, equal freedom and an ethic of care.[54] One way of assessing the reasonability of a reaction is to follow the suggestion that a social rule identified by means of the parallel people test should be examined to assess whether it can survive moral challenges grounded in individuality, dignity, equity or pluralism.[55] The moral challenges should derive from constitutional values, because in a multicultural, pluralistic society, every group of members enjoys its own rights and freedoms whose limits are the constitutional boundaries of others' rights and freedoms. This method examines the compatibility of the social rule of the parallel people with a fundamental value of a society.

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[46] See Ronald M Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 Yale LJ 986, 1000-001; J D Hodson, *The Ethics of Legal Coercion* (D Reidel Publishing Company 1983) 149.
[47] See *BOP* 88.
[48] See David W Shoemaker, ''Dirty Words'' and the Offense Principle' (2000) 19 L Phil 545, 560-61.
[49] See Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990) 160-61.
[50] See Ronald M Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 Yale LJ 986, 995-96.
[51] Ibid 1002.
[52] See Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 U Queensland L J 123, 144.
[53] Frédéric G Sourgens, 'Reason and Reasonability: The Common Necessary Diversity of the Common Law' (2015) 67 MeL Rev 73, 129.
[54] See Alan D Miller & Ronen Perry, 'The Reasonable Person' (2012) 87 NYUL Rev 323, 391.
[55] See Uma Narayan, 'Offensive Conduct: What Is It and When May We Legally Regulate It?' (PhD dissertation, New Brunswick Rutgers, The State University of New Jersey 1990) 190-92.

The process of determining the constitutional validity of a social rule in question can be difficult and controversial.[56] Here I will exemplify the process by applying constitutional equality. A substantive constitutional rule tends to be others-regarding – a fundamental value like equality is usually effective in interpersonal/across-group relations. As Feinberg argues, for 'personal autonomy', 'when two persons each have interests in how one of them lives his life, the interests of the one whose life it is ['personal interests'], are the more important [than 'external interests']'.[57] To preserve community traditions at the cost of others' interests is to treat other people as means, or rather, 'elements' of one's 'environment'.[58] Even if an adverse reaction to transvestitism were considered socially reasonable decades previously, it may no longer be so, it being increasingly accepted that individual clothing should be a part of freedom of expression or sexual autonomy.[59] Equal protection of a degree of individuality would be in everyone's constitutionally valid interest. Further, prioritising the religious belief that homosexuality is a sin over others' interests would be wrong on this approach because of the notion of equality – in so far that homosexual persons have equal rights to public expression of intimacy.[60] Similarly, individuals have equal rights to religious belief and practice and thus cooking and eating meat in one's own backyard is not wrongful. In short, a community's intolerance of certain conduct may fail a constitutional challenge of equality, in which case no imputation of offence can be made.

b. Harmful Disruption to Parallel People

After looking at how the socially reasonable reaction of being offended by neighbours' life activities can be constitutionally unreasonable in some cases, I will argue that the socially reasonable reaction of being harmed may also be constitutionally unreasonable. It is socially reasonable for the people inside a group to react similarly, claiming harmful disruption to their life by the activity of a neighbouring group. However, such life activities can be constitutionally protected.

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[56] In different cultural settings, the same interest might have different values or even not be recognised at all. See Nina Peršak, 'Using 'Quality of Life' to Legitimate Criminal Law Intervention: Gauging Gravity, Defining Disorder' in A P Simester and others (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014) 239.

[57] J Feinberg, 'Harm to Others—A Rejoinder' (1986) 5 Crim Just Ethics 16, 29.

[58] See *HW* 67-68; see Jonathan Schonsheck, *On Criminalisation: An Essay in the Philosophy of the Criminal Law* (Springer-Science +Business Media, B V 1994) 225-26.

[59] Or a part of 'self-expression and freedom of choice'. Paul Roberts, 'Penal Offence in Question: Some Reference Points for Interdisciplinary Conversation' in *IROB* 22.

[60] See *Obergefell v Hodges* 576 US ___ (2015).

For example, dwellers in villages or slums inside the same city may burn coal or wood while other city dwellers use cleaner fuels such as gas or electricity. Those other city dwellers may suffer inconvenient and uncomfortable air conditions as a result of the coal or wood being burnt. Imputing this life disruption to the burning of coal or wood can be problematic. Rules of imputing air pollution in similar cases can be followed. In harmful disruption, arising from different lifestyles and topographic features, it is possible that even neighboring groups of people have different starting points for a life condition becoming inconvenient and depend on different conditions to recover from an uncomfortable life condition. In China, if suburban farmers do not seasonally burn straw, they will suffer economic loss that they perceive as more important and unbearable than temporarily diminished air quality. However, city residents do not want to endure this seasonal air pollution because they have a worse baseline of air quality and a limited recovery time. Two parallel rules for city dwellers and neighboring farmers unavoidably conflict in such a case. We cannot say which rule itself is unreasonable – a drawback of the 'parallel people' approach that may be corrected by a substantive test.

Substantively, when the rule of farmers' air quality is affecting city dwellers, there should be balancing of priorities. It is suggested that the authorities should organise controlled burning, rather than having farmers pay to process the straw in other costly ways.[61] The gain of farming and the cost of processing straw involves farmers' property rights and even living rights that may be prioritised over others' right to health or to enjoy merely seasonal comfort. Thus, there may be no imputable inconvenience or discomfort to be targeted.[62]

To sum up, we can progressively solve the objective imputation problem of claimed disorder or offence by first applying the formal test of parallel people and then, if necessary, the substantive test of constitutional values.

IV. ABSTRACT RISK

Having explained how the law should deal with those cases where the conduct in question usually causes or risks no disorder but may abnormally have that effect, it is now necessary to consider reversely, those cases where there is an 'abstract risk' in 'specific instances of

[61] See Zhian Wang, 'A Microcosmic Investigation of Fog and Haze' <https://zhuanlan.zhihu.com/p/24494561> accessed 29 May 2018.

[62] To make the imputation valid, therefore, the city should compensate the farmers to control the burning and to tackle the straw otherwise. When farmers stray from this arrangement, there is imputable disorder disturbing public convenience and comfort.

generally harmful activities' that 'are sometimes themselves quite harmless'.[63] For example, begging another person within the immediate vicinity of an ATM or entrance to a bank usually risks harmful obstruction,[64] defying police orders typically risks harmful disorder, and indecent conduct in a public place (e.g. naked rambling) risks offence to others. However, we should ask whether the categorical prohibition is legitimate – specifically, whether the imputation of the abstract risk to all cases involving that kind of conduct is reasonable. Also, how should the law deal with those cases where there is in fact no harm or offence? I will argue that a two-tier approach can be applied to answer the question.

(i) Abstract Risk of Harmful Disorder

While the problem of abstract risk in preventative criminalisation has been discussed in existing scholarship, this work has focused on other areas (such as public safety), rather than public order.[65] In this section, I will describe how an abstract risk to public safety is approached – and demonstrate how the approach can be adapted to address an abstract risk to public order, specifically in begging cases involving 'captive' targets (focused on their business and unable to easily ignore the approaching person) and in cases of defying police orders.

a. Formal Test of Substantial Risk

The first step, as noted above, is applying the formal test of whether or not there is a substantial risk of harm or disorder. Feinberg has proposed doctrinal rules to assess the severity of the risk: (1) the more serious the possible harm, the less probable its realisation need be to justify the criminal prohibition of the conduct; (2) the more probable the harm, the less serious the harm need be to justify the prohibition.[66] This can submit to a mathematical formulation – viz., this is a product ('×') style calculation (risk = seriousness × probability). The gravity of the risk depends on the interaction of seriousness and probability.

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[63] See *HTO* 193. 'Crimes of implicit risk creation' 'consist of conduct that legislatures regard as sufficiently risky to justify categorical prohibition'. Peter Westen, 'The Ontological Problem of ''Risk'' and ''Endangerment'' in Criminal Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 325.

[64] Vancouver (city) By-law 8309, s 70A(1); Municipal Code of Chicago, s 8-4-025 (Aggressive Panhandling).

[65] See *HTO* 193-98; *CHW* 75-79.

[66] See *HTO* 216.

In cases of public safety, the criminalisation of an abstract risk generally involves an application of rule (1): As grave harm to a significant interest is risked, no high probability is required of the harm occuring. Grave harm is risked to: (a) a qualitatively exclusive and significant personal safety interest or (b) multiple other legal interests. For example, drunk driving or speeding risks the occurrence of grave harm (mainly, but not exclusively, to personal safety). This harm is deemed sufficiently grave that no emphasis is placed on probability. For example, 'driving with quite low blood alcohol levels (0.2 pro mil or more)' is still prohibited in Sweden.[67]

In analysing public disorder, by comparison, the gravity of risked harm has fallen on (b), i.e. the multiple subjects of the endangered legal interest. Public order usually refers to a multitude of bearers of an interest rather than an exclusive and significant personal safety interest. In public disorder, the risk should be prohibited because the interest in life convenience, comfort and peace – though not as significant as safety interests at the individual level – can be significant when a large number of potential victims is involved. For example, begging within a specified vicinity (10 m or 10 feet) of an ATM or entrances to specified public places does not require the commission of actual obstruction to justify the imposition of a criminal penalty.[68] Moreover, this conduct itself is regarded by legislators as constituting high risk to many people's comfortable or convenient passage. Therefore, the risk of disorderly obstruction is substantial.

b. Substantive Test of Competent Justification

After considering the first stage (the assessment of formal risk) it is then necessary to proceed to the second step: that is, whether there is a competent justification for the conduct. A calculation of the risk may be followed by an assessment of its acceptability – a balancing exercise involving the personal and social importance of the interests in engaging in the risky behaviour and of the competing interests which are endangered. Properly, the law should protect the interest which is relatively more important. This will require an assessment and comparison of the importance of each (i.e. the personal value of the conduct and the interest endangered by the conduct) in terms of the interest network of the possessor, and the extent

[67] *CHW* 58.
[68] Vancouver (city) By-law 8309, s 70A(1); Municipal Code of Chicago, s 8-4-025 (Aggressive Panhandling).

to which each might be reinforced by other interests (i.e. social meanings) and their respective inherent moral quality.[69]

In the case of approaching another person in the vicinity of an ATM or public entrance, the conflicting interests will be the actor's freedom to approach people without true harm being caused to public comfort or convenience – and the public interest in avoiding harm from truly obstructive behaviours. In this context, the respective importance of each interest to each party may be hard to compare, but the former is reinforced by an individual's right to expression of their plight. However, the former is morally less justified given the following pragmatic consideration. The characteristic of abstract risks so preferred by legislators and prosecutors is that they are easy to detect and prosecute without necessarily proving the existence of significant risks in the individual case.[70] Speed limits are an acceptable regulation of abstract risk partly because it may be hard to differentiate risky speeding from non-risky speeding in individual cases.

In assessing abstract risk to public order, this pragmatic consideration operates similarly. In cases of approaching in the specified vicinity of an ATM or public entrance, the police cannot easily differentiate obstructive approaching from peaceful approaching. Moreover, those approached in such situations may not have alternative means to avoid or alleviate inconvenience. In contrast, approaching could be easily conducted much less obstructively in alternative places without a 'captive' audience. The failure to adopt the easy alternative is immoral inconsideration in social cooperation. This test of moral consideration overrides the test of reinforcing interests, and thus the prohibition is justified.

Imputing abstract risk in legislation to all cases of such conduct should be done according to the two steps set out above, but as for abstract risk, in justice there may be a further possibility of equitably exempting liability. In cases of abstract risk, the kind of conduct is already presumed by the legislation to be risky, so the prosecution does not have to prove that the conduct was risky. However, if the accused could show in a specific case that his conduct was not risky, then he should be acquitted, because the sacrifice of his behavioral

[69] See *HTO* 191, 204. As argued in Chapter 2 (II(iii)), the morality quality of the interest should not be understood as that the interest is inherently unworthy/immoral. Here I will interpret it as representing immoral consideration in social cooperation.

[70] And even ulterior intent. See Peter Westen, 'The Ontological Problem of ''Risk'' and ''Endangerment'' in Criminal Law' in R A Duff, Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 325.

freedom is not necessary.[71] This 'abstract (legislation)/specific (justice)' division is also important in public order administration. For example, protesters may be accused of obstructing a police officer in the execution of his duty because of defying a police instruction to move.[72] Defying administrative orders leads to an abstract (rather than specific) risk of public disorder.[73] It usually risks public disorder but may (exceptionally) risk no disorder at all. One such case was where the police mistakenly thought that a road was a public highway but it transpired that it was (as the protesters had correctly believed) private.[74]

The existence of the offence of obstructing a police officer is not or should not be a blind grant of power to the police. When a police instruction is not objectively justifiable, the refusal to comply should surely not be treated as having actually risked disorder.[75] Further, though in the case above there was some factual basis for the assessment of risk, this meant only that the dispersal order and procedural arrest were objectively reasonable measures – and not an abuse of rights or infringement of people's freedom. It is still insufficient to criminalise objectively non-risky conduct.[76] If substantive liability were to be imposed on a person, that person should indeed have abused freedom and risked harm.

An 'abstract/specific' balance should be applied in criminalising the generally risky obstruction of administration. For the statutory offence of obstructing a police officer in the execution of their duty,[77] the risked public disorder may not be significant, but the probability is generally high, such that the risk of public disorder is still sufficiently grave as to justify categorical prohibition of obstructing police orders. However, the freedom to go about lawful business without harming others is vital. Institutionally, it is preferable to nurture people's critical ability in a democratic polity than nurture blind obedience to authority. It should therefore be a statutory defence for the accused to show that his

[71] In the case of 'repeatedly causing his car to skid by handbrake turns in a frozen car park late in evening and near to residential property' (*Horsburgh (Bryan John) v Russell* 1994 JC 117), the actor may prove there is no other car there or approaching in order to evade liability, if the law aims for safety and convenient use of the place.

[72] See Police Act 1996, s 89(2).

[73] It may not risk 'serious disturbance to the community' and breach of the peace. See *BOP* 28-29.

[74] See *McCann v Crown Prosecution Service* [2015] EWHC 2461 (Admin).

[75] See *BOP* 29-30; *Miller* v *Thomson* [2009] HCJAC 4 [13]– [14].

[76] The supportive view, however, is the mainstream justice practice. See Dilys Tausz, *'*Obstructing a Police Officer in the Execution of Duty*'* [2016] Crim LR 59 (note), 60-61. The appeal court recognised the statutory charge under the Police (Scotland) Act 1967, i.e. defying police orders, as 'normal practice'. *Miller* v *Thomson* [2009] HCJAC 4.

[77] See Police Act 1996, s 89(2).

disobedience of a police order did not risk causing disorder.[78] Otherwise, courts 'can impose court-created impossibility defences' – 'unless judges and/or juries fear that harmful, counterfactual conditions could have occurred', the accused should be acquitted.[79] The existence of such a defence would mean that risky obstruction would generally be prohibited in legislation, but allow for non-risky defiance (exceptionally) permitted in justice.[80] It is a desirable balance of police powers and citizen freedoms in public order administration.

(ii) Abstract Risk of Offence

Feinberg has only analysed an abstract risk of harm.[81] I would further consider an abstract risk of offence in circumstances in which a potentially offensive behaviour has occurred in a public place and has not offended anybody at the time, because there were no witness, but has been detected subsequently having been captured on CCTV or eye witnesses have not been personally offended. Generally, some people may *ex ante* conclude that nudity and/or sex in a public place could offend a member of the public – the act carries a high possibility of offence to others. However, it seems that if there were no possibility of offence having been caused at the time, the behaviour should not be punished. The accused may claim that 'there was no risk of offending others, so why punish me?' For example, suppose two persons have sex at night in a public place[82] – or the naked rambler strolls through a town at midnight – all recorded by a CCTV camera but not witnessed at the time. Or an indecent behaviour takes place within a car by the roadside obscured by its tinted windows, such that the behaviour cannot be observed by passers-by, but is discovered by a policeman while carrying out other tasks. This section will discuss how legislation and justice should play different roles in determining the scope of liability in the case only of an abstract risk of offence.

It is difficult to determine whether there was such a possibility of offending others in an individual case. More importantly, no one could guarantee that at the time of the offensive

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[78] For example, 'it shall be an offence for any person, without lawful authority or reasonable excuse, to fail to comply with a direction'. Criminal Justice (Public Order) Act, 1994, s 8(2).

[79] See Peter Westen, 'The Ontological Problem of ''Risk'' and ''Endangerment'' in Criminal Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 326.

[80] As Lord Hamilton states, 'there appears to have been nothing in the particular circumstances of the appellant's conduct ['to refuse to co-operate'] which made it … likely to be a catalyst for any serious disturbance…' *Hamilton v Higson* 2002 Scot (D) 39/12 [15].

[81] See *HTO* 193-202.

[82] The video of having sex in a fitting room just shows that the sex itself did not offend others at the time. See Chen J, 'Uploader of Indecent Video of Fitting Room of Uniq in Sanlitun Put in Custody' *Xinhuanet* (Beijing, 19 July 2015) <http://www.xinhuanet.com/local/2015-07/19/c_1115970930.htm> accessed 29 May 2018.

behavior, no other people would observe it. 'The answer lies in counterfactual judgments of a kind that cannot be verified'.[83] Therefore, legislation focuses prospectively on general categorisation of public offensive conduct, e.g. nudity in a public place or sex in a public place. It does not retrospectively address the circumstantial conditions of specific conduct. The grave risk of offending others is presumed and needs to be examined below.

To preventatively criminalise a risky act, the risk of the evil being realised should be regarded as high or the risked evil be deemed grave. However, purely offensive crimes are 'a petty misdemeanor' and 'only a violation'.[84] The possible gravity of the offence itself may be too small to justify preventative criminalisation. But judged *ex ante* by legislators, nudity and/or sex in a public place or in a place which is visible or accessible to the public carries a fairly high probability of being witnessed, and the risked offence (to many people) is serious. This risk is thus sufficiently serious to justify legislative prohibition of nudity and/or sex in a public place.

Secondly, similar to the case of harmful disorder (obstruction) above, the abstract risk of offence cannot be overridden by a justification of the conduct. The actor can readily access other venues, while the public do not have alternative opportunities to avoid the offence and the police do not have the means or resources not to target all public nudity or sex. A lack of social consideration by the actor means that there is no necessity or expectation of social tolerance in this context.

However, the assessment of risk in a specific case differs from that in legislation. As in cases of risk of disorder, there may be the further possibility that after establishing the reasonability of categorical imputation in legislation, the actor may still try to prove that there was no specific possibility. He might cite a defence of impossibility that is legally explicit or court-created, and the court may or may not accept this defence.[85] This is a reasonably effective and efficient interaction between legislators, judges and actors. In the case of having sex in a car which cannot be viewed from the road, one can reasonably argue that there is no specific possibility of the offensive conduct being observed, so the actors should not be

[83] Peter Westen, 'The Ontological Problem of ''Risk'' and ''Endangerment'' in Criminal Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 326-27.
[84] See *OTO* 4.
[85] For example, 'having regard to all the circumstances', the behaviour 'is likely to cause serious offence to any person who is, or *might reasonably be expected to be, aware* of such behviour'. Criminal Justice (Public Order) Act, 1994, s 5(3) (Ireland) (emphasis added).

punished.[86] In contrast, having sex in a public place or rambling naked through a town cannot be reasonably regarded as involving no probability of discovery.

It should be clear that it is not reasonable to expect law-makers to identify in advance every single incidence where there is a risk of offence. A common law crime may only define the consequential evil or risk. For example, the Scottish crime of breach of the peace requires the potential for 'serious disturbance to the community'.[87] It does not *ex ante* refer to any specific types of conduct, such as nudity in public or public cruelty to animals. Thus, the court often emphasises the public nature of the *locus* to presume the grave risk in the conduct, but has sometimes required that 'there was plainly a realistic risk of the conduct being discovered'.[88] The court swings between an abstract risk and a specific risk of disturbing the community. This inconsistency can cause huge controversy and be burdensome in judicial practice. The crime would be better framed as a common law crime of specific risk without explicit conduct types[89] – or a statutory crime of abstract risk by specifying conduct types.[90]

To sum up, after considering the severity of the risk and balancing possible justifications of the conduct, we may impute the abstract risk (of causing disorder or offence) to a category of conduct by legislation, but may need to allow for exceptional judicial exemption in a specific case of impossibility of realising the risk. This approach to the criminalisation of conduct of an abstract risk should be explicitly reflected in legislating for offences of abstract risk and applied in judicial practice.

V. REMOTE RISK

As well as direct endangerment offences (offences, discussed above, defined by reference to abstract risks inherent in the conduct itself), the law also recognises indirect endangerment offences where 'the [remote] harm would ensue only given *further*, wrongful actions by the

[86] As argued in the last section on public order administration, there was some factual basis for the assessment of risks and this can justify procedural measures by the police.
[87] *Smith v Donnelly* 2002 JC 65.
[88] See *BOP* 112-13.
[89] Standing in a doorway of a bar and repeatedly rubbing private parts over clothing amounted to a breach of the peace, because it was apparent from the video that 'at one point the outline of his penis was visible through his trousers', and 'for part of the time a young woman was standing within two or three feet of the appellant and people passed by on the pavement, including a group of teenagers'. See *Halcrow v Shanks* [2012] HCJAC 23.
[90] For the categorization of the conduct, see *BOP* 145ff.

agent or by others'.[91] This section will examine the problem of remote risk in two particular situations and consider when the remote disorder or offence can be fairly imputed.

(i) Remote Offence

A person may engage in conduct that is non-offensive in itself, but in circumstances where it is alleged that the conduct creates a future risk of further offensive behavior e.g. teenagers loitering in public. Alternatively, the actor may engage in conduct that offends no one at the time but where the discovery that the conduct has taken place might cause offence to the public at some future point. In these cases, it is necessary to consider whether the remote offence can be imputed to the conduct.

a. Further Offensive Conduct

Teenagers may gather in a public place in a way which 'make[s] it possible or likely that the actor (or someone else) engage in *further* behavior that is offensive'.[92] Simester and von Hirsch claim that criminalisation is only appropriate in instances of immediate offence and that there should be no intervention to prevent remote offence, e.g. the presence of youths or begging on a street corner cannot be criminalised because of likely further offensive behavior by the actor or others.[93] This claim requires careful examination. We know from Feinberg's 'risk acceptance' doctrine that the greater the possible evil and/or the higher probability of the evil, the more persuasive the case for criminal intervention.[94] Offence to inner peace is generally minor and even trivial. Therefore, if the risk of offence were to be accepted, the probability needs to be very high. However, in cases of teenagers congregating in public or begging in public, it may be difficult to prove that such conduct is very likely to lead to further offensive behavior – and, in the absence of such evidence, it might be argued that there is no substantial risk of offence. There is thus no need to further consider 'the [competing] effect of a prohibition on liberty and, particularly, on freedom of movement'.[95]

A contrasting example is making or possessing extremist materials. This might lead to further behaviour, specifically its exhibition, that would seriously offend others. Making materials propogating extremism such as violence, hatred or prejudice is categorically

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[91] R A Duff, 'Criminalising Endangerment' (2005) 65 La L Rev 941, 963 (emphasis added).
[92] *CHW* 130.
[93] Ibid 130-31.
[94] See *HTO* 216.
[95] *CHW* 130.

criminalised.[96] I would argue that the criminalisation of the making or possessing such material is justified. Public embodiments of extremism can cause serious offence to the public – and it is inherently probable that making or possessing such material is liable to lead to its exhibition and therefore offence. The risk is therefore grave enough to initiate the consideration of criminalisation.

Secondly, there is little counterbalancing value in the production of extremist material – the personal importance and social value of freely expressing extremist ideas cannot be normatively recognised respected.[97] Therefore, the remote offence of the further conduct of public extremism can be imputed to the earlier conduct of making. That is, the conduct of making can be preventatively criminalised. On the similar basis of remote offence, the conduct of possessing racially, religiously or sexually inflammatory material can be preventatively criminalised before the onward conduct of publishing or distributing.[98]

b. Knowledge after the Fact and Serious Offence to the Public

Another problem of imputing remote offence is that where conduct causes public outcry or indignation, this tends to be regarded as a separate factor justifying criminalisation or amounting to an aggravating factor in criminal sentencing, especially in China.[99] This kind of imputation issue is common when 'immoral' or 'abnormal' behaviours are disclosed by third parties, *causing serious offence to the public*. In Chapter 2, it was explained that the communicative mechanism in the offence principle means that in *ex post* bare knowledge cases, the conduct itself does not cause offence – while here the problem is that the conduct may be criminalised or aggravated simply by the further serious offence caused to the public. Feinberg argues that *private* immoralities such as flag desecration, if revealed by others, such as a voyeuristic landlord and to the extent that they cause serious offence to the community, should not be punished via the offence principle, because the revelation is beyond the actor's control and the offence is not inherently wrongful.[100] I will systematically apply the general two-step approach to consider how social impact after the private or public conduct can be an independent evil in the criminalisation consideration – that is, how remote

[96] Anti-Terrorism Act (China 2015), s 80 (2); Criminal Law (China), s 120C.
[97] See Ch 2, III(iii).
[98] Public Order Act 1986, ss 23, 29G. These provisions aim to prevent hatr(ed), but I am here aiming to prevent serious offence.
[99] Such as in crimes by taking advantage of duty, see Zhilong Guo, 'Systematic Turn of Crime Quantitative Standards in Information Age' (2015) 6 Oriental L Rev 114, 121.
[100] See OTO, 62, 69.

public offence, which results from the actions of third parties in revealing the conduct, can be imputed to the earlier conduct.

The revelation may arise from the actions of an ordinary person. For example, 'Grandpa Bi', a Chinese television personality, was revealed by a fellow diner during a meal to have satirized, insulted and criticized Chairman Mao and the Red Army.[101] Alternatively, a public authority might reveal the act. Consider the case of 'Uncle Qu', famous for monitoring the private use of official vehicles in Guangzhou, who was revealed by the Hunan Police to have used prostitutes.[102] But for these third-party disclosures, there would have been no social impact at all resulting from the actor's conduct. But the consequences of such actions might have been contingent (the actor was exceptionally caught and reported) or even been the subject of manipulation (e.g. by the media).

The conduct may in other cases take place in public and cause serious offence to additional people as a result of further revelations still. A recent statutory example of social influence as imputable remote offence was the Tourist Incivilities Regulation by the China Bureau of Tourism, which provides that if certain specified behaviours (disrupting public transport order; disturbing public environment and hygiene; violating social customs of the destination and ethnic life habits; damaging cultural relics and historic sites; participating in gambling, pornography etc.) *cause serious* social negative influence (i.e. social outcry or indignation), even if they do not result in the imposition of administrative penalty or a court determination, they will be labelled as 'tourist incivilities' and may be reported to the police, customs, traffic departments and banks. Such reports can be as serious as a criminal record.[103] That is, these public or private uncivil behaviors can be punished severely when they cause serious social negative influence. The problem is that a specified behaviour may affront the public at the time – *and*, additionally, offend more people still as a result of the actions of others in disclosing the conduct. In the latter case, it is necessary to ask whether the imputation of the further offence to the earlier behaviour is reasonable.

Firstly, we should assess whether there is little probability of causing a public outcry. The gravity of the remote offence to the public suffices, but if that probability were little, the risk

[101] Enhu Du, 'Fujian Bi may be Discontinued His Program for Four Days' *Sohu News* (Beijing, 8 April 2015) <http://news.sohu.com/20150408/n410957193.shtml> accessed 29 May 2018.

[102] 'Uncle Qu Has Given up Accusing Changsha Police for the Incident of Going Whoring' *Sina News* (Beijing, 14 April 2015) <http://news.sina.com.cn/c/2015-04-14/133631716212.shtml> accessed 29 May 2018.

[103] See Qing Zhong, 'Nation Bureau of Tourism: Six Incivilities of Tourists will be Blacklisted' *China New Site* (Beijing, 7 April 2015) <http://finance.chinanews.com/cj/2015/04-07/7187025.shtml> accessed 29 May 2018.

is not enough to justify the imputation of the social outcry. Many of the enumerated tourist incivilities (disrupting public transport tool order; disturbing public environment and hygiene; violating destination social customs and ethnic life habits; damaging cultural relics and historic sites) tend to be public in character, and thus there is a substantial probability of their revelation and a resultant social outcry. Other incivilities such as gambling or prostitution (as in Uncle Qu's case), although notionally private, are highly likely to be detected and revealed in China at least, because the conduct is illegal. In contrast, when the revelation was not under the control of the original actor – such as in the case of Grandpa Bi who may have made reasonable efforts to avoid communication to the public by asking others present not to disseminate the video – there is little probability of offending the public, and so the imputation of the later social outcry is not acceptable.

Secondly, the revelation should not be substantively illegitimate. The earlier action may be of a competent value, rendering the subsequent revelation unreasonable. We should compare the importance and moral validity of the interests concerned. In the case of Grandpa Bi, the revelation was against both the law of privacy and a breach of trust. In the case of going whoring, the police acted under the relevant policing law. The revelation in the case of Grandpa Bi is unethical and should not be recognized – out of respect for the civilising function or to avoid a moral credibility collapse of the criminal law.[104] Similarly, if 'Uncle Qu' were in a jurisdiction that does not outlaw going whoring, this could exonerate him from the later influence, because a person's private life should not be scrutinised and revealed to the public.[105] However, participation in incivilities such as gambling or pornography, though usually private, can still have imputed to the participation the remote offence as an aggravation of the conduct – if the conduct itself involved evils such as exploitation that can justify the search and revelation by the police.

Obviously, the lower the probability of offending the public, the more unreasonable the revelation – and thus the more unreasonable any imputation of the social outcry. That is, private immoralities generally cannot be punished because of uncontrollable and unreasonable revelations by others – while public incivilities can have the remote offence imputed to them, because the actor should assume the risk when he chooses to engage in the

[104] Maybe it accords with the Party discipline if revealed only to the Party when the player is a Party member subject to the discipline of belief and loyalty.

[105] The revelation also could be illegal if he were set up by the police as he claimed: the former act itself is not to be proved because of the unacceptability of 'the fruit of the poisonous tree'.

relevant conduct in public – and the uncivil conduct itself is prohibited partly to prevent offence to others.

(ii) Remote Harm of Offence

Offence may also cause harm. Provocation is a typical case of offence leading to remote harm.[106] As Feinberg expresses it:

> Offended states of mind, even intense ones, are not in themselves harms; but … they are sometimes symptoms or consequences of prior or concurrent harms, and more often, the causes of subsequent harms, as for example, when provoked ill will leads to violence or riot.[107]

The latter half of the sentence shows that offence may risk harm (to public order).[108] Section 5 of the POA 1936 formerly criminalised offensive conduct conducive to breaches of the peace.[109] In Scotland breach of the peace has been used to criminalise transvestitism in circumstances where it was regarded as risking disorder [110] – and also naked rambling which was regarded as risking disorder.[111] In short, the 'disorderly potential of disapproval' is a problem of regulating indecency in a public place.[112] Assessing this disorderly potential in order to justify criminalisation (if the offensive conduct itself were not serious enough) or its aggravation (if serious enough) is problematic.[113]

Because the remote harm to public order is insignificant and uncertain, the imputation of the risk to the conduct should be denied.[114] Regarding the significance of remote harm here, even if the possible conflict occurs, it generally would not risk serious disturbance to public

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[106] It should be clear that by 'remote' the harm is not caused by the current conduct – but by the *further conduct*. So, it does not matter whether the harm is immediate, if only it is caused by the further conduct.

[107] *HTO* 49.

[108] The first half shows that harm could accompany or risk offence. It is still a pattern of a serious evil risking a lesser evil, just like a broken bone risking a less serious hurt.

[109] Breach of the peace in English criminal law generally refers to some danger to the person or imminent, severe attack of a dwelling house. See *Thorpe v Dpp* [2006] IEHC 319 [5.1].

[110] See *Stewart v Lockhart* 1990 SCCR 390.

[111] *Gough v The United Kingdom* (2015) 61 EHRR 8 [158].

[112] See Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offense' in Rowan Cruft, Matthew H Kramer, Mark R Reiff (eds), *Crime, Punishment and Responsibility* (OUP 2011) 284-85.

[113] For example, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 criminalised offensive or threatening behaviour *likely to incite* public disorder at certain football matches (s 1, now repealed).

[114] After balancing relevant restraint's onerousness with relevant offence seriousness and likelihood, some remote harm may be rightly imputed. See R A Duff, 'Criminalising Endangerment' (2005) 65 La L Rev 941, 965.

life – because these conflicts typically involve only quarrelling and ordinary pushing rather than fierce fighting. But sometimes, there may be disorder affecting the public and the gravity seems to be enough to justify preventative interference.

However, no specific, clear proof could be provided for the probability of that grave harm. There is generally only a speculative probability that abstract peace would be breached.[115] In cases where the police are insulted, 'intervention' by a third party is 'unlikely'.[116] In the case of public transvestitism, the likeliness of causing a conflict may not be specific, but speculative and contingent. 'There would now need to be clearer evidence of the likelihood of a disturbance.'[117] However, it is very difficult to know in advance whether remote disturbance would result from a given instance of offensive conduct. Self-disciplined victims are unlikely to react physically and will instead resort to law enforcement. Victims who are less self-disciplined and more susceptible to offensive behaviours are more likely to react in a manner causing disturbance. Imputing presumed conflict may risk pandering to violence.

In extreme cases of offending – such as aggressive abuse,[118] persistent offence or extreme insult – there is the substantial possibility of a physical conflict disturbing the civil life of others.[119] Extreme offensive conduct will be met with virtually zero social tolerance, making the relationship between the offence and the risk of further disorder much more certain (substantial certainty). The identification of extreme offence has two principal directions. Substantively, extreme offence includes conduct of preaching or threatening violence, stirring-up hatred or prejudice that challenges the fundamental rights of others to be free from discrimination – and is thus of extremely high social unacceptability. Secondly there are some formal texts that assist in determining whether the offense is extreme or not. Extreme insults are basically notorious internationally – and are prescribed in international texts,[120] which underlines international expectation of what is not tolerable. This is a good way for domestic criminalisation to draw on resources from international endeavours. Also, national constitutions assist in determining extremity. Some states in the USA once prohibited public disrespect or mutilation of the American flag in order to deter provocative

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[115] See *BOP* 107-09.

[116] *Coleman v Power and Others* [2004] HCA 39 [9]. In [200] it is claimed that 'others who might hear [insulting police] would be reasonably to be provoked to physical retaliation'.

[117] *BOP* 109.

[118] For example, D entered a pub frequented by rival football fans and abused them. Ibid 107.

[119] Another way to presume probability is seen in section 4 of POA 1986 which specifies the certainty by requiring either subjective intention to provoke or objective likeliness to believe the certainty. But it is difficult to judge when there is subjective intention or objective likeliness.

[120] See e.g. Council of Europe, *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (Council Europe Publishing 2010).

acts that could result in public brawls.[121] Such legislation prohibited offensive conduct which risks harmful disorder. The presumed substantial likelihood of immediate confrontation made it necessary for the state to interfere in advance.[122] However, respect for free speech with its explicit constitutional protections may mean that there is scope to challenge this presumed degree of possibility in the absence of a clear constitutional provision protecting the national flag.[123] In contrast, national symbols and ethnic equality are expressly protected in the Chinese Constitution[124] – and under the Criminal Law it is a crime to insult these cherished symbols in public and to stir up ethnic hatred or prejudice.[125]

Obviously, the more extreme the offence, the more grave and probable the risk of harmful disorder is. Where football supporters aggressively abuse a rival team, the possible harm is as great as serious violence and the probability is high and immediate.[126] Thus, the risk of harm to public order is serious enough for considering criminalisation. The immediacy of the realisation of the probability is important. Even if the offence were extreme, if the conflict were not urgent – such as in the case of a racist graffiti left by a departed actor – the possible conflict should not be imputed to aggravate the offensive conduct, because the offended can and should seek other remedies.[127]

Secondly, it follows from the extremity of the offence that the conduct has little acknowledgeable personal importance and social value.[128] That is, the extreme offence is rarely justifiable. Therefore, the remote harm is imputable to the offensive conduct.[129]

In short, remote harms of offence should generally not be imputed. When there is substantially certain causation of immediate harmful disorder we can justifiably attribute the

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[121] See Robert Force, 'Decriminalisation of BOP Statutes: A Nonpenal Approach to Order Maintenance' (1972) 46 Tul L Rev 367, 388-89.

[122] Free speech with explicit constitutional protection may challenge this presumed degree of possibility when there is no clear constitutional provision protecting the national flag.

[123] The Supreme Court protected burning American flag as symbolic speech in *Texas v Johnson* 491 US 397 (1989).

[124] See respectively ch 4 and s 4.

[125] See s 299 and s 249. Although s 249 provides a crime against personal right and civil right, as will be argued in ch 5 (IV(ii)), it should be understood as a crime against public order. Here I want to make it clear that the constitutional provision means that the kind of insult is extreme enough to presume in criminal law the substantial certainty of provoking disorder.

[126] See *BOP* 107.

[127] The extreme offence itself is sufficient to justify criminalisation.

[128] See Ch 2, III(iii).

[129] However, it is claimed that the harm is caused by others' freely chosen act and it is those others who ought to be arrested. See *BOP* 107-08. However, advocacy, encouragement and assistance all face voluntary others, but all the actors of them should be responsible for remote harm from voluntary others. There is no exception why provocation's actor should not be responsible for remote harm from voluntary others. Even if there is others' voluntary act, there can be normative involvement of the former actor.

risk to offensive conduct. The repeal of section 5 of POA 1936 was thus a sensible development.[130]

VI. CONCLUSION

The problem of fair imputation should be taken seriously in criminalising public order crimes. This chapter has systematically examined issues around imputing and preventing disorder/offence – and has sought to develop a consistent approach to these questions. Firstly, *imputation problems* lie not only in abstract risks and abnormal risks that are both in the current conduct itself, but also in remote risks by the further conduct. Secondly, to look at fair imputation broadly, imputation problems around harm should be developed as imputation problems relating to harm and offence. Rather than only focusing on the imputation problems of harm as Feinberg does, it is necessary to consider seriously the question of how offence (as the other kind of setback to interests than harm) affects the whole system of imputation. In this way, this chapter has identified new problems of imputing abstract risk of offence, remote risk of offence and remote harm of offence.

In respect of all the imputation problems discussed here, *a structured approach* is proposed. The first test is formal: i.e. whether the parallel people would react in the same way, or whether the risk, compounded out of possible gravity and its probability, is sufficiently severe. The second test is of substantive justification: i.e. whether the parallel people's reaction is still not justified or whether the severe risk is still acceptable, given the personal importance and social values of the conduct. This general approach of categorically imputing abnormal, abstract and remote risks of disorder and offence remains to be theoretically elaborated in the light of legislative and judicial experience.

[130] Public Order Act 1986, s 40(3), Sch 3.

Chapter 4 Disorderly Begging and Loitering

I. INTRODUCTION

In the first three chapters of this thesis, I identified and discussed some general issues surrounding the specification of public order as an interest, issues about the nature of harm and offence and issues about the imputation of harm and offence, and thus identified certain principles which should apply in the identification of public order crimes. In this and the following chapter I will apply these principles to specific public order problems. I will examine the relationship between harm and disorder in relation to specific issues of disorderly conduct. The next chapter will look at offence in relation to specific issues of offensive conduct. The aim is to clarify the argument and to show how the principles I have identified can assist in addressing some difficult issues in public order law.

In the first three chapters, I posited a broad hierarchical framework for applying the harm principle so as to define and limit the scope of public order crimes. However, limiting the scope of public order law poses practical problems, as there are multifarious offences against public order, which the courts have tended to use indiscriminately. In order to deal with problems in practice, we need to identify some typical public order problems so as to think through the application of the principles. Problems can arise with the frequent use of 'catch-all' common law offences – such as public nuisance in England and breach of the peace in Scotland – to deal with disorderly conduct in public places related to begging and loitering and the the application of the law is not clearly defined.[1] By clarifying the situations and problems in the criminalisation of begging and loitering, this chapter will address the imputable and wrongful harms involved, in order to demonstrate how the identified principles can help determine the valid scope of specific public order crimes. The examination of these two offences can hopefully exemplify how the harm principle can be effective in the simplification of relevant common law crimes and in the criminalisation of other forms of conduct.[2]

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[1] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015). In Scotland, the common law crime breach of the peace is suggested to be restated as 'a more clearly defined statutory offence', see *BOP* 137.

[2] Other similar or accompanied behaviours compromising public place order – e.g. public drunkenness and solicitation – will be analysed accordingly. In Australia, there are problems of offences undermining the

The chapter is in two main parts. Part II examines the criminalisation of begging and part III the criminalisation of loitering. Each part has four sections. The respective first sections will look at how different jurisdictions have approached the criminalisation of these kinds of conduct. I will criticise existing approaches as being unclear and inconsistent, and unable to assess the asserted harmfulness of the conduct. The second section will then show how the kinds of harmfulness which are sometimes claimed by the law can be consistently rebutted from the perspective of the harm principle. In the third section I will then begin to apply the approach that I have developed in the first three chapters to rethink the factual harms involved in begging/loitering (the first step in the two-stage test that I have developed). I will look at how to identify some real intrusions in three forms of begging (passive, active and aggressive), and loitering's harms in three situations (present, remote and suspected). Then, in the fourth and final sections, I will demonstrate the valid scope of criminalisation of begging/loitering, by addressing the question of the wrongfulness of the harm/offence, i.e. balancing conflicting interests.

II. THE CRIMINALISATION OF DISORDERLY BEGGING

Begging may pose problems of public order and indeed is frequently criminalised. However, different jurisdictions take different approaches to the criminalisation of begging, such that anti-begging laws can either be over-inclusive or under-inclusive. From a starting point of assessing different approaches to the criminalisation of begging, I shall progressively establish consistent and coherent arguments in support of criminalising some begging behaviours, while not criminalising others.

(i) Inconsistent Approaches to Criminalising Begging

It is possible to identify three broad approaches to the criminalisation of begging – while this section will set out and generally review. Different approaches to the criminalisation of begging similarly accept that some specified interferences of begging are justified as opposed to a general ban. However, it is unclear how these justifiable interferences should be distinguished from those which are not justifiable.

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quality of community use of public places e.g. public nuisance, begging, willful exposure and public drunkenness, see Nicole Dixon, 'Reform of Vagrancy Laws in Queensland: The Summary Offences Bill 2004 (Qld)' (Queensland Parliamentary Library, RBR 06/2005), 11-21 <www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2005/200506.pdf> accessed 29 May 2018.

In England, begging itself was historically targeted by the Vagrancy Act 1824 as a threat to social order: '…every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms… shall be deemed an idle and disorderly person within the true intent and meaning of this Act…'. The 1824 Act was enacted in the context of displaced people, without any visible means of support, being seen as a threat to the established order: 'The terms of vagrancy and vagrants have universally implied that those so labelled not only are wanderers without homes but are also likely to participate in criminal activity.'[3] This prohibition sounds strict, but the Crown Prosecution Service does not provide legal guidance on the prosecution of begging or vagrancy.[4] Begging itself is rarely prosecuted, at least under this Act. This reflects something of a historical transition. The general criminalisation of vagrancy has been discredited because it appears to target economic or social status rather than conduct. Contemporary criminal law is usually directed instead at specific conduct associated with homelessness, such as begging.

Current legal practice focuses on finding aspects of begging that could lead to harmful or offensive nuisance in public places, rather than the actual begging itself. So, begging itself is not unlawful, but conduct associated with begging may be unlawful. The associated conduct can be covered by common law crimes such as public nuisance in England to maintain public order. But the standard of a behaviour constituting public nuisance is not clear. Though a key rationale in nuisance law is that people soliciting or begging block pavements and interfere with rights of passage, it is not clear whether there are other cases of begging causing nuisance and what they might be. This approach provides a flexible tool to deal with different forms of disorderly begging conduct and may accordingly confer the authority with an arbitrary discretion. For example, it has been claimed that beggars commit other crimes such as theft, robbery or assault: 'the majority' of beggars 'are often caught up in much more serious crime'.[5] Or it might be claimed that begging may encourage others to engage in serious crimes in the area.[6] In such cases, it is not clear whether the nuisance approach only applies to the harmfulness of begging itself or whether it also applies to other related harms of begging. That is, it is not clear how the related harms of begging should be tackled. In addition, beggars have often been thought to pretend to be poor and to cheat

[3] Jim Baumohl, 'Vagrancy' in David Levinson (ed), *Encyclopedia of Homelessness* (Vol 2) (Sage Publications, 2004), 583.
[4] There is no result of searching either 'begging' or 'vagrancy' on the website of the Crown Prosecution Service <http://www.cps.gov.uk/> accessed 1 June 2017.
[5] See Home Office, *Respect and Responsibility – Taking a Stand against Anti-Social Behaviour* (Cm 5778, 2003) para 3.41.
[6] Ibid para 1.8.

people,[7] a belief which has changed scarcely in centuries.[8] But fraud is not a public order problem. It is not clear how the problem of fraudulent begging should be tackled.[9]

In the Republic of Ireland, which follows the same basic common law model as England, the statutory law does specify cases of nuisance in which begging is criminalised. Section 2 of the Irish Criminal Justice (Public Order) Act 2011 provides that 'a person who, while begging in any place—(a) harasses, intimidates, assaults or threatens any other person or persons, or (b) obstructs the passage of persons or vehicles, is guilty of an offence'.[10] This provision tries to specify begging cases that cause nuisance but its phraseology may still be problematic. 'Harassing' is ambiguously inclusive. It is not clear whether it requires repeat acts. More importantly, while the provision focuses on harmful conduct, it fails to reveal the protected interests. It is unclear what type of (public order) interest is harmed or endangered; nor is it clear whether it aims to protect physical comfort or inner peace, or is for other purposes, such as allowing free movement on the streets. As a result, it may be unclear what forms of begging constitute harassment and thus should be prohibited. The prohibition of some begging conduct may thus be arbitrary.

In short, the first approach above targets the (possible) nuisance, rather than begging itself. It focuses on finding types of begging that could lead to harmful or offensive nuisance in

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[7] See R Humphreys, *No Fixed Abode: A History of Response to the Roofless and Rootless in Britain* (Macmillan Press 1999) 17.

[8] See A Erskine and I McIntosh, 'Why Begging Offends: Historical Perspectives and Continuities' in H Dean (ed), *Begging Questions: Street-level Economic Activity and Social Policy Failure* (The Policy Press 1999) 29-30.

[9] In UK, another approach may be worthy of attention. In Scotland, although the Vagrancy Act 1824 does not apply, common law crimes such as breach of the peace may target some instances of begging. For example, D was found by two police officers to approach people and many appeared to be alarmed and D on some occasions walked along the approached for some distance. The court held that begging did not constitute a breach of the peace, it was the manner which was relevant in establishing by an objective test of whether the conduct was likely to cause fear and alarm. See *Donaldson (James) v Vannet* 1998 SLT 957. So, the harmfulness of begging seems to be the causing of alarm to others. But this approach of targeting alarm still cannot answer clearly whether they are other harmfulness of begging that should be targeted. This problem also exists in another approach of targeting begging that should cause alarm, distress or harassment by civil orders. Although there may still be total ban of begging by one person in the form of the imposition of an injunction (see Lorie Charlesworth, 'Readings of Begging: The Legal Response to Begging Considered in Its Modern and Historical Context' (2006) 15 NottLJ 1, 2-3), ASBOs tend to be granted against only some begging behaviours likely to cause harassment, alarm or distress (A criminal behaviour order (CBO) (preventing the causation of harassment, alarm or distress) replaces an ASBO on conviction. See Anti-social Behaviour, Crime and Policing Act 2014, s 22). A five-year ASBO that prohibited A from 'causing harassment, nuisance or annoyance by seeking to beg' on any train or railway station within the M25 motorway boundary was breached and thus A was punished; the Court of Appeal confirmed that in respect of 'a first offender', sentencing for an ASBO breach should 'primarily reflect the harassment, alarm or distress involved' (*R v Fagan (Paul Patrick)* [2010] EWCA Crim 2449). It is not clear if there is another harmfulness of begging that can be criminally targeted. Even for these harms of alarm, distress and harassment, it is not clear what kind of begging conduct can be regarded as harmful.

[10] And it is liable, on summary conviction, to a class E fine or imprisonment for a term not exceeding one month or both.

public places. However, it is unclear what type of (public order) interest is harmed or endangered. Consequently, it would not be clear what types of begging should be prohibited – some types may still be arbitrarily banned.[11]

The second type of approach can be found in China. Here, begging was strictly regulated in order to control population movement between urban and rural areas. Vagrants and beggars in cities were routinely detained and repatriated to their hometown. This was a coercive measure against the flow of people from rural to urban areas, an aspect of economic planning and urban crime prevention. However, in 2003 a graduate wrongly suspected of vagrancy was beaten to death in detention, and following the social and academic outcry over the infringements of personal rights implicit in this all-encompassing approach, this regulation was abolished.[12] The current policing law articulates the harmful conduct of begging under reference to section 41 in the chapter on *personal and/or property interests*: 'Begging by importuning, forcibly begging or by any other means of disturbing any person shall be detained for no more than 5 days or shall be given a warning.' Now only begging conduct that importunes, forces or disturbs others is prohibited. So, it seems that only begging conduct that disturbs others' exercise of personal and/or property rights is prohibited. Begging is thus regulated mainly for the purpose of protecting personal and/or property rights – and not for other purposes such as maintaining public order. The Chinese approach has not fully identified the kinds of protectable interests which might expect to be involved (such as public order), so the arbitrary indication of protected interests (personal/property rights) may in practice lead to an arbitrary scope of prohibited forms of begging: 'any other means' may be seen as 'disturbing any person'. For example, begging may be seen by a local authority as an 'eyesore' harmful to a city's image and aesthetics and thus beggars may be expelled from that city.[13] In this case begging is in fact prohibited for purposes beyond

[11] As argued in Chapter 2 (II(ii)b), The harm principle firstly requires a recognisable setback to a physical interest. A criminal law provision should prevent specified setbacks to a particular interest. 'For reasons of legal security, it is vitally important to specify, in the crime definition, the harm to be prevented. This is the only method by which the harm requirement can be given the more effective protection of the legality principle.' Albin Eser, 'The Principle of ''Harm'' In the Concept of Crime: A Comparative Analysis of The Criminally Protected Legal Interests' (1965-1966) 4 Duq UL Rev 345, 385. The specified harm to a particular interest is the nature of a crime. 'It constitutes a triumph of freedom if every punishment is derived from the particular nature of the crime. Nothing arbitrary remains.' Thomas Vormbaum and Michael Bohlander (eds), *A Modern History of German Criminal Law* (Margaret Hiley (tr), Springer 2014) 35.

[12] Detention and Repatriation Measures of Urban Vagrants and Beggars by the National Council (1982-2003) in 2003 was replaced by Aiding Administration Measures of Vagrants and Beggars without Livelihood in Cities, in which aiding is a welfare choice of beggars i.e. beggars can choose whether go to the special welfare institution for assistance.

[13] Section 24 of the Foushan City Appearance Standard 2012 prohibits begging and sleeping in public places.

personal/property rights and it is not clear whether the purposes are valid reasons to justify prohibition.

The American approach, as the third type of approach, recognises panhandling (begging) as a protected form of expression. The beggar is free to communicate their own economic situation and appeal for assistance, 'calling his condition to the attention of the general public'.[14] Peaceful begging is permitted and an absolute ban prohibited.[15] The New York District Court has ruled that 'the interest in permitting free speech and the message begging sends about our society predominates' – and thus 'a total ban on a conduct' of begging 'with an expressive component' 'is deemed unconstitutional'.[16] However, 'while courts generally recognise panhandling as protected expression, they give a significant amount of discretion to local governments to impose partial restraints'.[17] It is still unclear what kind of partial ban is valid.[18] It means that in practice begging may still be substantially and arbitrarily prohibited. The Supreme Judicial Court of Massachusetts, Middlesex has concluded that 'no compelling State interest has been demonstrated that would warrant punishing a beggar's peaceful communication with his or her fellow citizens in a public place [i.e. 'he does not approach or threaten anyone either physically or verbally, and he does not block any sidewalk or any store entrance']' and 'these types of bans are not lightly permitted'.[19] The decision implicates the possibility of banning harmful begging behaviours of approaching, threatening, obstructing, etc. But it is still unclear whether any harm caused by such conduct is wrongful, or if only some such harms are. That is, it is unclear when a restriction of the manner of approaching, for example, is reasonable, though we can claim that 'a reasonable time, place, and manner restriction' is permitted, e.g. 'a regulation prohibiting all solicitation in a ten-block radius from Grand Central Station during the rush hour'.[20] For example, in some places begging may be regarded as offensive, triggering psychological discomfort to some people, because they assume that beggars are too lazy to deserve the giving of money,

[14] *Loper v New York City Police Dept* 802 F Supp 1029 (SDNY 1992). See also *McLaughlin v Lowell* 140 F Supp 3d 177, 184 (D Mass 2015).
[15] See *Loper v New York City Police Dept* 802 F Supp 1029 (SDNY 1992). 'Begging is protected expression, and total prohibitions are unconstitutional.' Nate Vogel, 'The Fundraisers, The Beggars, And the Hungry: The First Amendment Rights to Solicit Donations, To Beg for Money, And to Share Food' (2012) 15 U Pa J L & Soc Change 537, 543.
[16] See *Loper v New York City Police Dept* 802 F Supp 1029 (SDNY 1992).
[17] Nate Vogel, 'The Fundraisers, The Beggars, And the Hungry: The First Amendment Rights to Solicit Donations, To Beg for Money, And to Share Food' (2012) 15 U Pa J L & Soc Change 537, 550.
[18] See Drew Sena, 'A Constitutional Critique on the Criminalization of Panhandling in Washington State' 2017 41 Seattle U LR 287, 309.
[19] See *Craig Benefit v City of Cambridge & others* 424 Mass 918 (1997).
[20] *Loper v New York City Police Dept* 802 F Supp 1029 (SDNY 1992).

an intrusion of privacy, or simply bothersome.[21] It has been claimed that 'the sight of homeless people lined up on the street is not conducive to attracting new businesses and customers'.[22] In these cases, it is not clear whether the begging is peaceful enough that it should be free from prohibition. Although the American approach of protecting free speech does not clearly list specific forms of begging that can be criminalised, certain cities such as Chicago have enacted ordinances that detail criminalised conduct. The Chicago style of prescription is to exclude passive begging from criminalisation and criminalise begging in specified locations or by specified intimidating manners.[23] The scope of criminalisation is clear, but the rationale for the delimitation by listing locations, for example, is not clear, and thus it appears that the scope may be arbitrary.

In Canada begging is also recognised as a form of protected expression, but the law permits the prohibition of forms of begging (obstructive begging) that are in conflict with the principal purpose of passage through the streets (i.e. efficient and safe movement).[24] Here, a factual harm of obstruction is identified and the harm is identified as wrongful when it sets back the principal interest of movement. The Canadian test of obstructing movement is clearer than the broad American discretion. Vancouver defines "obstruction" of the safe and efficient passage of pedestrians in five very specific ways.[25] It seems, therefore, that other ways are not wrongful. But legislatively it is not clear how these wrongful ways are differentiated from the other non-wrongful ways. Though this provision seems comprehensive in covering some conduct on the street, it neglects other places. Obviously, harmful begging should be regulated in other places. But it is not clear how a way of begging

[21] See R C Ellickson, 'Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning' (1996) 105 Yale LJ 1165, 1181.

[22] The National Coalition for the Homeless and The National Law Center on Homelessness & Poverty, 'A Dream Denied: The Criminalisation of Homelessness in U.S. Cities', 36 (*National Homeless*, January 2006) <www.nationalhomeless.org/crimreport/report.pdf> accessed 29 May 2018.

[23] See Municipal Code of Chicago, s 8-4-025 (Aggressive Panhandling).

[24] The Supreme Court of British Columbia, in *Federated Anti-Poverty Groups of BC v Vancouver (City)* 2002 BCSC 105, held that obstructive or aggressive panhandling is justifiably limited on the basis of its inhibiting efficient and safe movement as the dominant purpose/use of streets. This included the potential obstruction in areas within 10 metres of an ATM or bank/trust company entrance; one exercising freedom to expression should adjust 'means of communicating' to 'the principal function or intended purpose' of a public place.

[25] See Vancouver (city) By-law 8309, s 70A(1): "cause an obstruction" means
(a) to sit or lie on a street in a manner which obstructs or impedes the convenient passage of any pedestrian traffic in a street, in the course of solicitation, (b) to continue to solicit from or otherwise harass a pedestrian after that person has made a negative initial response to the solicitation or has otherwise indicated a refusal, (c) to physically approach and solicit from a pedestrian as a member of a group of three or more persons, (d) to solicit on a street within 10 m of (i) an entrance to a bank, credit union or trust company, or (ii) an automated teller machine, or (e) to solicit from an occupant of a motor vehicle in a manner which obstructs or impedes the convenient passage of any vehicular traffic in a street.

might be wrongful in other places. And the broader problem is: can the right to free movement always override the freedom to expression, making the panhandling wrongful?

In short, the specific approaches listed above are illuminating, but do not categorise prohibited begging behaviour according to clear or consistent criteria. The English approach targets begging conduct that could cause public nuisance, the Irish approach targets begging conduct that could cause specific forms of nuisance, the Chinese approach targets begging conduct that should infringe personal/property rights, while the North American approach targets begging conduct that is non-peaceful. Inconsistencies are obvious between the different approaches – and within the same jurisdiction, the inconsistency of criminalisation practice can still appear because none of the tests of criminalisation is itself sufficiently clear. The underlying problem, as I shall argue in the next section, is that there has been no attempt to clearly articulate the underlying harm(s).

(ii) Claimed Harmfulness of Begging

As we saw in the last part, the claimed harms associated with begging fall into three main types: crimes of begging itself; further crimes committed by beggars; and crimes committed by others induced by the presence or conduct of beggars. I shall look at these in turn to show that the claimed harmfulness of begging either does not consist in factual setbacks to protectable interests or is not wrongful.

a. Crimes of Begging Itself

Begging has been regarded as fraudulent, offensive or an eyesore or even harmful to commercial attraction. Some beggars may pretend to be miserable and helpless and use this fraudulent pretence to achieve help.[26] However, despite some fraudulent cases, may still want to assist, such that it is hardly reasonable to prevent begging by criminalisation.[27] The normative reason for this view is that if a decision to provide assistance is voluntary and informed, then there is no fraud. However, there remains the concern that because a person may be unable to differentiate those begging fraudulently and those doing so honestly, he

[26] Beggars were thought to be fraudulent, as mentioned (II(i)), see R Humphreys, *No Fixed Abode: A History of Response to the Roofless and Rootless in Britain* (Macmillan Press 1999) 17. This belief has changed little over hundreds of years, see A Erskine and I McIntosh, 'Why Begging Offends: Historical Perspectives and Continuities' in H Dean (ed), *Begging Questions: Street-level Economic Activity and Social Policy Failure* (Policy Press 1999) 29-30.

[27] Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73J Crim L 212, 227.

has to accept the risk of being cheated to help those genuinely in need. In this case, there is no real voluntariness. But the state should merely punish fraudulent begging, not all begging. Otherwise, honest beggars are punished for others' fraudulent begging. The regulation of abstract risks commends a relatively high probability given that the risked harm to property is not significant. Virtually all beggars are poor.[28] Thus the likelihood of fraudulent begging is not sufficiently grave as to justify targeting all begging.

Begging may be offensive, triggering psychological discomfort to some people, because they assume that it reflects laziness, is intrusive to privacy or simply bothersome.[29] However, only some beggars do not deserve the gain. Thus, this offence should not be attributed to all begging. Similarly, only some begging is harmful to privacy or bothersome. It is not reasonable to be offended by all begging behaviours. As the offence is not attributed, there is no need to consider further whether the offence is wrongful or not. To refute claimed offence, it is argued that 'a polite request for assistance does not wrong anyone. The passer-by can easily ignore the solicitation and walk on'.[30] However, the ease of avoiding or terminating the offensive contact is only one factor affecting the seriousness of that offence.[31] It does not by itself result in the absence of wrongfulness, e.g. trivial offence is still wrongful if it is unnecessary.[32]

There is another motivation for governments to limit begging. Cynically, they may seek to remove the 'eyesore' of begging as an in order to improve a city's image, because beggars will be perceived as spoiling public places.[33] Firstly, aesthetic unpleasantness is not a problem of taking offence,[34] because there is no communication to offend others. Further, it is not harmful to a protectable interest which can be referable to the fundamental values of a society. Aesthetic value is meaningful to people's life in physical comfort. If a public place

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[28] See Roger Hopkins Burke, 'Tolerance or Intolerance? The Policing of Begging in the Urban Context' in Hartley Dean (ed), *Begging Questions: Street Level Economic Activity and Social Policy Failure* (The Policy Press 1999) 229.

[29] See R C Ellickson, 'Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning' (1996) 105 Yale LJ 1165, 1181.

[30] Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73J Crim L 212, 231.

[31] See *OTO* 32.

[32] For the role of the alternative to avoid the offence in deciding wrongfulness of an offence, see next chapter (III(iii)b).

[33] As mentioned (II(i)), section 24 of the Foushan City Appearance Standard 2012 prohibits begging and sleeping in public places. For American illustrations such as Tacoma, Wash., Mun. Code (2007) ch 8.13A, s 010, see Drew Sena, 'A Constitutional Critique on the Criminalization of Panhandling in Washington State' (2017) 41 Seattle U LR 287, 292.

[34] Cf Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73 J Crim L 212, 232.

is deemed less beautiful and enjoyable than previously, people's comfort in using that place is harmed. Activities such as camping may not interfere with others' movement, but they can alter the original appearance of a location to the extent that they could be seen as aesthetically harmful. However, the aesthetic value of a city should only lie in the physical appearance of public places, not of the persons who occupy them. Otherwise, an ordinary person's appearance, authentic or handmade, will be only used about pleasing others. What an individual wears and the personal effects they carry are an integral part of their autonomy. If a type of beauty such as city image specifically excludes those citizens who come into conflict with this type of beauty, then it breaches a general human right to equal participation in social activities and thus should not be deemed protectable. Beggars should not be punished for their own lack of external or superficial 'beauty' in a public place, but only for the adverse effects of their special conduct on the beauty of a public place.

City comfort may have alternative objectives, e.g. attracting new businesses and customers.[35] Commercial attraction is generally protectable, but any harm to it in this context is justified by the exercise of the competing right to be there.[36] Therefore, it is a presumptuous misconception to think that criminally forbidding homeless persons using commercial or tourist districts could justifiably improve the aesthetic comfort of these areas.

b. Further Crimes by Beggars

It has been claimed that beggars have a propensity commit other crimes such as theft, robbery or assault.[37] However, firstly, no remote harm can be normatively established in this particular context. It is difficult to argue that begging itself concretely creates further harmful behaviours, that is, it is difficult to prove that begging itself is a necessary or sufficient condition for further harm.

Secondly, though it has been claimed that 'the majority' of beggars 'are *often* caught up in much more serious crime',[38] there is no abstract risk to be prevented. In cases involving abstract risk, the probability of harm inherently exists in the conduct itself (e.g. drunk-

[35] As mentioned (II(i)), 'the sight of homeless people lined up on the street is not conducive to attracting new businesses and customers.' The National Coalition for the Homeless and The National Law Center on Homelessness & Poverty, 'A Dream Denied: The Criminalisation of Homelessness in U.S. Cities', 36 (*National Homeless*, January 2006) <www.nationalhomeless.org/crimreport/report.pdf> accessed 29 May 2018.

[36] See (iv).

[37] See Home Office, *Respect and Responsibility – Taking a Stand against Anti-social Behaviour* (Cm 5778, 2003) para 3.41.

[38] Ibid (emphasis added).

driving) but begging itself does not include the risk of other crimes being committed. Criminal law should only substantially target dangerous conduct rather than status.[39] There is, therefore, no normative basis to preventatively criminalise the abstract risk presented by all beggars. Moreover, criminalisation of abstract risk is generally justified on the basis that the specifically risky (drunk driving) conduct is difficult to differentiate from other specifically non-risky or marginally safe (drunk driving) conduct – or that differentiation would be at an unreasonable cost. In section 4 of the Vagrancy Act 1824, begging is placed alongside offences of rogueing and vagabonding. Such behaviour may typically accompany begging. However, as such behaviour is easy to differentiate from begging, which itself is an exercise of the right to freedom of expression, it should be criminalised separately from begging.[40]

c. Crimes by Others

It has been claimed that begging may encourage others to engage in serious crimes in the area concerned.[41] The basis of this claim is the notorious broken window theory – that is, if visible minor disorder and incivility are not dealt with in a community, more serious crimes will ensue.[42] But this theory is disputed.[43] Even if it were empirically proved, criminological findings should be assessed normatively and only selectively – and not necessarily accepted in criminal law. If begging is to be regulated criminally because of the consequence of serious crimes by others, then a legitimate basis for imputation of this remote harm must be established.

But this harm is too remote to be attributed. The prospect of inadvertent influence on others demonstrates no normative involvement.[44] Criminal law does not loosely accept such remote harm based on too extensive 'but-for' causation. Factual causation cannot be fairly imputed because begging generally has not raised the risk by a legally important degree (no high

[39] Every group of people identifiable by their status – whether public sector or white-collar workers – is likely to have some of its members committing crimes to varying extents. However, no one would suggest these status groups should be preventatively targeted.

[40] It is the reasons for begging e.g. desperation leading to begging-related crimes – thus extra-legal responses should target the reason while legal measures should target the differentiable crimes.

[41] See Home Office, *Respect and Responsibility – Taking a Stand against Anti-social Behaviour* (Cm 5778, 2003) para 1.8.

[42] See J Q Wilson and G Kelling, 'Broken Windows: The Police and Neighbourhood Safety' (1982) 3 Atlantic Monthly 29.

[43] See Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73J Crim L 212, 224, 226.

[44] See Dennis J Baker, 'The Moral Limits of Criminalising Remote Harms' (2007) 10 New Crim L Rev 370, 390.

probability) – and nor has it done so in a legally-forbidden way (the risk is justifiable) when the conduct concerned is a lawful exercise of freedom.[45] The state should directly punish serious crimes by others. No one would seriously argue that if increased exposure of body parts in summer increases sex offences then the exposure should be punished – or that if carrying more cash increases acquisitive crime then the carrying should be punished.

(iii) Harms of Begging

The harms of begging are mainly the adverse effects on safety and amenity in public places.[46] In this section I will apply the harm principle in order to identify the harms of begging in a more systematic way. Identifying factual setbacks to interests is the first step of my test of criminalising some types of begging.

It has been claimed that criminal law should be tailored to only prohibit 'genuinely aggressive and intimidating' begging such as 'begging in trains and near ATMs'.[47] However, 'genuinely aggressive and intimidating' is a cumbersome formulation rather than a workable normative standard. I will argue that begging may constitute different kinds of public disorder, but that this will depend on the form of the begging. We can identify three different forms:[48] passive (sitting or standing); active (approaching); and aggressive (following, repeatedly asking or threatening). This categorisation allows us 'to gain an objective profile and understanding of the extent and nature of begging'[49] – and will help us analyse begging in a normatively constructive way. My aim here is to see whether a particular form (passive, active or aggressive) is substantively peaceful, intruding on no one' interests[50] – or is substantively harmful, intruding on others' interests (in public order). As a result of this analysis, it will be shown that begging in an aggressive manner is obviously *intrusive*, while the active approaching and especially the passive manners needs further consideration.

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[45] There is a 'lack of creation of legally relevant danger' when' D acts lawfully'. See Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 50.
[46] See P Lynch, 'Understanding and Responding to Begging' (2005) 29 MULR 518, 554.
[47] See Dennis J Baker, *Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012) 240.
[48] See Michael Horn and others, *A Question of Begging: A Study of The Extent and Nature of Begging in The City of Melbourne* (Hanover Welfare Services 2001) 9.
[49] Ibid 24.
[50] Facing a peaceful act, another person does not have to or should not reasonbly react in a non-passive manner. See *Federated Anti-Poverty Groups of BC v Vancouver (City)* 2002 BCSC 105 [301].

a. Passive Begging

Forms of passive begging (without moving) can be peaceful and cause no harm e.g. most obviously standing or sitting in a spacious street or pavement. However, there are other forms of conduct that can be harmful. When a beggar remains static (standing, sitting, lying) in a point on a street, road, passageway or pavement, lying would be the most disturbing manner, because it involves the occupation of greater ground space and is most likely to be outside a moving person's field of vision. When the ground space is occupied, users of public space experience inconvenience in avoiding that space. This is a type of public disorder. When one person lies outside another's field of vision, the passer-by may stumble (or try to avoid touching the body of the beggar) and thus suffer injury to their person or property. This is a public security concern. In short, lying to beg is a nuisance both to public order and public security – and thus could be a candidate for criminal prohibition.

Comparatively, standing would be much more convenient and safer for the users of public places than lying. It is usually not an impediment to passage. Sitting is an intermediate category and its probable nuisance value depends on other factors such as the layout of a location. If the street were spacious, sitting may be permitted because by-passes would not need to reroute. However, case by case judgments may increase enforcement costs. A total ban on sitting in public areas could be economical in enforcement. However, it would be disproportionate. The costs of case-by-case enforcement should not override people's right to sit, which is harmful to no-one in a spacious place. The costs are not as enormous as that of differentiating safe drunk driving and speeding from the dangerous, in so far that the number of sitting beggars is a limited, readily-ascertainable quantity in contrast to undetected cases of drunk driving and speeding. The assessments of a location's capacity seem easier than the assessment of a driver's capacity of safe driving.

Therefore, when one begs on streets or sidewalks, the conduct of staying by the wall/guard rail avoids blocking the movement of other users of public passages. If one stands or sits in the middle of a street or sidewalk, the degree of inconvenience suffered by other users will depend on how crowded the area is.

Public life peace has other aspects that may be intruded by other passive manners of calling attention to oneself. If a beggar uses crying, singing, clothing, pictures or words to draw attention to or express their own individual miserable story, their conduct may offend against general sensual comfort or psychological comfort – when the sound is of a high volume, it

may be a type of noise nuisance against audio comfort; when the content expressed is offensive, it is against inner peace.[51]

Another passive yet intrusive manner of begging should be assessed. 'If a beggar corners a captive audience at an ATM, this would have an intimidatory effect and would not be tolerable'.[52] Through this offence to psychological comfort, civil life is disrupted. When a beggar sits beside an ATM, a user may be worried about the security of their personal information or money or both.[53] Their alarm is reasonably predictable because a beggar is someone eager for money without equitable exchange and in this case of sitting beside an ATM the user's money is immediately accessible. Valuable property should not be displayed, because it is an important privacy issue that concerns not only property safety but also personal safety. The anxiety is unnecessarily caused offence and could be easily avoided by the beggar.[54] Although the sitting is passive, it is not necessarily peaceful. Rather, it is genuinely intrusive to users in causing anxiety through presence.[55] So, passive begging behaviours may still be harmful in some cases and can at this stage be seen as suitable candidates for criminalisation.

b. Active Begging

Merely walking by a beggar causes no harm – just as walking by other pedestrians does not. It would be more acceptable to move in the middle of a street or pavement when it does not involve blocking the movement of public road users. If a beggar actively approaches a target, this disturbs others' convenient use of that public place by stopping or slowing down their

[51] Such as breach of the peace by begging and making comments to passers-by, see *Daly (James Anthony) v Vannet* 1999 SCCR 346. Shouting and/or swearing is easily to be regarded amounted to breach of the peace, physically and/or psychologically, see *BOP* 154-56. A foul-smelly beggar may offend olfactory comfort and may even exert danger to public health security. Though the beggar has done nothing, he is culpable by the omission of keeping poor hygiene. The wrongfulness may be denied because the beggar has no choice of hygiene.

[52] Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73J Crim L 212, 238.

[53] There is a difference between the beggar who simply sits there and the one who actively makes requests or demands of ATM users. However, even other users should not be too close to the one using the ATM. The exclusion zone could be broader than other users because of likely accumulation of beggars aside an ATM when there seems to be the possibility of greater gains than other places.

[54] The offence is not fear, because the 'subjectively experienced' intimidation usually does not reach 'threatening degree'. See Roger Hopkins Burke, 'Tolerance or Intolerance? The Policing of Begging in the Urban Context' in Hartley Dean (ed), *Begging Questions: Street Level Economic Activity and Social Policy Failure* (The Policy Press 1999) 230.

[55] It is also obstructive – see Ch 3 (III(i)a).

pace. However, its wrongfulness can be controversial, such that it will be further analysed in the next section.

Other forms of active conduct can be harmful. As well as streets, passages and sidewalks, possible begging venues or destinations include a highway and moving public facilities (public transportation). In these 'captive' cases, active begging causes intrusion (unsafety, inconvenience, embarrassment) that cannot be easily avoided.

Self-evidently, vehicles move more quickly and stop less readily than pedestrians. Begging from cars on the road creates huge safety concerns for drivers and their passengers. In intersections with traffic lights, people may also find beggars symbolically cleaning windows of stopping cars at traffic lights and asking for money.[56] 'Washing of car windows in traffic (squeegeeing)' is 'soliciting aggressively'.[57] Although a 'stationary' vehicle does not move, its driver in this scenario is already trying to be cautious, with crowded space, to start moving. The distractive action of a beggar aggravates the situation, substantially increasing the accident risk.[58] People in charge of vehicles are disturbed and thus the problem is mainly a security concern.

Still, begging could take place in relatively closed and confined spaces, such as public transport e.g. buses, subway trains or railway carriages. Busking on public transport is a form of approaching a captive target audience.[59] It disrupts the quiet use of public transport and makes other passengers uncomfortable. When the transport is crowded, the targeted passengers cannot easily ignore the begging or leave. The journey is rendered uncomfortable. Even if the transport were not crowded and the targeted passenger could easily ignore the beggar or leave, that element of inconvenience remains. In public transport, the proper or preferred state of a passenger is to be firmly fixed in position, whether sitting or standing, rather than moving. If a passenger has to move because he wishes or needs to leave the beggar, he suffers unnecessary inconvenience. This is different from an open space scenario, where people are generally in motion and so need take no extra effort to avoid the begging. Moreover, the vehicle itself may (or may about to be) in motion. If the approached passenger has to move more frequently, then there is greater risk of injury or damage to the person or

[56] It is criminalised in India to clean vehicles at red lights. See D Mukherjee, 'Laws for Beggars, Justice for Whom: A Critical Review of the Bombay Prevention of Begging Act 1959' (2008) 12 Intl JHR 279, 282.
[57] See *Federated Anti-Poverty Groups of BC v Vancouver (City)* 2002 BCSC 105 [308].
[58] Whether to punish those giving money is another question.
[59] It is a criminal offence in India. See D Mukherjee, 'Laws for Beggars, Justice for Whom: A Critical Review of the Bombay Prevention of Begging Act 1959' (2008) 12 Intl JHR 279, 282.

property. In general, begging in public transport is a concern in terms of both public order and public security.

The Home Office has recognised the embarrassment caused to the approached.[60] However, the offence should be quantitatively assessed in terms of its seriousness. The ease of avoiding or terminating offence affects the seriousness of that offence.[61] In open spaces, even if one could not easily ignore and leave the beggar, other pedestrians are passing quickly, so the approached would not feel pressured as he would if he were watched by other passengers. However, in public transport, begging places substantial social pressure on the targeted passenger because other passengers remain in the vicinity and observe him. It is via this social psychology that inner comfort is breached.[62] Therefore, even if a person merely silently announces their intention to beg by the use of written words, it still pressures and discomforts near-by passengers.

Public transportation will be owned by a private company or a public agency. Though they may have a public function and facilitate social life, they will have a private (profit) function that begging indirectly interfered. Begging on public transport may lead to people avoiding it. Exercising alternative choices will harm the operation of the transportation business and the property rights of the owner/operator.

Finally, operation of transport providers or retail premises can be disrupted by begging inside or even immediately outside. Public order is disrupted. While a shop is open to the public, it differs from streets or squares open to public. A shop is open to the public almost exclusively for shopping, while streets or squares are open for other general social activities. When a beggar enters a store or begging information is communicated, the commercial operation/service is disrupted. In comparison, a home is for private or family life and people inside are rendered even more captive still if confronted by a beggar. Door-to-door begging is an intolerable disruption of private life comfort and peace and thus is a type of disruption of public order. Even one solitary knock on the door of a family by one beggar is a disruption of their life peace. These harms establish that there is a *prima facie* argument for

[60] See Home Office, *Respect and Responsibility – Taking a Stand against Anti-social Behaviour* (Cm 5778, 2003) para 3.40.
[61] See *OTO* 32.
[62] Of course, this social psychology works in a community with a substantial section of members who value giving to the weak.

criminalisation. If they are further confirmed as wrongful in the next section, an argument for criminalisation can be made.

c. Aggressive Begging

The begging behaviours hitherto examined tend not to be very aggressive in character (except begging by traffic 'squeegeeing') – and thus may not be obviously intrusive to legal interests. I will examine obviously intrusive begging conduct that consists in approaching others in a disorderly way (importuning), or in abusive, insulting or threatening forms (forcible pulling or begging in groups). These behaviours in England can be covered by sections 4A and 5 of the POA 1986. Section 41 of the Chinese policing law lists aggressively troubling ways of importuning and forcible begging. Clearly, there is a *prima facie* case for criminalisation, although in some instances this may not be only a matter of public order because the harm here mainly targets personal rights.

The Chinese criterion of importuning or force is a rigid standard of regulating intrusive begging. Disorderly importuning refers to begging after an explicit or implicit refusal, in the manner of blocking, accompanying or following in a discourse. Generally, this requires at least two instances. But in the manner of following that is itself consistent, even if the person followed did not expressly order or request the beggar to desist, the manner could still be identified as importuning, dependent on the length of time or route involved. When a beggar follows a passenger, it is a form of harassment and stalking that is invasive of privacy, pre-empts attention (disrupting life peace) and breaches inner peace. In one case, the actor approached a number of people walking alongside over a distance.[63] Here, the approaching itself may not be sufficient to cause fear and alarm,[64] but its persistent manner may be.[65]

Forcible begging is threatening and thus aggressive. An extreme case might involve the use of direct force on the targeted person, such as pulling. Indeed, the very act of touching constitute assault.[66] When a beggar pulls a passenger, not only is their normal use of the place disrupted, but their personal safety is endangered. Another case of forcible begging may avoid direct touching, but the detention of the targeted person. Two or more beggars

[63] See *Donaldson v Vannet* 1998 SLT 957.
[64] Ibid 959.
[65] Persistent following is generally deemed to be a breach of the peace, see *BOP* 150.
[66] W had approached members of the public, offered to shake hands with them, patted them on the shoulder and then asked for money, the conduct was deemed likely to cause alarm or apprehension on the part of the public and thus amounted to breach of the peace, see *Wyness v Lockhart* 1992 SCCR 808. The offering itself is enough to disturb convenience of free passing and the patting itself is unacceptable force against person.

moving towards the same target causes inconvenience in the normal use of a public place and creates a potentially alarming state undermining psychological comfort.

In sum, by the application of the first step of my test, I have identified some initial candidates for criminalisation. *Intrusiveness* can be a sufficient standard to allow peaceful begging such as passively standing/sitting by the wall/guard rail that causes no harm, while considering the prohibition of other conduct such as slowing passers-by by active approaching, stopping/blocking passers-by by sitting/lying/objects, following passers-by, pulling passers-by or begging in a group – each of which is likely to constitute a interference with the convenient use of public places/facilities, a breach of inner peace, an invasion of privacy or even endangerment of safety. These cases of intrusion on interests should be further normatively examined to assess whether or not the criminal law should be engaged.

(iv) Wrongful Begging Behaviours

After this analysis of begging in terms of factual setbacks to (public order) interests, this section applies the second step of my posited test for criminalisation. Here I will structurally balance conflicting interests in the cases of intrusive begging identified above, in order to show how criminalisation might be further limited by considering the wrongfulness of the conduct.

Not every expression is protected. Structurally, conflicting interests should be balanced so as to identify wrongful and thus criminalisable intrusions. Freedom of expression and the right to avoid intrusive begging in public places are necessarily opposed interests, defined by Feinberg as the interest in avoiding the harm from an activity and the interest in engaging it.[67] People who beg, busk or solicit indeed express something. Those who disorderly use public places may claim a right to express, but the right not to be intrusively communicated with by others surely limits the means of expression. As an 'atomistic self-governing individual' (autonomous bounded self), 'the right to pass freely' is necessary for circulation.[68]

In conducting the balancing exercise, consideration should be given to how 'vital' each interest in the interest network of its possessor actually is – and the degree to which each is

[67] See *HTO* 203.
[68] See N Blomley, 'The Right to Pass Freely: Circulation, Begging, and The Bounded Self' (2010) 19 S&LS 331, 331.

reinforced by other private and public interests and their inherent moral quality.[69] Expression involves the exercise of a political right in the network, while convenience and comfort is a life right. It is hard to say which is more important. For others or for society generally, both values are comparable. Intrusive expression is important for the actor to seek support and for others to know social facts and for humanity as a whole to flourish,[70] while peaceful passing is important for the actor to conveniently and comfortably use the public place, for relevant parties to interact efficiently with the actor and for the whole city to be economically efficient and socially attractive.[71]

However, consideration of the moral quality of an interest should result in a favourable outcome for the targeted, because no one should unnecessarily sacrifice others' interests for their own. If other comparably effective alternatives but less intrusive forms of expression are readily available, it is hardly moral to sacrifice others' interests, even if less important, for one's own. It is the aggressive soliciting person who initiates the conflict of interests. Therefore, the conflict should be limited by the actor to what is necessary.[72] Everyone enjoys the right to freedom to expression, but the means by which this is to be achieved should be reasonable and not sacrifice others' interests unnecessarily. Otherwise, this will lead to an inequality in respecting of the interests of different subjects – the interest of the subject who exercise freedom to expression would be indiscriminately prioritised over the interests of all others.

Therefore, aggressive manners are clearly not acceptable. Aggressive means of solicitation are too intrusive to the interests of others. They could and should be easily avoided. It is not that 'obstructive panhandling' 'cannot promote those underlying [personal and social] values',[73] e.g. 'it is also in the audience's interest to be exposed to expression even when it

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[69] See *HTO* 217.

[70] 'The nature of the principles and values underlying the vigilant protection of free expression in a society such as ours' are: '(1) [others'] seeking and attaining the truth…; (2) [own] participation in social and political decision-making …; and (3) the diversity in forms of individual self-fulfillment and human flourishing ….' *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927, 58 DLR (4th) 577 [612]. See also *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 [459].

[71] 'Movement and activity' is aesthetically valuable and 'inherently productive for the state and its residents'. See Ron Levi, 'Loitering in the City That Works' in Markus D Dubber and Mariana Valverde (eds), *Police and the Liberal State* (Stanford General 2008) 198.

[72] Similarly, in so far that it is the state which initiates the regulation of begging, the regulation should be limited to what is necessary. A blanket ban of begging ends the right to begging peacefully, leaving no ample alternative means of communication. See *Hill v Colorado* 530 US 703, 726-27 (2000).

[73] See *Federated Anti-Poverty Groups of BC v Vancouver (City)* 2002 BCSC 105 [18].

may come in unwelcome forms'.[74] It is just there are other reasonably useful means by which a person can express their plight.

But to what extent could intrusive manners be punished? On begging only, it may be claimed that active approaching is still intrusive and should be criminalised. However, if people see begging as a specific type of solicitation,[75] would they still believe that all solicitation involving active approaching should be punished? Perhaps not. Actively distributing religious, political, social or even commercial leaflets or soliciting charitable contributions may be considered acceptable.[76] If such uninvited approaching were to be totally forbidden, no initiation of active interaction from a stranger would be permitted. This is scarcely consistent with the general needs of social interaction and cooperation. More importantly, a passer-by can easily ignore polite solicitation for assistance and walk on.[77] Active approaching usually does not force others to reroute – they can still pass freely. It is not compulsory for others to listen – once they refuse, whether explicitly or implicitly, the freedom of expression finishes. This solution strikes an acceptable balance between freedom of expression and public convenience and comfort. In this sense, simple active approaching, though intrusive, is not wrongful. Exceptionally, its occurrence in the close vicinity to a public entrance determines that the begging is not ordinary active approaching, but a form of aggressive begging in a relatively captive situation where the target cannot easily ignore the solicitation and walk on.[78] Then it seems active solicitation should generally be permitted, subject to limitations in some cases.[79]

However, if there were too many solicitations by beggars in a public place, a passer-by would be substantially disturbed in the convenient use of that place because the passer-by would be the subject of repeat approaches in the same public place by the same beggar and for other beggars – such that there can be corresponding limitations to prevent the accumulative harm.[80] Other soliciting behaviours are not as prevalent as begging and tend not to cause this

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[74] *Loper v New York City Police Dept* 802 F Supp 1029 (SDNY 1992) 1042-043.

[75] Broadening the context to that of a person seeks help/attention is a good way to avoid 'disfavoring a particular message communicated by a particular class of individuals'. See Drew Sena, 'A Constitutional Critique on the Criminalization of Panhandling in Washington State' (2017) 41 Seattle U LR 287, 307-08.

[76] After all, this is the essence of journalism.

[77] Dennis J Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging' (2009) 73J Crim L 212, 231.

[78] See Municipal Code of Chicago, s 8-4-025 (Aggressive Panhandling).

[79] Similarly, general ban of street performance and art vending except for 11 specified locations is 'substantially broader than necessary'. See *State of Florida v O'Daniels* 2005 WL 2373437 (Fla App 3 Dist).

[80] Conjunctive/accumulative harm arises from the combination of others' similar acts that are not morally distinct from each other. Preventative regulation of accumulative harm can be justified in 'a scheme of cooperation requiring joint action (or, more precisely, joint desistence)' to avoid substantially probable harm to others, by doing no or less part for own part not to be combined with others' parts to become (that)

concern. With accumulative begging, the relevant test to limit expression – 'that substantial privacy interests are being invaded in an essentially intolerable manner'[81] – is exceptionally met. This accumulative harm shall be considered in being of allowing as a stating proposition, approaching by beggars in public places, but with the problem solved by time control (such as rush hour) and/or venue controls (such as a central business district). In the solution, there may still be discomfort,[82] but it is reduced to an acceptable degree and is manageable.

Lastly, begging should be conducted in a fashion compatible with and balanced against the principal function or intended purpose of a public place.[83] The principal function or intended purpose of a public place determines its design and use. It is vital to effective urban planning and functioning. So, harm to it is in principle disproportionate, resulting in unequal and unethical use, unless there were clear and present countering considerations. It is in this sense that we can understand that 'the pedestrian is not imagined as open to encounter' – and that 'the sidewalk, more generally, is not a forum for expressive liberties, but a conduit of flow.'[84] However, the principal function or intended purpose of a public place may change over time and its evolution is justified by the democratic process and the making of reasonable overall arrangements. For example, the United States Supreme Court has considered whether places such as sidewalks and parks traditionally operate as public fora to decide whether they are places suitable for expression.[85] This consideration is not always effective – if city planners democratically change the long-standing arrangements and the venues for such public channels of expression, tradition is no longer a binding guide to the principal function or intended purpose of the place.

In sum, aggressive manners and captive circumstances – being a disproportionate and immoral interference – are not justified by the right to freedom of expression, and thus are

harmful. *CHW* 86. That is, criminal sanctions in accumulative harm often reply on defying the regulatory threshold. See *HTO* 244.

[81] *Cohen v California* 403 US 15, 91 S Ct 1780, 29 L Ed 2d 284 (1971) [21].

[82] See Angus Erskine and Ian McIntosh, 'Why Begging Offends: Historical Perspectives and Continuities' in Hartley Dean (ed), *Begging Questions: Street Level Economic Activity and Social Policy Failure* (The Policy Press 1999) 39.

[83] See *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 [394]- [395]. Similarly, graffiti is purportedly an expression of art or other ideas. However, if public places are intended for other known/presumed uses, graffiti should be limited.

[84] See N Blomley, 'The Right to Pass Freely: Circulation, Begging, and The Bounded Self' (2010) 19 SLS 331, 331, 345.

[85] Julia Koestner, 'Begging The (First Amendment) Question: The Constitutionality of Arizona's Prohibition of Begging in a Public Place' (2013) 45 Ariz St LJ 1227, 1241.

wrongful disruptions of public order. But simple active approaching, though intrusive, can be a proportionate means of expression and not wrongful.

Based on the analysis of factual and wrongful harms, there are three categories of wrongful begging conduct that correspond to legal interests in convenience and comfort and inner peace: (1) soliciting to a moving person in a bus stop, cab stand, railway station, entrance, or lying, sitting or standing in the middle of a passageway as to obstruct convenient passage; (2) soliciting a 'captive' person engaged in other activities – if, for example, while they are in an enclosed area,[86] in an outdoor café, while queuing or stopped at traffic lights – should be regarded as disturbing the comfort or safety of the use of a public place or facility; (3) soliciting in an intimidating manner or circumstances (in a group, by following, in close proximity to an ATM or pay phone, or during certain the hours of darkness should be regarded as causing fear or alarm (in terms of personal or property safety).[87] All these specific articulations of begging conduct match legal interests with wrongful conduct in improper circumstances – and help clearly and effectively protect order (and safety) in public places. These concepts of interests ensure we avoid inconsistent classification of wrongful conduct – and these categories of conduct substantiate these otherwise hollow concepts.

III. THE CRIMINALISATION OF LOITERING

The ordinary, common-sensible definition of loitering is neutral staying in a place or moving around a limited area with no apparent goal. But in law, it bears a negative implication. It evokes suspicion of an unlawful purpose and thus often elicits some sort of legal response. People such as beggars may be punished by laws against loitering. Some loitering behaviours such as group loitering can disrupt the inner peace of members of the public, in the form of causing fear, and/or even cause inconvenience to free movement. This raises further questions about the valid scope of public order crimes. I will consider here how some jurisdictions have criminalised loitering and explain why these approaches have been problematic – in order to argue for a new approach to understanding loitering from the perspective of the harm principle.

[86] The area includes public toilets, shops and dwellings etc.

[87] Besides, touching is criminal assault and an invasion of bodily integrity – with the attendant threat of robbery – such that it is naturally impermissible.

(i) Inconsistent Approaches to Criminalising Loitering

Different jurisdictions have adopted varying approaches to tackling loitering problems, and with different aims. In this section I will look at what the 'claimed harms' of loitering are – and show why and how loitering is framed as a public order problem.

Firstly, many jurisdictions criminalise some loitering conduct in order to prevent other crimes. The origin of this approach seems to be section 4 of the Vagrancy Act 1824, which originally prescribed both the offence of loitering in a particular place for an unlawful purpose and the more general offence of loitering in a public place.

Section 4 in its modern form remains as an offence of loitering in a particular place: 'every person being found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any closed yard, garden, or area, for any unlawful purpose...'. On the particular offence of loitering, Tasmania confirms the approach taken in the 1824 Act that loitering on property needs an unlawful purpose to be criminalised. Tasmania criminalises loitering (of a suspected person or reputed thief) on property 'for any unlawful purpose'.[88] Similarly, being found in or on any building or enclosed area or transport facility without reasonable excuse is a specific loitering offence in New Zealand.[89] This kind of test also features in the miscellaneous chapter in the Penal Code of California.[90] As to the particular offence of loitering, these jurisdictions take a consistent approach: the act must be in a limited place for an unlawful purpose.

However, no consistency exists between these jurisdictions regarding the general offence of loitering in a public place. England and the Republic of Ireland have repealed the original offence in the Vagrancy Act 1824. In England, section 8 of the Criminal Attempts Act 1981 abolished the offence of loitering in a public place – the provisions of section 4 of the Vagrancy Act 1824 which had applied to suspected persons and reputed thieves frequenting or loitering about the public places described in that section, with the intent to commit felony,

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[88] See Police Offences Act 1935, s 7.

[89] See Summary Offences Act 1981, s 29(1).

[90] California criminalised loitering 'upon the streets or from place to place without apparent reason or business' and refusing 'to identify himself and to account for his presence' 'if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification' (see Penal Code Ann. (West 1970), s 647(e)). There was guidance on when such a demand might be made. But the standards to judge whether one has identified himself was held to be unconstitutionally vague (see *Kolender v Lawson* 461 US 352, 361 (1983)). Now 'loiter' 'refers to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.' (Penal Code, s 653.20(c)).

were repealed.[91] Similarly in Ireland, it was suggested that no new offence of general 'loitering with intent' should be enacted to replace section 4.[92] However, some common law jurisdictions such as Tasmania and New Zealand still retain an offence of loitering in a public place. Tasmania criminalises loitering in a public place 'with intent to commit a crime or an offence'.[93] New Zealand has a general loitering offence of 'being found in public place' 'behaving in a manner from which it can reasonably be inferred that he is preparing to commit an imprisonable offence'.[94]

The above approach is thus justified in terms of preventing other crimes (that the loiterers might commit). But it is not clear whether these jurisdictions can justifiably enact an offence of loitering in a particular or public place – and if so, what kind of intention should be required. More importantly, the approach does not address the harms of loitering itself (to public order).

One alternative approach to the criminalisation of loitering involves it not being based on the harm of loitering itself, but on the harm of the defiance of an order to disperse. For example, in New Zealand a request to cease loitering is backed by a substantive penalty: 'in circumstances that do not cause the constable to suspect an intention to commit any other offence', there may be a warning to leave and it is the refusal to obey which leads to the imposition of a fine.[95] In this scenario, the loitering itself is not harmful – not a preparation for further crimes as in the first approach. But it is not immediately clear whether the persistent loitering is a public order problem. So, we need to ascertain the harm associated with persistent loitering that justifies criminalisation.

The third approach to criminalising loitering recognises something more of an intrinsic interest in public order. Arizona, for example, outlaws being present in a public place and soliciting in an offensive or disturbing manner, or being present 'in a transportation facility' (i.e. actually on public transport) and conducting 'business, trade or commercial transactions involving the sale of merchandise or services' after a request to cease or without authorisation, etc.[96] However, the law does not criminalise loitering itself but the further conduct of solicitation or selling that offends or disturbs others. The law engages with the

[91] Preparation needs a specific intention, rather than an obscure intention to commit a feasible felony. See *Lyons v Owen* (1963) Crim LR 123.
[92] See Law Reform Commission (Ireland), *Report on Vagrancy and Related Offences* (LRC No 11, 1985) 96.
[93] See Police Offences Act 1935, s 7.
[94] See Summary Offences Act 1981, s 28.
[95] The fine shall not exceed $ 500, see Summary Offences Act 1981, s 29(3).
[96] See Arizona Revised Statutes, Title 13 Criminal Code, s 2905.

uses of public space in order to target specific forms of conduct related to or associated with loitering. One jurisdiction in Australia (the Northern Territory) outlaws persistent loitering in order to discontinue or prevent public disorder problems caused by loitering (obstruction of movement and interference with the enjoyment of using a public place).[97] This law means that loitering itself is conceived as a public order problem when it involves the obstruction of traffic movement or interference with the enjoyable use of a public place – such that it is justifiable to criminalise the persistence of such disorderly loitering.

Another approach targets disorderly loitering by gang members. It is an offence in Chicago, when 'a member of a criminal street gang engaged in loitering with one or more other persons' in any designated public place, refuses to leave as ordered by police.[98] The approach is aimed both at preventing further crimes such as drug dealing – and at the harm implicit in gang loitering itself, specifically, disrupting public order by causing obstruction and intimidation to the public. This aims partly at policing the movement of the public in the city.[99] It means it is justifiable to criminalise the persistence or repetition of such disorderly gang loitering.

In sum, there are inconsistencies between jurisdictions; between substantive and procedural measures in a given jurisdiction; and even within the operation of the same measure in a given jurisdiction. None of above approaches can offer clear *and* comprehensive answers to the harmfulness of loitering. In next section, therefore, I will assess and refute the claimed

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[97] Section 47A of the Summary Offences Act 1923 provides that:

> (1) A person loitering in any public place who does not give a satisfactory account of himself when requested so to do by a member of the Police Force shall, on request by a member of the Police Force to cease loitering, cease so to loiter. Penalty: $2,000 or imprisonment for 6 months, or both. [subsection (1) generally punishes persistent loitering after no reasonable account of the actor] (2) Where a person is loitering in a public place and a member of the Police Force believes, on reasonable grounds (a) that an offence has been or is likely to be committed; or (b) that the *movement* of pedestrian or vehicular traffic *is obstructed or is about to be* obstructed, by that person or by any other person loitering in the vicinity of that person; (c) that the safety of the person or any person in his vicinity is in danger; or (d) that the person *is interfering* with the reasonable *enjoyment* of other persons *using* the public place for the purpose or purposes for which it was intend(ed), the member of the Police Force may require any person so loitering to cease loitering and to remove from that public place any article under his control, and a person so required shall comply with and shall not contravene the requirement. Penalty: $2,000 or imprisonment for 6 months, or both. (Emphasis added)

[98] The Municipal Code of Chicago includes explanations of designated public places in subsection (b) and of 'gang loitering', 'criminal street gang' and 'criminal gang activity' under subsection (d). See s 8-4-015 (Gang loitering). This scheme survived the constitutional challenge of being vague, arbitrary and overbroad in *City of Chicago v Morales*. The previous wording 'to remain in any one place with no apparent purpose' gave 'absolute discretion to determine what type of activities constitute loitering.' 527 US 41 (1999).

[99] See Ron Levi, 'Loitering in the City That Works' in Markus D Dubber and Mariana Valverde (eds), *Police and the Liberal State* (Stanford General 2008) 198.

harmfulness of loitering. Then in section (iii) I will apply the harm principle to consider comprehensively how to identify possible harms in cases of loitering.

(ii) Claimed Harms of Loitering

There are, broadly, three claimed harms of loitering. First, loitering by individuals or groups might be criminalised to prevent future crimes (either in general, or where some specific intent is required). It is claimed that the criminalisation of loitering will prevent the commission of such future crimes as drug trafficking, violence or the harassment of neighbouring residents.[100] This is indirect harm. Second, loitering by individuals or groups might be criminalised because it can damage the quality of life in a particular neighbourhood (also because some further crimes might conceivably be committed). It is argued that loitering may limit residents of a neighbourhood in pursuing recreational, familial and commercial daily life on a street corner, or outside a shop or café because they are concerned about the crimes that the loiterers might commit in the future.[101] This is a harm of loitering. Thirdly, loitering by groups might be criminalised because the groups are themselves intimidating.[102] Residents may simply be intimidated by the presence of groups of young people – even if these young people do not intend to be intimidating or it is not envisaged that other crimes might be committed. There is a harmfulness implicit in a large group. I would argue from the consistent perspective of the restated harm principle that the three kinds of claimed harms above (future crimes of loitering, loitering's interference with daily life, intimidation from large groups) do not justify criminalisation.

In respect of future crimes, loitering itself is as neutral an action as begging. Loitering in residential areas could be either an innocuous daily activity or involves preparation for the commission of contemplated crimes, depending on the actor's intention. But the intention may not be readily established – it should be proved from objective circumstances. Similarly, the crime of being 'out-of-doors after nightfall' is 'basically one of suspicion'.[103] Criminalisation should target more specific and non-neutral behaviours (such as further harassment offences) – rather than the general and neutral loitering itself – because the low

[100] Ibid 180.
[101] Ibid 198.
[102] Gang loitering is obviously such intimidating, see Municipal Code of Chicago, s 8-4-015(b) (Gang loitering). And it is not uncommon for people to think other group loitering as intimidating.
[103] See P Michael Lahan, 'Trends in the Law of Vagrancy' (1968) 1 Conn L Rev 350, 365.

probability of loitering causing further harm should not override the general freedom of loitering as a form of personal liberty.

There is little cause for concern if there is no substantial risk of being committed. Accordingly, the apprehension of above normatively unestablished remote harm of loitering and the corresponding harm of daily life being interfered cannot reasonably be imputed to the loitering.

Finally, if some people do not apprehend remote harm, but nonetheless suffer anxiety merely because they observe an ordinary group (not comprising reputed thieves or gang members) loitering in an ordinary public place (not designated by the police as suspicious), loitering is seen as an eyesore and gets on their nerves. This is a personal problem of abnormal vulnerability and, as argued in chapter 3 (III(ii)a), their anxiety should not be imputed to the loitering conduct. Otherwise, group loitering as an exercise of the freedom of assembly will be denied. For example, nowadays strangers gather in a place to play some cyber-games together on their mobile phones. It would be an excessive interference with freedom of assembly if individuals are punished simply because others become anxious at the sight of a group gathering in an ordinary place.

In sum, loitering by an individual or a group usually does not risk remote harm or harm life quality or cause anxiety in the normative sense. In the next part I will look at how, exceptionally, loitering can be harmful or risky.

(iii) Harms of Loitering

In this first step of my test of criminalising loitering, I will look at how loitering can be apt for criminalisation in three cases of present harms, suspected harms and remote harms.

a. Present Harms of Loitering

Loitering is generally conducted by walking around a place or standing in a place, or sitting or lying in a place that is typically not necessary for public passage. Loitering does not, in general, unreasonably interfere with the use of a public place. However, loitering itself can cause harmfulness on the spot in exceptional or rare cases – as in the third and fourth approaches above of criminalising loitering. Intoxicated loitering may cause inconvenience

and discomfort to free movement and enjoyable use of a public place. A flash mob may cause an obstruction, while gang loitering may cause alarm.

Firstly, one may loiter because of drunkenness or intoxication in general. Drunken loitering is highly likely to disrupt public convenience and comfort because of the space occupied and the accompanying smell and even vomit.[104] Secondly, there are flash mobs that began as peaceful experiments in which large groups of people would gather in public places to transiently perform innocuous acts and then quickly disperse.[105] This may temporarily obstruct pedestrians. Lastly, gang loitering, because of the particular identity of the actor and the *ex ante* designated places, is enough to cause alarm to the public. 'Gang loitering means remaining *in particular areas* of the city' designated by written directive by the police 'under circumstances that warrant a reasonable person to believe that the purpose or effect of that behavior is to enable *a criminal street gang* to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities'.[106] The reaction of alarm is thus perfectly reasonable, different from the abnormal anxiety reaction simply from the sight of an ordinary group loitering in an ordinary public place. Accordingly, the asserted control over the public area concerned harms others' normal use of it and their life quality. In these three rare cases, there can be scope for criminalisation.

b. Remote Harms of Loitering

When the loitering is found to have substantially risked an interest by further conduct, there can be substantive punishment. The risk needs to be proved as a non-trivial probability unless the remote harm is of tremendous magnitude. As Feinberg articulates, possible harm gravity and possibility compound the scale of risk of harm to decide its acceptance.[107] Immediate threat to public safety could justify substantive punishment, as well as procedural 'stop-and-frisk'.[108] Immediate threat of public disorder could also be a justification, but remote harm of minor public disorder may not be. The decision depends on whether or not the risk of

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[104] It is an offence to be intoxicated in a public place in some jurisdictions. See Summary Offences Act 2005 (Queensland), s 10.

[105] See L Claycomb, 'Regulating Flash Mobs: Seeking A Middle Ground Approach That Preserves Free Expression and Maintains Public Order' (2013) 51 U Louisville LR 375, 375.

[106] See Municipal Code of Chicago, s 8-4-015.

[107] See *HTO* 216.

[108] See David Keenan & Tina M Thomas, 'An Offense-Severity Modal for Stop-and-Frisks' (2014) 123 Yale LJ 1448, 1448. If an officer has a reasonable and specific suspicion that a suspect is involved in a crime and may be carrying a weapon, stop and frisk is justified (*Terry v Ohio* 392 US 1 (1968)), but it is unclear how much objective evidence could make a suspicion reasonable. See James W H McCord and Sandra L McCord, *Criminal Law and Procedure for the Paralegal: A Systems Approach* (3rd edn, Thomson Cengage Learning 2006) 330.

remote harm is high. If it is not, there is too much erosion of liberty to justify addressing low risk. This risk assessment exercise should not be reduced to the subjective judgment/suspicion of a police officer. Criminalising preparation needs more specifically objective evidence such as trespass[109] – or the possession of articles causing safety concerns.[110]

A specific remote harm of loitering may be sexual solicitation.[111] In England, section 1 of the Street Offences Act 1959 punishes loitering or soliciting for purposes of prostitution.[112] Solicitation is a future crime of loitering and it could amount to public disorder. Solicitation, as begging, generally does not harm others. But it offends incorrect targets and other viewers unnecessarily by the fact of it being conducting in public.[113] The public is exposed to the offence. The risk of the public being offended is clear and present. So there is substantial risk which justifies the preventative criminalisation of loitering engaged in for the purposes of solicitation. It should be punished as well as the soliciting behaviour.[114] However, it may be difficult to prove that the loitering was carried out with the purpose of solicitation, but it will be comparatively easy to establish reasonable suspicion/probability to procedurally order the suspected person to leave. Therefore, a procedural order backed by penalty should preferably be prescribed. Such a measure requires further examination of the harms of defiant loitering.

c. Harms of Defiant Loitering

Persistent loitering that defies a policing order to disperse can be harmful. The public or police authority needs competent evidence relating to the intention of remote harms of loitering to justify criminalisation. When there is no such clear evidence, but only reasonable suspicion (as in the fourth approach), loitering is generally targeted for detective

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[109] See *Regina v Mark Riddell* [2013] EWCA Crim 2284, in which the defendants were arrested on suspicion of burglary which was not pursued against them and the appellant pleaded guilty to the vagrancy offence.

[110] See Criminal Law (Consolidation) (Scotland) Act 1995, s 47; Criminal Law (Consolidation) (Scotland) Act 1995, s 49; Civil Government (Scotland) Act 1982, s 58; Criminal Justice and Licensing (Scotland) Act 1982, s 49(1); Police and Fire Reform (Scotland) Act 2012, s 92 (2). Or a male being found in a women's toilet without convincing excuse to exclude criminal purpose at the scene.

[111] This example is now more meaningful in theory than in practice because information technology has substantially changed the way of initiating sex worker transactions.

[112] California similarly outlaws loitering 'in any public place with the intent to commit prostitution' (Penal Code, s 653.22). Arizona, in a more general manner, outlaws being present in a public place and soliciting in an offensive or disturbing manner. See Arizona Revised Statutes, Title 13 Criminal Code, s 2905.

[113] See Abraham Sionk, *Prostitution and the Law* (Faber 1977) 59; Law Reform Commission (Ireland), *Report on Vagrancy and Related Offences* (LRC No 11, 1985) 256.

[114] See Law Reform Commission (Ireland), *Report on Vagrancy and Related Offences* (LRC No 11, 1985) 268.

convenience by police at the scene on the basis of the presumed risk of further crimes (as in the second approach of criminalising persistent loitering).

Assuming reasonable suspicion, temporary detention verifying, identification and search could be acceptable police procedures.[115] '[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information.'[116] Reasonable suspicion of involvement in a crime justifies such a provision being backed by arrest and prosecution.[117] The reason is that '[t]he ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice'.[118] The suspicion should be connected with the probability of specific crime(s) being committed – not some obscure intention to commit a feasible felony[119] – nor mere immoral purpose or 'hiding from the police'.[120] Convictions can evidence intent and reasonable suspicion.[121] The known character of the individual could also be a basis for reasonable suspicion.[122] Drug-related loitering at suspicious locations where drug use is notoriously prevalent or in 'designated areas of the city' 'by written directive' may also allow procedural dispersal as well as investigation.[123] The dispersal order as a governmental technique – predicated on reasonably-believed harmful purpose or effect should be limited to specified enforcement areas, rather than to a whole city, and should only last for a matter of hours.[124]

Refusal to desist and leave can justify criminalisation because it is harmful. In one case, a protestor was attending a demonstration which constituted a major disturbance to public transportation. After being asked to leave, she moved three or four paces then stopped for

[115] See *Brown v Texas* 443 US 47, 51-52 (1979).
[116] *Hayes v Florida* 470 US 811, 816 (1985).
[117] See *Hiibel v Sixth Judicial District Court of Nevada* 542 US 177 (2004).
[118] *United States v Hensley* 469 US 221, 229 (1985).
[119] See *Lyons v Owen* [1963] Crim LR 123.
[120] See David Ormerod, 'Ingredients of Offence: Test to Determine Whether Person 'Found' In an Enclosed Yard for An Unlawful Purpose – Vagrancy Act 1824, s. 4' [2008] Crim LR 216, 218.
[121] See *R v Fairbairn (Walter Joseph)* (1949) 2 KB 690. Injunctions made by a court require proof of the past conduct or future danger to 'on the balance of probabilities' standard or even to 'beyond reasonable doubt' standard. See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 82. Orders sought by police should also be done so on an objective basis.
[122] See *R v Wilson* [1962] NZLR 979.
[123] See *Johnson v Athens - Clarke County* 529 SE 2d 613 (Ga 2000); Chicago Municipal Code, ss 8-4-015(b) (Gang loitering) & 8-4-017(b) (Narcotics-related loitering).
[124] See Ron Levi, 'Loitering in the City That Works' in Markus D Dubber and Mariana Valverde (eds), *Police and the Liberal State* (Stanford General 2008) 199.

25 seconds during which time she waved her fists and yelled her disapproval at other people in the vicinity. Whether her action amounted to 'loitering' should be answered by an objective consideration of the observable facts and circumstances.[125] Given the preceding major disturbance to public transportation, even if there were no waving fists and yelling,[126] the loitering was sufficiently serious to have an criminal aspect to it. The reason, as argued in chapter 2 (II(ii)b), is that the persistence of loitering is a harmful disruption to the specific administration activity which is a civil life activity based on a reasonable suspicion (that the continuation of the loitering would escalate the disturbance).[127]

In short, when there is an objective basis for concluding that a person's loitering may lead to or assist in the commission of a crime, the police could firstly procedurally detain and check the suspect at the locus or order them to leave; secondly they could move to arrest and even prosecute for a substantive penalty if the procedural measure were defied.

(iv) Wrongful Loitering Behaviours

People are free to loiter for an innocent purpose in the exercise of their liberty.[128] Loitering itself should be generally seen as the freedom of the person and the right to use public places. It has meaning for both individual fulfillment and social prosperity. These liberal values should be balanced (against the potential harms) in assessing whether loitering has taken place in a wrongful manner, which is the second step of my test of criminalising loitering.

The process of balancing is referable to the criminalisation of begging and can be simplified. For example, in flash mobbing, the protection of expressive performance art is more important than the resultant transient obstruction. Flash mob participants could claim the protection of expressive performance art.[129] Punishing flash mob participants for breaching the peace or disrupting the traffic/pedestrian flow by an unusual or eccentric manners – where a mass group stands in the middle of a passageway, rather than punishing them for their mere participation, is currently the optimal holistic approach.[130] In contrast, gang loitering in an *ex ante* designated place is wrongful because the actor has other ample places

[125] See *Power v Huffa* (1976) 14 SASR 337.
[126] The behaviours should cause alarm, see Ch 3, II(ii)b.
[127] This procedural order of dispersal slightly limiting liberty is justified by the more important interest in preventing crimes and disorder. It should be free of desistence.
[128] See *Kent v Dulles* 357 US 116, 126 (1958).
[129] See L Claycomb, 'Regulating Flash Mobs: Seeking A Middle Ground Approach That Preserves Free Expression and Maintains Public Order' (2013) 51 U Louisville LR 375, 378.
[130] Ibid 404-05.

in which to exercise their freedom of gathering at no great cost while the public cannot choose other places in which to conduct their daily lives without substantial cost. So, these cases show that loitering behaviours are usually not wrongful – and rarely would there be valid limits of loitering behaviours.

In sum, it is only exceptional obstructive loitering, intoxicated loitering and gang loitering (that should be regarded as disrupting public order) – or loitering substantially risking further crimes – that can be seen as types of loitering that are unnecessary, wrongful and thus can be directly criminalised. Other objectively suspicious loitering conduct generally only justifies procedural identifications, stop-and-frisk and/or mandated dispersals as preventative measures backed by substantive penalties. Legislation addressing loitering should be amended accordingly.

IV. CONCLUSION

It is encouraging that research, legislation and justice have all endeavoured to delimit valid criminalisation of public order crimes, though from different perspectives and to different extents. This chapter has comprehensively applied a consistent criminalisation principle to typical public order offences. Solicitation and loitering are typical behaviours that may disturb the normal use of public places. The part on begging has principally examined actual harms in the framework of the harm principle, while the part on loitering has mainly focused on risks of harms. Solicitation and loitering are not in themselves a harm to public amenity or a concern of security, but do tend to be grouped with offence to others or with aesthetic harm or risking increased crimes. However, the suggested harms/risks either do not set back a criminally protectable interest – or are not criminally imputable because of doctrinal or empirical reasons – or are not criminally wrongful because they are justified by personal meaning to the actor and social value to others.

On the level of setting-back interests, public places e.g. streets exist mainly for peoples' convenient and comfortable movement. Where there is interference with this type of movement, public place order is disrupted. Considering the main use of public places helps to select positive and negative cases of candidates for criminalisation. Peaceful behaviours by the wall/guard rail generally interfere with no one, but aggressive approach to others or unreasonable use of a place, given the venue, time and other circumstance, may be a disruption of public order. This harm-clarifying thought is the meaningful starting point of criminalisation. No offences of nuisance should be enacted without identifying the

interference with life comfort, convenience or peace. Not only begging for material giving, but solicitation for charitable, commercial or other social purposes should be regulated similarly, for the proper use of public places and people's life convenience, comfort and peace.[131]

On the level of fair imputation/prevention, remote harms can be normatively recognised only when there is normative involvement, as well as a substantial risk. The general need of this theoretical level in criminalisation practice should be emphasised with a careful examination in specific situations. Claimed harms of begging, loitering, etc. tend to be empirically dubious, and further, cannot be normatively imputed to the conduct.

On the level of wrongfulness, the existence of amenity and safety of the public harmed or risked by a given behaviour and the existence of rights/freedoms backing the same behaviour are not mutually exclusive. They may co-exist in the same case as structurally-conflicting interests, and a doctrinally-structured balancing exercise is required to determine the wrongfulness of the conduct.

This chapter has thus demonstrated that the harm principle can, in a clear and efficient fashion, assess and shape valid criminalisation of begging and loitering to a relatively full extent. This systematic, doctrinal framework of three-step tests (harm-imputation-wrong) can enlighten the criminalisation analysis of all cases of public disorder – particularly multifarious behaviours covered by common law offences such as public nuisance in England and breach of the peace in Scotland. Their relevant statutory embodiments, if possible, should be considered in terms of this normative test – that the systematic moral limits of the criminal law might be met.

[131] Or in similar words, 'enjoyment of, or peaceful passage through, a public place.' Rights in Public Space Action Group, 'Review of the Vagrants, Gaming and Other Offences Act 1931 (Qld)' (*Law Right*, August 2004), 5 < www.lawright.org.au/_dbase_upl/Review_of_Vagrants.pdf> accessed 29 May 2018). The First Amendment protection of free speech extends to soliciting for oneself and soliciting for others (see Nate Vogel, 'The Fundraisers, The Beggars, And the Hungry: The First Amendment Rights to Solicit Donations, To Beg for Money, And to Share Food' (2012) 15 U Pa J L & Soc Change 537, 542). Begging exemplifies solicitation in general. Begging has similar motivations to other street-level economic activities, including busking, pavement art, windscreen cleaning and street trading (see D Mukherjee, 'Laws for Beggars, Justice for Whom: A Critical Review of the Bombay Prevention of Begging Act 1959' (2008) 12 Intl JHR 279, 280). To consider begging as a form of holistic solicitation is not only illuminating to consistently determine the legal status of begging, but also to equally and efficiently to resolve all the solicitation cases – the message communicated generally is neutral and may not constitute an offence under the offence principle, but the manner of communicating may be harmful or offensive.

Chapter 5 Offensive Conduct: Indecency and Insult

I. INTRODUCTION

The previous chapter considered how the harm principle can consistently be applied to cases of begging and loitering in order to delimit the scope of public order law. This chapter will examine cases of offensive conduct that involve a serious loss of inner peace to members of the public, and will argue for a more consistent application of a criminalisation principle. As argued in chapter 2, the offence principle can be applied to types of offensive conduct as suitable candidates for criminalisation, by progressively looking at the serious offence that is caused or risked by the conduct and assessing whether or not the conduct is reasonable. This chapter thus aims to apply these broad principles to some specific examples of offending.

The chapter is in three main parts. In Part II I will consider the many different forms of offensive conduct and offensive reactions. We should 'resist categorical statements about the legal significance of offence without further specifying the kind of offence in question'.[1] Therefore, in Part II I will outline a method for developing a consistent classification of offensive conduct into threats, indecencies and insults – and then for each category of offensive conduct I will analyse the typical categories of offence reaction (the consequential mental displeasure). The criminalisation of threats is non-controversial,[2] and thus requires no separate attention in this chapter, which will otherwise focus on indecencies and insults.

In Part III, I look at how indecent conduct can cause serious offence to others. This part has three sections. Section (i) analyses the scope of indecency, limiting it to the violations of standards of propriety that are a problem of public offence. Section (ii) further argues that serious offence caused by indecency is relevant to criminalisation in this area, setting out relatively clear rules for identifying categories of (likely) serious offence. Section (iii) finally looks at how the wrongfulness of indecencies requires a balancing of the seriousness of the indecency against the right to freedom of expression. This section primarily considers the

[1] Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB* 96.
[2] See the relevant discussion many years ago, Peter Alldridge, 'Threats Offences – a Case for Reform' [1994] Crim LR 176.

wrongfulness problem argued in chapter 2, because the imputation problems of indecency and insult cases have already been analysed in chapter 3.

Part IV then proceeds to look at whether and how insults can be criminalised – not because of harm but because of the serious offence caused to others. I will firstly outline the kinds of insults that are capable of giving rise to serious offence. Then, in the particular category of insulting a group, I will look at how crimes of hate speech can be persuasive cases for demonstrating the advantage of applying the offence principle in preference to ideas of (remote) harm. Finally, I will argue that the wrongfulness of offensive insults has not been properly tackled by legislation (on insulting a group), and look at how freedom of expression can override the offensive insults and thus argue that the hierarchical balancing steps argued in Part III(iii) should still apply.

II. CLASSIFYING OFFENCE

I set out the outlines of an offence principle in Chapter 2. In this section I will identify the types of offence that the principle applies to because, in order to effectively apply the offence principle in the following parts, it is necessary first to develop a reasonable classification of offence. The goal of classification is to identify precise and coherent types of offence.

Existing theoretical classifications of offence are either too fragmented or incomplete – that is, they develop too many or too few categories. Feinberg, for example, classifies cases of offence into six types in *Offense to Others*: (a) affronts to the senses; (b) disgust and revulsion; (c) shock to moral, religious or patriotic sensibilities; (d) shame, (vicarious) embarrassment and anxiety; (e) annoyance, boredom and frustration; (f) fear, resentment, humiliation and anger (from empty threats, insults, mockery, flaunting or taunting).[3] However, these types are based on three different standards which may overlap with each other: categories (b), (d), (e) and (f) are based on offence reactions (category (f) is also based on offensive acts), while category (c) is based on affronted sensibilities. In the face of so many, and such inconsistent categories, it is difficult to efficiently and effectively apply the offence principle.[4]

[3] See *OTO* 10-13. The first type of affronts to senses are not offence (but harm as argued in chapter 2, II(ii)a).
[4] He only reveals the meanings of these types. Ibid 14-22. He goes on to mediate the offence principle (ch 8), analyse profound offences (ch 9), especially different types of obscenity in a series (chs 10-16). As will be summarized (III(i)), on obscenity, he means not only indecency (acts), but also pornography and insults.

In another influential account, Simester and von Hirsch offer standard examples of wrongful offence, including insulting conduct and exhibitionism.[5] However, this is an incomplete summation of the potential range of offensive conduct, mainly based on intuition and experience. Moreover, in giving these examples, they do not consider the broader categories to which the examples belong (e.g. exhibitionism belongs to the category of indecency, discussed below). Lastly, they do not consider the role that the consequence of the offending act may play in the classification of offence. Other authors choose disgust as a type of offence reaction to deepen understanding of the offence principle in the area of disgusting conduct.[6] However, they fail to explain how other types of offence can be analysed by the offence principle.

In contrast to the inconsistent theoretical classifications above, legal practice in many common law jurisdictions seems to be consistent in combining the offensive conduct and the offence reaction in defining crimes of offence. In many Australian jurisdictions, key public order offences generally explicitly require offensive conduct and an offence reaction[7] – viz., (a) fear or alarm from intimidating or threatening conduct; (b) obscene/indecent exposure (of wounds or deformities to beg), singing or language. The indecent includes the obscene,[8] and decency mainly concerns propriety towards body and sex, e.g. bathing and clothing;[9] (c) annoyance resulting from abusive, insulting, cursing, swearing, profane, blasphemous, objectionable behaviour. Offensive conduct is classified into three main types, namely threats, indecency and insults, and typical types of serious offence reactions (which the law seeks to prevent resulting from each type of offensive conduct) are usually explicitly stated as part of the definition. This kind of classification is based on the same primary standard (the offensive conduct) and secondary standard (the type of serious offence reaction). In Queensland it is a crime of public nuisance to behave in an offensive way (using 'offensive, obscene, indecent or abusive language') or in a threatening way to 'interfere with the enjoyment of, a public place by a member of the public'.[10] This crime implicitly combines offensive conduct and offence reaction – in so far that the enjoyment of a public

[5] See *CHW* 97-99. The last example of infringements of anonymity in public spaces such as aggressive or insistent soliciting is mainly harmful as argued in the previous chapter (II(iii)b-c).

[6] One example is a book review of *OTO*, see Harlon L Dalton, ''Disgust' and Punishment' (1987) 96 Yale LJ, 881-913. See also Douglas Husak, 'Disgust: Metaphysical and Empirical Speculations' in *IROB* 91-114; Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offence' in Rowan Cruft, Matthew H Kramer, Mark R Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 273-89.

[7] See Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008) Appendix 2.

[8] See Summary Offences Act 1953 (South Australia), s 22 (2).

[9] See Police Offences Act 1935 (Tasmania), s 14.

[10] Summary Offences Act 2005 (Qld), s 6.

place is a type of physical comfort or psychological peace). It has been suggested that the government should amend the offence to provide for a clear standard of offence and defence/excuse.[11] The standard is needed to identify the class of offence, from which the consideration of criminalisation can progress.[12]

British laws of offence are similar in combining the offensive conduct and the reaction to it and can also be classified into three main types. The first is fear, harassment, alarm or distress from threatening, abusive or insulting words, behaviour, visible representation, disorderly behaviour or contamination of or interference with goods.[13] The second is outraging public decency in England, which requires obscenity at a higher level of impropriety than indecency,[14] and public indecency in Scotland, where affronting public sensibility is different from lewd and libidinous practices or behaviour directed at a specific victim.[15] The English offence directly focuses on the degrees of offensiveness while the Scottish offence focuses on the public nature of the conduct to limit the seriousness of offence. The third is conduct likely to incite racial hatred, religious hatred and hatred based on sexual orientation.[16] Systematically, the last group of offence seems better to be combined with the insulting conduct in the first group, as both attack others' personality and dignity. Thus, there are mainly three types of offensive conduct (threats/abuses, indecencies and insults) with respective type(s) of serious offence. These categories seem to cover most cases of offence in criminal law and one category does not overlap with another. Moreover, these three types are neither too specific nor too general – and thus establish a good basis for the effective application of the offence principle.

This approach to classification, which is based primarily on the conduct and secondly on the reaction to it, will be followed here for two reasons. Firstly, criminalisation exists to guide people's actions and to instruct or inform judicial decision-making. So a clear statement of the prohibited conduct will be required. The clarity of a criminal law provision requires a primary focus on the qualities of the offending conduct. Secondly, the result of the conduct should be considered in the criminalisation process, and even be explicitly stated in the provision – in order to understand the purpose of the provision (i.e. to prevent offence or

[11] See Tamara Walsh, 'Offensive language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analysis' (2005) 12 U Queensland LJ 123, 145.
[12] The defence is needed to exclude non-wrongful offence from criminalisation.
[13] See Public Order Act 1986, pt 1 and s 38.
[14] See *R v Hamilton (Simon Austin)* [2007] EWCA Crim 2062; *R v Stanley (Alan Basil)* [1965] 2 QB 327.
[15] See *Webster v Dominick* 2005 1 JC 65; *McKenzie v Whyte* (1864) 4 Irvine 570.
[16] See Public Order Act 1986, pts 3 and 3A.

harm or immorality) – and preferable to further guide or assist members of the public and judiciary. To ensure fair notice, it is preferable if the result were explicitly stated ('causing or likely to cause alarm etc.') – rather than being implicit in underlying legislative motivations. Although the offensive conduct may not exactly result in a given type of offence, it has typical offence reaction(s). The psychological affront should be considered in legislation even if not required for proof of criminal liability (likely offence should suffice).[17] Therefore, the following two parts will look at how the conduct categories (of indecency and insult) and reaction categories (of alarm, distress, disgust etc.) are related in determining the scope of criminalisation of offensive conduct.

III. INDECENCY AND SERIOUS OFFENCE

It has long been an offence to exhibit an obscene print or picture, or to 'willfully, openly, lewdly, and obscenely' expose one's person.[18] However, I will argue here that that provisions such as this are too broad and indiscriminate – and then set out how the serious and wrongful types of offence caused by indecent conduct can be progressively identified.

(i) The meaning of 'Indecency'

As a first step, I will clarify the qualities of indecent conduct, and in particular explore how the meaning and scope of indecency should be distinguished from obscenity. In common parlance (and often in judicial speech as well), indecency can qualitatively refer to things which titillate or disgust, or both – while obscenity involves degree, referring to stronger titillation or stronger disgust.[19] In this respect, obscenity does not differ from indecency in terms of the quality of the conduct, but in terms of its degree. The scope of indecency in this sense is generally summarised by Feinberg as: natural objects, persons' actions and created things that would blatantly disgust, shock or repel normal people;[20] pornographic materials

[17] See Avlana k Eisenberg, 'Criminal Infliction of Emotional Distress' (2015) 113 Mich L Rev 607, 653.
[18] See Vagrancy Act 1824, s 4. See also the four 'catch all' common law crimes mentioned in the Preface (I).
[19] See Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (Law Com CP No 193, 2010) para 3.17. 'The words "indecent or obscene" convey one idea, namely, offending against the recognised standards of propriety – indecent being at the lower end of the scale and obscene at the upper end of the scale.' *Stanley* [1965] 1 All ER 1035, 1038.
[20] See *OTO* 97-98. The first type is openly and massively obtrusive to sensibilities, not veiled or subtle offensiveness. Ibid 124-25.

and displays which are deliberately designed for erotic arousal;[21] and a certain class of impolite words that are inherently meant to offend and shock.[22]

In my thesis, obscenity differs from indecency from two perspectives. Firstly, obscenity laws (in the UK) mainly deal with the publication or distribution or consumption of pornographic materials – which would usually take place in private.[23] Indecency, however, has always been about something public, while obscenity is a quality of the item and might affect private conduct.[24] So I would choose the term 'indecency' to refer to violations of standards of propriety in public. That is, for the purposes of this thesis, I will limit discussion of indecency to what is socially distasteful and what amounts to impropriety in public. This notion that disorderly indecency is of offensiveness is also affirmed by Scottish judicial opinion:

> … the decision of the [South African] appellate court was concerned almost entirely with the question whether the audience were shocked. In my view, if such conduct is seen as a public order offence, questions about *the depraving or corrupting effects* [i.e. moral harm] of the conduct complained of are at most of indirect relevance ... As in the English offence of outraging public decency… it is sufficient [necessary, actually] for liability that, on an objective assessment, the conduct complained of *should cause public offence*.[25]

Therefore, indecency does not include private obscenity in the sense of titillating materials which have a tendency to deprave and corrupt the viewers. Pornographic (obscene) materials are thus not primarily a problem of offensive conduct or public order (but probably a problem of moral harm), though the two may overlap in, say, the indecent display of those materials.

Secondly, there can be different degrees of offensiveness. That is, the obscenity in private is not a problem of indecency, but when the obscenity has a public element, with its stronger offensiveness, is a problem of serious indecency. These indecencies are 'far from being dangerously tempting, they are disgusting and revolting to the average person'.[26] Understanding public obscenity as serious indecency is important because the offence principle is applied to prevent serious offence to others: i.e. trivial indecency should not be

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[21] Ibid 124-25. The second type can cause moral harm or risk sexual violence, even in private, if extreme, and can be the action in the first type if in public i.e. public displays or open depictions.
[22] Ibid 190-91. The third type generally causes the same degree of offence as the first one does.
[23] See Obscene Publication Act 1959, s 1(1).
[24] Lindsay Farmer, 'Disgust, Respect, and the Criminalisation of Offence' in Rowan Cruft, Matthew H Kramer, Mark R Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 273-89.
[25] *Webster v Dominick* 2005 1 J C 65 [51]- [52] (emphasis added).
[26] See *OTO* 100.

criminalised. The degree of offensiveness of the obscene in public is shocking, disgusting or revolting, not merely distasteful or embarrassing.[27] It is loathsome, very distasteful.[28]

Thus, indecency is a public order problem, and criminalisation should target serious indecency (including obscene displays in public) that may cause serious offence to others. Therefore, the next section will look at how the arguments of serious indecency can work in criminalisation.

(ii) Serious Offence caused by Indecency

The exposure of sexual organs to others is a typical type of indecency and can help us to think through how the offence principle can limit the scope of criminalisation.[29] Exposure of sexual organs is not necessarily the same thing as 'sexual' exposure, because sexual exposure requires some 'sexual' aspect or motivation to the exposure. However, as sexual exposure objectively entails exposure of sexual organs, the exposure of sexual organs may engage public order law as well sexual offences law. This section aims to ascertain how we should deal with exposure of sexual organs in the criminal law. I will firstly assess the legal approaches to the criminalisation of exposure of sexual organs, and then analyse the types of serious offence (likely) to be caused by the indecency. I will argue that it is theoretically and pragmatically meaningful to consider criminalising this kind of indecency from the perspective of serious offence to others, rather than from the perspective of harm.

a. Sexual Exposure: Harmful or Offensive

The exposure of genitals may in some instances be regarded as a sexual offence under sexual offences legislation. Traditionally, sexual offences were a sub-category of and then they began to be treated in a separate category from crimes against the person.[30] So, presumptively they are harmful (to personal/sexual interests). The Scottish offence of sexual exposure requires that conduct be objectively sexual (that the actor exposes genitals in a manner that a reasonable person, in all the circumstances, would consider sexual) – and that

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[27] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010) para 3.21.
[28] See *R v Hamilton (Simon Austin)* [2007] EWCA Crim 2062 [30].
[29] Forms of indecency are mainly about sexual organs, such as exposure of sexual organs or performing sexual activity. See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010) para 3.2.
[30] Compare Bl Comm 656 and Lord Justice Hooper and David Ormerod (eds), *Blackstone's Criminal Law Practice 2012* (OUP 2011) 292.

it be accompanied with the subjective intention of obtaining sexual gratification or causing alarm, distress or humiliation.[31] The equivalent English offence requires that the offender 'intentionally exposes his genitals' and 'intends that someone will see them and be caused alarm or distress'.[32] So the common and minimum requirement of the sexual offence in England and Scotland is that the actor intentionally expose his genitals. The sexual offence seems to be directed at harm to sexual autonomy i.e. the rather obvious interest not to be exposed to others' genitals when one has not chosen or invited it. In short, in cases where there is a sexual element, it may be sensible to regard exposure of sexual organs as a sexual offence.

However, it may not always be possible for legislators to distinguish between sexual and non-sexual exposure.[33] For example, from the wording in the English and Scottish law it is apparent that the test of the exposure of genitals being sexual can be inconsistent. Although the offences do not necessarily require subjective purpose of sexual gratification, the English law only requires intentional exposure of genitals to cause alarm or distress – while the Scottish law further requires that the exposure be objectively sexual. It is not clear whether both different tests of being sexual can be reasonable. Further, a consequence of the presence of a sexual element in the legislation is the discretionary or even arbitrary judgement as to the existence of a sexual element in a particular case. That is, the question of whether this is a matter of sexual offences turns on the question of the sexual element but there is no clear guidance on the meaning of 'sexual' which would help the courts to make that distinction.

The court not only needs clear guidance on the meaning of 'sexual' in judging whether the crime is constituted, but also requires further clear guidance on the meaning of 'sexual' in determining whether the criminal should be the subject of sex offender notification: 'where the evidence discloses that there was a significant sexual element in the offender's behaviour, such as to warrant additional measures to protect the public from the risk posed by the offender, the court should have a discretionary power to order notification.'[34] That is, the

[31] See Sexual Offences (Scotland) Act 2009, s 8 ('sexual' is defined in s60(2)).

[32] Sexual Offences Act 2003, s 66 (Exposure).

[33] See Stuart P Green, 'What Are the Sexual Offenses?' in Chad Flanders and Zachary Hoskins (eds), *The New Philosophy of Criminal Law* (Rowman & Littlefield, 2016) 67, 69-70. In some cases, although there was a significant sexual element, it may not be proper to label the conduct as a sexual offence rather than another kind of offence. An offender may injure or cut off victims' sexual organs for psychiatric gratification. There may be a sexual element in particular, but it would be more proper to label the conduct as a crime against life or body, rather than a sexual crime.

[34] Report of the Expert Panel on Sex Offending chaired by Lady Cosgrove, 'Reducing the Risk - Improving the response to sex offending' (June 2001), 60 <www.gov.scot/Resource/Doc/158890/0043160.pdf> accessed 29 May 2018.

sexual element in this stage should be sufficiently significant as to indicate an underlying sexual disorder or deviance from which society is entitled to be protected.[35] However, there is no clear guidance on the significance of the sexual element on which that discretionary power rests in the marginal case. In short, the ambiguous meaning of 'sexual' affects both the constitution of the crime and the treatment of the criminal.

To avoid the above problem of arbitrarily deeming an exposure to be sexual – with the consequence that the convicted offender be arbitrarily subject to sex offender registration and notification requirements – I would suggest that we consistently look at this from the perspective of the general nature that all indecent conduct has in common i.e. conduct that should cause offence to others, and that it should specifically constitute a public order offence when it offends a member of the public or in public.[36] For example, in *A Draft Criminal Code for Scotland with Commentary*, all exposure of sexual organs belongs to 'offensive conduct' rather than 'sexual offences'.[37] So, I would suggest understanding exposure as an offensive offence because it causes or risks serious offence to others. In the next section I will look at how indecent exposure in particular and indecent conduct in general causes serious offence to others.

This is not to suggest that we should never treat sexual exposure in public as presumptively a sexual offence. Some conduct, with the additional sexual intention of gratification and additional sexual conduct (rather than mere exposure of genitals) – e.g. public masturbation and especially in the vicinity of a school – may be better categorised as a sexual offence. That is, there will still be cases where it is more appropriate to charge sexual exposure rather than indecency, even when the conduct has taken place in public e.g. where there is some sort of clear sexual motive. But in cases of doubt (where there is no obvious sexual motive), we should presumptively charge the public order offence.[38]

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[35] See *Wylie v M* 2009 SLT (Sh Ct) 18, Sheriff Pyle [13]; *Hay (Ian Morris) v HM Advocate* [2012] HCJAC 28.

[36] Of course, some cases of sexual exposure will take place in private, so would not be public order offences.

[37] Eric Clive and others, (Scottish Law Commission, 2003) <www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf> accessed 29 June 2018, 180.

[38] This approach of choosing the proper crime category can be applied to other cases such as sexual assault: 'Where it is alleged that the accused has touched the complainer inappropriately, the Crown may charge that *species facti* as indecent assault, or since 1 December 2010 as a sexual assault (Sexual Offences (Scotland) Act 2009, s 3), or as a simple assault or as a breach of the peace. Where it is alleged that the accused has exposed himself in public, the Crown may charge that *species facti* as a statutory offence under by-laws; or as public indecency (*Webster v Dominick* 2005 JC 65) or, since 1 December 2010, as sexual exposure (Sexual Offences (Scotland) Act 2009, s 8); or as a breach of the peace.' *Hay (Ian Morris) v HM Advocate* [2012] HCJAC 28.

b. The Seriousness of Offence

For the purpose of the offence principle, indecent conduct should be criminalised in order to prevent serious offence to others.[39] However, it is not clear what degree of seriousness should be the threshold for criminalising offence. In legal practice, there are inconsistent approaches to the test of seriousness. The statutory law on sexual exposure aims to prevent alarm, distress and humiliation – though this is not understood in terms of the offence principle, but as a standard of harm to the sexual autonomy of the victim.[40] If we construe the serious offence to be prevented from the offensive exposure of sexual organs (assuming the provision is in a public order law), the categories of serious offence again seem to be alarm, distress and humiliation.[41]

This test looks the same as the test in sexual offences. But there are important differences. In sexual exposure, the serious offence is a by-product of the harm to sexual autonomy by the sexual conduct with additional sexual intention and the additional sexual element (to the act or simple exposure itself), just as distress can be caused as a by-product of the harm to my reputation or body parts, while in offensive exposure, the serious offence is the direct result of the offensive conduct.

But in indecency law more generally, the tests of serious offence are not consistently identified in authoritative cases law and Law Commission reports. Outraging public decency, a common law crime in England, is used to protect public members from being seriously offended by indecent language, behaviours or displays. It has been suggested that this crime be restated in a statutory form.[42] In its 2010 Report, the Law Commission cites Lord Reid as setting out the test for outraging public decency as being something of a shocking, disgusting

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[39] The legislature should differentiate between types and degrees of offence in criminalisation, for reasons of fair notice and proportionate sentencing considerations. Prosecutors should also value the differences in types and degrees of offence to be discriminating in prosecution even if the law in its literal sense targets all indecency cases.

[40] Sexual Offences (Scotland) Act 2009, s 8; Sexual Offences Act 2003, s 66.

[41] 'It is not necessary for A's genitals to have been seen by anyone or for anyone to have been alarmed or distressed.' Explanatory Notes to the Sexual Offences Act 2003, para 126. It should be observed that the Sexual Offences (Scotland) Act 2009 adds 'humiliation' by section 8 (sexual exposure) while the Sexual Offences Act 2003 only targets 'alarm' and 'distress' by section 66. When the disgusting (exposure) is imposed on a given person, it is also humiliating. Masturbating and driving alongside lone women drivers (*Taft* 919970, CA, Crim Div, unreported, see David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) 1238) and masturbating seen by the only one other person (*Parkin v Norman* [1983] QB 92, 92) were identified as humiliating. In brief, exposure may lead to alarm, humiliation and distress as types of serious offence.

[42] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No 193, 2010) para 6.12.

and revolting nature.[43] The Report then says that the offence must be strong enough to cause shock or disgust, not mere distaste or embarrassment – and that it should include humiliation of the target and indignation to a bystander, if there is one.[44] However, in restating the test for offence in their final Report they use 'shock, outrage or humiliation' as the test of serious offence.[45] In contrast, their 2015 Report does not focus at all on the specified likely offence reaction – it only requires the conduct to be seriously offensive ('obscene or disgusting').[46]

Therefore, the exact types of caused/likely offence have not been clearly dealt with. Only the seriousness of the actual or possible offence has been generally emphasized – either directly by specifying types of serious offence reaction or, indirectly, by specifying the serious nature of the offensive conduct. It seems indecent languages and/or behaviours causing or risking a serious offence category of shock/alarm, disgust, humiliation, distress,[47] or indignation/outrage can be criminalised.[48] These concepts are too obscure to be understood or applied consistently in all cases. Understanding and improving the articulation of serious offence in legislative and judicial practice is problematic. We need to be clear how the seriousness of the actual or possible offence can be specified in a given situation.

As argued in chapter 2 III(iii), the magnitude of offence depends on the intensity of the offence (mainly the category of serious offence) – and the duration and the extent of the impact on the affected person. I will not dwell here on how the quantitative factors of duration and extent can affect the seriousness of offence, because litigation practice does not directly involve such quantitative factors, but I will focus on the qualitative factor of the category of serious offence. This is stating an objective test in so far that humiliation, alarm or distress could be understood as objective qualities of the conduct, rather than as referring to any actual reaction. It would not matter if the audience were not in fact offended if the conduct were judged to be seriously offensive.

In judging the seriousness of the offence, I would argue that generally indecency can be of three levels of offensiveness: ordinary/simple indecency; disgusting/serious indecency; and

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[43] Ibid para 3.4, citing *Knuller (Publishing, Printing and Promotions) Ltd v DPP* (1973) AC 435.
[44] Ibid para 3.21.
[45] Ibid para 6.13.
[46] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 4.10.
[47] The listed shock, disgust, humiliation, indignation/outrage or annoyance of indecency in two reports still neglects distress valued in the (sexual) exposure legislation, although shock could include alarm.
[48] Irritation or annoyance is a milder variant of anger while fury or rage is an intensified variant, see Scott Schieman, 'Anger' in Jan E Stets and Jonathan H Turner (eds), *Handbook of the Sociology of Emotions* (Springer 2006) 494.

outrageous/extreme indecency – all depending on certain relevant contextual factors. These degrees of offence can be illuminated by Feinberg's account. Feinberg argues that mere nudity and *ordinary* sex, if they take place in public, elicit mechanisms of shame (of the victim's own sudden loss of control or vicarious sympathetic identification), embarrassment (because of the victim's own presence being foreign in offenders' privacy) and anxiety (because of the victim's own stirred up feelings and others' unrestrained public performance)[49] – while *abnormal* sexual acts such as sadomasochistic sex acts or oral contact with canine genitalia, if they take place in public, are immediately threatening and spontaneously disgusting.[50] So Feinberg has generally found two levels of seriousness of offence, depending on the nature of conduct i.e. whether the related nudity/sex itself is ordinary or abnormal.

However, even in the case of mere nudity and ordinary sex, the indecency can be alarming, more serious than merely shaming and embarrassing, and for abnormal sexual acts, the indecency can be outrageous, more serious than merely threatening or disgusting. This is because of a supplementary test that can elaborate the levels of seriousness. Arguably in the latter case of abnormal sexual acts, if the act is public because of public display – e.g. exhibition of bestiality pictures – because the audience do not face the actor depicted in the display, the degree of offensiveness is lower than that when the act is public because of real public presence, e.g. real acts of bestiality heard or viewed instantly. Similarly, in the first case of ordinary sex, if the public form is display and the audience do not face the actor who arranges the display, the offensiveness is lower than when the audience do face the actor. So, the test for distinguishing between three levels of serious offence is primarily the nature of the conduct itself and secondly whether the actor of the sex or the display is at the scene.[51]

So, typically, public nudity or sex can be offensive indecency in three different degrees. Firstly, for mere nudity or displays of ordinary sexual conduct, it may only be of simple offensiveness – merely embarrassing, rather than of such high offensiveness as to be humiliating, disgusting or alarming (but when the actor who arranges the display is at the

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[49] See *OTO* 16-19.

[50] Ibid 19-20. Feinberg does say why it is disgusting, although he says male homosexuality is held in considerable terror by many males. Ibid 20. For the mechanism of the 'disgusting eliciting disgust', also see Paul Rozin and others, 'Disgust' in Michael Lewis and others (eds), *Handbook of Emotions* (3rd edn, The Guilford Press 2008) 757-62; Douglas Husak, 'Metaphysical and Empirical Speculations' in *IROB* 106-11. This mechanism has been summarised in Chapter 1 (IV(ii)a) in articulating inner peace as an interest.

[51] We have to admit that the test of seriousness of offence is not straightforward as economic calculation. This may explain why Feinberg has not explicitly sought the test. The test is merely based on rule of thumb considerations, taking in to account some social experience, social tolerance and the cultural connotations of the conduct (such as whether a kind of sexual conduct is abnormal or not).

scene, it may still be alarming, although not disgusting). Secondly, the exposure of genitals without obvious non-harmful purpose or ordinary sex by real actors or displays of abnormal sexual conduct can disgust, alarm (when the actor who arranges the display is not at the scene, it may not be alarming,[52] but still disgusting). This can also distress or even humiliate others in public, but may not outrage others' minimum sensibility. Humiliation will be caused if the view of the indecency is forcible.[53] Distress will be caused if the indecency is to a specified victim.[54] Alarm will be caused if the indecency is to a general passer-by.[55] Disgust will be caused if the indecency readily reminds people of their animal-like vulnerability e.g. death, disease or infection, or of their animal-like distasteful choices.[56] Thirdly, for abnormal sexual conduct such as bestiality or necrophilia,[57] its public manifestation form by real actors viewed or heard at the scene is outrageous indecency.[58]

In sum, when socially distasteful impropriety (indecency) is felt by others, the serious offence needed for criminalisation– such as disgust, alarm, distress, humiliation and/or indignation – can be caused, depending on a series of factors surrounding the indecent conduct – viz., whether the actor is at the scene (alarming), whether the receptor is specified

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[52] Indecent displays tend to offend without the actor's presence in front of the offended (this is prominent in cyberspace).

[53] The most captive case (where it is difficult for the victim to escape) is forcible lewdness in which the victim is mainly harmed by personal and sexual infringements; being offended by the insulting (causing humiliation) is a by-product (because any force against the person is insulting). See Andrew von Hirsch and Nils Jareborg, Gauging Criminal Harm: 'A ''Living Standard'' Analysis' (1991) 11 OJLS 1, 25.

[54] Being captive generally means the victim is specified by the indecency. When a passer-by is specified as the victim, there is distress: 'why do you specifically target me and why I am the unfortunate offended one?' Even for phlegmatic police officers, grave harassment, alarm or distress can be caused by being particularly targeted. See *Southard v DPP* [2006] EWHC 3449 (Admin) [24].

[55] In non-captive cases, there may be no humiliation or distress to specified targets, but only alarm to general passers-by. The word 'alarm' indicates undefined evils: the actor present at the locus is likely to commit further offensive and/or harmful acts there and this exerts serious psychological pressure (alarm) to the observer.

[56] See Paul Rozin and others, 'Disgust' in Michael Lewis and others (eds), *Handbook of Emotions* (3rd edn, The Guilford Press 2008) 761-62. The indecency is disgusting because it is against the recognition or belief that a stimulus is dangerous or distasteful and thus lead people to die or live like an animal. For example, 'the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers.' *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 at 572 (1991). The disgust can be evidenced in other ways, such as hearing as well as seeing. See *R v Hamilton (Simon Austin)* [2007] EWCA Crim 2062 [34]. Further, 's. 5 of the Public Order Act 1986 and the common law offence of outraging public decency are capable of covering this behaviour [sexual activity in a public lavatory (including masturbation) targeted by s. 71, Sexual Offences Act 2003] where it causes harassment, alarm, distress or [other serious] offence.' SC Deb (B) 18 September 2003, col 289. Usually there is no distress or humiliation. More importantly, people will not be alarmed for further possible acts because the actor does not intend to face people, so only disgust will be caused/risked.

[57] 'It represents a violation of the respect that should be shown for human remains. When such behaviour comes to light, it is profoundly distressing for the family of the dead person.' SC Deb (B) 18 September 2003, col 310.

[58] In a heterogeneous community, the seriousness of various moral derelictions is widely divergent (citing s 207.1, MPC, comment at 207 (Tent Draft No 4, 1955)), but there is a 'moral consensus' against flagrant breaches and affronts. See Louis B Schwartz, 'Morals Offenses and the Model Penal Code' (1963) 63 Colum L Rev 669, 674.

(distressing) or forced (humiliating) and/or whether the indecency is disgusting or even outrageous.

(iii) Wrongfulness of Public Indecency

Indecent conduct that causes or risks serious offence still needs to be wrongful if it is going to be criminally targeted. A very controversial problem of wrongful indecency is where public nudity is adopted as a form of freedom of expression. This can accordingly be a useful illustrative case for thinking through the wrongfulness of indecencies. This part will examine how expression by offensive indecency such as nudity can be structurally limited, by firstly arguing for the general framework of balancing freedom of expression and offence to others – and then specifically analysing the extent to which freedom of expression should be protected and the alternatives to avoid the offence.

a. Introducing General Framework of Balancing

In reviewing Feinberg's offence principle, I have in chapter 2 identified two lists of factors to be balanced and argued that the balance should be more structured. Here I will reaffirm my position by looking at the specific provisions of the ECHR and introducing the framework of progressive balancing.

It has been claimed by Bailin that, in dealing with the permissibility of the exercise of free speech, the UK and the ECtHR should adopt the test that only the exercise of free speech that causes 'a risk of violence' is wrongful and can be criminalised[59] – following the American test of 'clear and present danger'[60] – or the more recent stringent test of 'imminent lawless action' in curbing political speech.[61] However, while the American test emphasises the immediacy of harm, Bailin's suggested test focuses on the seriousness of the risk – and is not limited to the political arena. More importantly, while both tests focus on the risk of harm (disorder or crime), it is not only the risk of harm, but also offence that can override the right to free speech. Technically, in the framework article 10(2) of ECHR, the exercise of freedom of expression can be restricted or penalised for 'national security', 'public safety', 'prevention of disorder or crime', 'rights of others', etc.[62] The 'rights of others' (article 10(2) of ECHR) to be balanced against free speech include the right to inner peace (not to be

[59] See Alex Bailin, 'Criminalising Free Speech?' [2011] Crim LR 705, 709-11.
[60] See *Schenck v United States* (1919) 249 US 47.
[61] See *Brandenburg v Ohio* (1969) 395 US 444.
[62] Thus, the possible harm to be prevented from speech is not limited to violence.

offended unjustifiably) in the exercise of normal life.[63] Thus, for the offensive conduct to be wrongful, the right to avoid the affront should outweigh the right to freedom of expression in question.

This process of the identification of wrongfulness introduces the operation of a strict application of a proportionality balancing exercise.[64] Three progressive steps determine the wrongfulness of the offence:[65] a necessity/suitability to limit the freedom in terms of the need to avoid offence; that the values of the freedom should not override that need; and the availability of the alternative courses of action for the parties involved. The first step is obviously passed: it is necessary to limit the freedom because the offence is brought about by the exercise of the freedom, and it is suitable to limit the exercise because the limit can avoid the offence.[66] So, we move to the second step.

b. Balance Values of Freedom of Expression and Need to Avoid Offence

The preliminary test of the need to protect freedom of expression is whether the exercise of the freedom has some value that may outweigh the need to avoid the offence. If the personal value and/or social value of the free expression cannot override the offensiveness of the nudity, the nudity is wrongful. This is the most complex and important step in striking a balance.

Firstly, identifying *the values* of the conduct can be fraught because the personal and social value of the conduct may be understood differently in different cases. The naked rambler in Scotland claims that he used nakedness to express his belief that being naked is not offensive.[67] Naked group cycling was an activity designed to promote environmental and

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[63] See e.g. *Percy v DPP* [2001] EWHC Admin 1125 [20], [25].

[64] The proportionality test can be illustrated by the balance of movement freedom and public order measures, for the balance criteria, see Liesbeth Todts, 'The Legitimacy of Area-Based Restrictions to Maintain Public Order: Given Content to the Proportionality Principle from a European Legal Perspective' (2017) 3 RAP 128, 151ff.

[65] The Court overemphasises on the factor of less restrictive alternative, neglecting the systematic balancing test. See Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 454, 458.

[66] 'There is a conceptual link between offence and expression.' *CHW* 122.

[67] In the case of naked rambling, the ECtHR recognises that 'the right to freedom of expression may include the right for a person to express his ideas through his mode of dress or his conduct' (*Gough v The United Kingdom* (2015) 61 EHRR 8 [149]), and shows that 'the applicant has chosen to be naked in public in order to give expression to his opinion as to the inoffensive nature of the human body' ([150]). This is a case of expression of nudity itself, by nudity except only a hat, a backpack and shoes.

health awareness in cities like London.[68] For the personal value of the exercise of the freedom in the two cases, nudity seems more important as a long-term pursuit or belief to the rambler, than as a temporary strategy of the riders. 'Some rare persons [like the naked rambler] do have an interest in their own happiness [belief in public nudity]' that other 'persons rarely seek directly', 'as a type of chief interest among equals'.[69] However, as argued in chapter 2 (III(iii)), if the conduct were only seen as important by the individual actor, the meaning of the conduct is a subjectively arbitrary claim of the actor – not socially recognised as important. It will be normatively of little personal importance in his network of interests. The degree of social value is comparable in two cases, because even 'activities or modes of life that at first repel us might be worthwhile, although we would not engage in them ourselves'.[70]

Secondly, there are different types and degrees of *offensiveness*. The sudden sight of the naked rambler may be instantly alarming, especially to 'children or vulnerable old people' 'in or near one of the main streets of a busy town',[71] while the naked riders keep the public informed in advance so that the public may be mentally prepared. Thus, the latter may be less alarming, although it may still be embarrassing for some.

Therefore, in the latter case the potent value of the naked cycling may outweigh the right not to be temporarily and slightly offended when there is no other pressing need of the public.[72] In the former case of naked rambling, the slight value of the conduct may not outweigh the serious offence.

In comparison, if there are other significant harms as well as slight or marginal offence, the balancing result may be different. One example is where a company organised a partially-naked Spartacus cosplay of 300 foreign men in a commercial area of Beijing, which many people were attracted to view and photograph even while they were riding escalators.[73] As

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[68] See W Noble, 'In Pictures: London's World Naked Bike Ride 2018', *Londonist* (London, 6 June 2018) <https://londonist.com/london/art-and-photography/in-pictures-london-s-world-naked-bike-ride-2018> accessed 15 June 2018.

[69] See *HTO* 56.

[70] See R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 66-67. To express is of personal importance to the naked rambler and of social value in having diverse beliefs in human body and social nudity.

[71] *Gough v The United Kingdom* (2015) 61 EHRR 8 [80].

[72] Political expression such as wearing a jacket bearing the words 'Fuck the Draft' in the corridor of a courthouse (see *Cohen v California* 403 US 15, 91 S Ct 1780, 29 L Ed 2d 284 (1971)) is of great social value, and the value outweighed the slight disruption of inner peace.

[73] See Jin Tie, ''300 Spartacus Soldiers' Sending Food in Sanlitun were Pushed Down by Police' *Sohu News* (Beijing, 22 July 2015) <http://news.sohu.com/20150722/n417325805.shtml?> accessed 29 May 2018. The safety risk from distraction could be imputed to the actors.

well as offence from partial nudity, the police discerned the prominent concern to be public safety in a crowded place. The offence *and* the substantial risk of harm cannot be justified when the personal importance to the commercial entity was not pressing enough – it not being a promotion of its core business – and the social value was neither remarkable enough – there being no emergence of new potential customers or core needs of the public engaged.

c. Alternatives to Avoid the Offence

Can the offence be avoided in so far that there may be other means by which the actor can exercise their freedom, at no unreasonable greater cost to them (than the current means) to achieve a comparable expression, and whether the offence can be easily avoided by the claimant,[74] at no intolerable greater cost to them (than the offence)?

When the actor has alternative means to achieve a similar effect at a cost no greater than the indecent means – even where the value of the expression could override the need to avoid the offence – the exercise of freedom of expression can be limited. It is the actor who causes the conflict of interests – and it should be the actor who should keep the conflict to a minimum level.[75] Otherwise, there could be an abuse of that freedom by unnecessarily infringing others' interests. For naked cyclists there may be few other means by which they can bring about a similar effect, because of the need to secure the attention of passers-by and more particularly, the media. To express or promote the need for health and sustainability may well be a popular topic and thus be in substantial need of uncommon means of expression such as naked cycling.

In contrast, the naked rambler could have alternative options available to him, which instead lead to no offence or merely trivial offence being created – most obviously by resort to promotional advertising on clothing or through social media. Advocating public nakedness is a much less common phenomenon and thus even common means of writing or sloganising might still bring about a satisfactory publicity effect.[76] If the expression of nudity itself should be justified, then advocacy of other non-offensive opinions to be non-offensive in

[74] See Aatifa Khan, 'A ''Right Not to Be Offended'' under Article 10(2) ECHR? Concerns in the Construction of the ''Rights of Others''' [2012] EHRLR 191, 198; *Secretary of State for the Home Department v Central Broadcasting Ltd and another* [1993] EMLR 253, 271 ('it is quite unnecessary for any relative of any of Nilsen's victims to be distressed by this programme if broadcast in its existing form in any way at all, since all that anyone has to do is to switch off the programme').

[75] As argued in ch 2 (III(iii)), this standing is for social consideration.

[76] It is a pity that ECtHR mentioned 'many other avenues' (*Gough v The United Kingdom* (2015) 61 EHRR 8 [175]), rather than generally emphasising 'many other means' which is more inclusive.

public should also be justified. When someone thinks having sex in public is inoffensive, or when someone thinks killing a cat in public should be free from interference, he could claim: 'This is my expression by doing it, and it should not be wrong'. It is unacceptable.

When those affected have an alternative course of conduct available at no great cost or inconvenience to them – in circumstances where, say, advance warning had been given by the cyclists – then the actor may not need to resort to an alternative or that should be the exception. When the actor has no alternative while the affected does have a reasonable alternative to avoid the offence, then properly the affected should be expected to allow for the actor's exceptional exercise of that freedom.[77] However, in the cases of naked rambling and naked promotion, passers-by cannot avoid the unexpected offence at a cost no greater than the offence. That is the calculus. These actors must choose alternative courses of action.

In sum, these steps provide an analytical framework which can be helpful in determining the limits or parameters of indecency – albeit this approach does not necessarily always provide legal precision because of the complexity of particular marginal situations.[78]

IV. INSULT AND SERIOUS OFFENCE

We now look at insults of 'treat[ing] others without dignity'.[79] This part will, firstly, classify different kinds of insults and outline the forms of serious offence which are caused. Secondly, it will analyse the criminality of a particular type of insults i.e. insulting a group of people, especially hate speech, to exemplify how to apply the offence principle. Finally, it will analyse the wrongfulness of insults. It is helpful to consider the 'bigger' picture of insults and their serious offence before examining a particular type of insult. So, in the first section, I will start by looking at how insults, whether against an individual or a group, can be perpetrated directly or indirectly.

[77] As argued in ch 2(III(iii)), this standing is for social tolerance.

[78] This analytic framework can be really applied to other cases. With begging by exposing deformities or wounds, though the enormous personal importance and social value outweighs the right not to be offended (slight disgust (likely to be) caused; not the right not to be infected), the alternatives available to the actor, such as conveying their message by means of a paper board, are reasonably available with no greatly lesser effect, while there are no reasonably available alternatives for passersby not to be offended, thus limiting the medium of expression.

[79] Jonathan H Turner and Jan E Stets, 'Moral Emotions' in Jan E Stets and Jonathan H Turner (eds), *Handbook of the Sociology of Emotions* (Springer 2006) 553.

(i) Types of Insult and Respective Serious Offence

Insults may be *directly* inflicted against the personality or dignity of an individual or a group.[80] They may be directed at individual targets, but also groups, or individuals because of their membership of a group. Insults directed against a person are arguably a species of crime against the person, but these may also be a public order crime when the criminal law does not directly protect the dignity of an individual, but otherwise protects them from insulting conduct in public life.[81] Whether direct insults against a group are a crime against personal rights or other interests will be discussed in the next section. I will argue that insults can be conducted against a group of people in the form of expressing, encouraging, stirring up, or inciting violence, hatred, or prejudice and causing resentment and even alarm or fear.

In Feinberg's example, when 'a counter-demonstrator leaves a feminist rally to enter the bus' and 'carries a banner with an offensive caricature of a female' whose caption is 'keep the bitches barefoot and pregnant',[82] there is a gender hatred causing anger, resentment, distress and fear. The offensive caricature generally causes anger, but the word 'bitches' has a moral taint or whiff about it, which causes resentment and distress – while the wording 'barefoot and pregnant' causes a fear even of personal assaults. Other insults against a racial, ethnic and religious group can be punished for similar reasons (see section ii).

Alternatively, insults may be *indirectly* aimed at the existence of an individual or a group by attacking objects or beliefs that are of special symbolic significance to those individuals or groups. As Feinberg shows, conduct such as insulting a crucifix or national flag is an emotional flare and a shock to high level sensibilities and can lead to serious offence such as sudden violent anger, anxious fear and humiliation.[83] Indirect insults firstly include religious insults, where the targets could be the symbols or sacred sites of a religion. Unlike direct insults to individuals' dignity, these are directed at the sacred, thus affronting adherents' sensibilities. Feinberg's two examples on a bus are held to be offensive: a cartoon of Christ on the cross with the words 'Hang in there, baby!'[84] – and an abusive caricature of the Pope accompanied by an anti-Catholic slogan.[85] Christ and the Pope are both matters held sacred by Roman Catholics, and abuses or insults to them are at least offensive to

[80] Respectively see Chinese criminal law, ss 237 (insulting others), 249 (insulting ethnic groups).
[81] POA 1986, s 4A.
[82] See *OTO* 13.
[83] See *OTO* 11-12, 16. An affront to a higher sensibility is profound offence i.e. *severe* unpleasantness that can be caused even if it is only imagined to be conducted in private or known after the event. See *OTO* 57-58.
[84] Ibid 11.
[85] Ibid 13.

adherents of the Roman Catholic religion. The Republic of Ireland targets outrage among a substantial number of the adherents of any religion caused by any publication or utterance that grossly abuses or insults matters held sacred by that religion.[86] The 'matters' are comprehensive, including all possible targets.

Indirect insults also include patriotic insults, where the target could be a hero, the nation's constitution, symbols or memorials. In Feinberg's example, the actor bundles his lunch with an American flag that he splits to clean his mouth, blow his nose and shine his shoes.[87] This conduct of insulting the national flag is to offend passengers on the bus, mainly causing resentment or alarm.[88] China punishes insults of the national flag or emblem of China.[89] In 2017, insulting the national anthem was also criminalised.[90] In short, both religious insults and patriotic insults are indirect insults against a group.

All types of insults can be all important doctrinally and pragmatically, but insults inflicted against a group or at individuals precisely of their membership of that that group, whether directly or indirectly, are of increasing importance, judging from the huge, burgeoning growth in legislation in the jurisdictions discussed below, and I will focus my discussion on this area of hate speech. In the UK, the focus of the positive law is on preventing hatred.[91] Hate speech has been theoretically summarised as speech that "expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality, and sexual orientation".[92] So hatred is legally and theoretically necessary for this kind of crime because it is a possible effect of the speech.

But I would suggest all speech that "expresses, encourages, stirs up, or incites *violence,* hatred and *prejudice* against a group …" is hate speech, because supranational organisations such as the EU and UN (see the next section) consistently treat violence, hatred and prejudice

[86] See Defamation Act 2009, s 36.
[87] See *OTO* 11-12.
[88] Or it may cause distress to a person of that nation in abroad, see *Percy v DPP* [2001] EWHC 1125 (Admin).
[89] See Chinese Criminal Law, s 299.
[90] Ibid. Problematically, there is no correlating punishment for insulting the flags of other countries. See German Criminal Law, s 104. In contrast, on religious insults, every religion is protected to the same extent. Moreover, every individual is protected from personal insults. Section 4A of Public Order Act 1986 can generally be used to target intentional insulting behaviours. As suggested in chapter 1 (III(i)b), a country is just a typical subject of public interests; what really still mattered is individuals in so far that every individual should be protected from unjustified offence.
[91] See POA 1986, Pts III and 3A.
[92] B Parekh, 'Is there a case for banning hate speech?' in M Herz and P Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge UP 2012) 40.

against a group together. This is defining hate speech more widely that mere words, to include a behaviour and the display of writing, sign or other visible representation. As will be argued below, it is worth noting that this definition is not central to my argument, because I am not so much concerned with defining hate speech, but with classifying hate speech as insults in public order law.

(ii) Serious Offence from Insulting a Group by Hate Speech

Hate speech is insulting to the targeted group's dignity and thus may deny the fundamental equality of humanity. How should hate speech engage the criminal law? In EU law, it is seen as 'offences concerning racism and xenophobia'.[93] In UK and China hate speech is usually criminalised because it harms or risks harm to certain interests. I will argue that its criminality may not lie in harm to others, but in serious offence to others.

a. Refuting Harms

There are different approaches to justifying the criminalisation of hate speech. Firstly, it is commonly claimed that hate speech causes remote harms. Legal theorists generally assert that (racial) insults directed at a group risks harm to their membership of that society, to the environment and freedom of opportunity generally.[94] Legislators may specifically think that unregulated hate speech encourages others to go on and commit further crimes – atrocities even – against the group or its members. An example is found in recent Chinese recent legislation where inciting hatred, inciting discrimination or preaching violence has been normatively recognised as the ideological basis of terrorism.[95] Correspondingly, the publication, incitement and glorification (indirect and inexplicit incitation) of hatred, prejudice or violence is seen as a kind of criminal preparation risking remote harm of terrorist attacks, and was thus criminalised in 2015 as a crime against *public safety*.[96]

However, the ground or notion of remote harm is dubious – the problems of recognising remote harm having been discussed in chapter 3(III). That is, there is rarely solid and concrete evidence that hate speech causes discriminatory treatment or other hate crimes, and

[93] See Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of the criminal law [2008] OJ L 328/55, art 1.
[94] See *CHW* 115.
[95] See Anti-Terrorism Law (China, 2015), s 4(2).
[96] Chinese criminal law, s123C.

it may not be fair to impute the remote harm by another autonomous agent to the original speaker.[97]

Another approach to criminalising hate speech is to treat it as a crime against *personal rights*. For example, in China there is also an established crime of inciting ethnic hatred or prejudice, this being as a crime against personal rights.[98] So, this approach to justifying criminalisation is referable to the direct harm to psychological health or dignity of the victim. However, once again the empirical evidence of the causation is unsubstantiated, so the argument may instead turn to the plausible notion of the cumulative effect of spreading prejudice against the group that may escalate into discrimination, hatred or violence.[99]

However, to impute cumulative harm to different autonomous agents also requires careful examination.[100] We cannot assume that the imputation is appropriate. Moreover, it is incongruous for the same jurisdiction to proscribe inciting hatred in general as a crime against public safety while retaining inciting ethnic hatred in particular as a crime against personal rights. It is preferable to adopt a more consistent approach of targeting all conduct of inciting hatred as insulting conduct. But once again (as in the case of exposure) a slightly more nuanced approach is commended. There may be cases of incitement which are clearly directed against a particular person, even if committed in public. So, the argument might be that where there is doubt (whether the incitement is an attack on the dignity of the particular person), it would be preferable to resort to the public order offence, rather than the crime against the person.

Some UK legislation criminalises hate speech that is likely, or intended, to incite or stir up racial, religious or sexual orientation hatred as part of public order law.[101] The expression of insults directed at a group of people may be seen as likely to stir up hatred. This approach

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[97] See James Chalmers and Fiona Leverick, 'A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review' (Scotland Government, July 2017) https://consult.scotland.gov.uk/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf> 73-74, accessed 29 May 2018. The potential harmful consequences should not be entirely contingent upon the actor's future choices. See Andrew Cornford, 'Preventative Criminalization' (2015) 18 N Crim LR 1, 15-16.

[98] Chinese criminal law, s 249.

[99] See James Chalmers and Fiona Leverick, 'A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review' (Scotland Government, July 2017) https://consult.scotland.gov.uk/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf> 70ff, accessed 29 May 2018.

[100] See *HTO* 225ff, *CHW* 85ff.

[101] See Public Order Act 1986, pts III and 3A.

has been adopted partly because of international treaty obligations. The UN requires the signatory states' criminalisation of the dissemination or incitement of racial hatred, discrimination or violence.[102] Hatred may lead to acts of discrimination, and both can lead to violence.[103] EU law also requires criminalisation of the dissemination, incitement of racial hatred or violence.[104] So, the crimes are understood in quite a different way in the UK – where incitement to hatred pre-dates the anti-terrorist legislation and is about protecting certain groups – with incitement conceived as a form of *violence* (it is precisely the *immediacy* of potential harm which is relevant rather than its remoteness). This approach seems sensible in theory – as argued in chapter 3 (V(ii)), in the case of extreme insults, there would be the substantial possibility of a physical conflict disturbing the civil life of others e.g. inciting violence or provoking a breach of the peace.[105] For example, the Scottish parliament had criminalised certain forms of hate speech to prevent 'public disorder' in the sporting context.[106]

However, in practice merely insulting (and non-abusive or non-threatening) expression is rarely likely to 'stir up hatred',[107] even though it may well be possible to stir up other kinds of hate, such as hostility, ill-will, contempt or ridicule. It is admittedly difficult to define what 'hate' speech actually is – and it is arbitrary to merely prevent 'hatred' while leaving other kinds of hate. This is different from other jurisdictions that prevent various kinds of hate.[108] Legislating to identify protected persons by their specific characteristics is also problematic.[109] Consequently, the scope of hate speech crimes can be arbitrary in

[102] See UN Convention on Racial Discrimination (1965), art 4.

[103] See Law Commission, *Hate Crime: The Case for Extending the Existing Offences (A Consultation Paper)* (Law CP No 213, 2013) paras 4.38-4.45. Thus 'hatred itself is not illegal' (para 4.38) since there is no conduct involved, but freedom of thought and conscience – but the expression or incitation of it is illegal because something more than mere thought and there is no freedom of expression over others' dignity.

[104] See Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55, art 1.

[105] See Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (Palgrave 2001) 20-21.

[106] Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 1. But similar conduct is criminalised in neighbouring jurisdictions without requiring the likeliness of inciting public disorder. See section 3 of the Football Offences Act 1991 (applicable to England and Wales) and section 37 of the Justice Act (Northern Ireland) 2011.

[107] See Law Commission, *Hate Crime: The Case for Extending the Existing Offences (A Consultation Paper)* (*Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights)* (Law CP No 213, 2013) para A.80.

[108] See James Chalmers and Fiona Leverick, 'A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review' (Scotland Government, July 2017) https://consult.scotland.gov.uk/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf> 78-79, accessed 29 May 2018.

[109] Ibid 52ff.

England/Scotland and inconsistent in application throughout the UK. So, the approach of targeting the *incitement of hatred* by speech is inherently flawed.

I would argue for a different approach to criminalising hate speech – that it be consistently treated as insulting, and thus *offensive conduct* and thereby a *public order* problem. In section 4 of the Public Order Act 1986, insulting conduct is criminalised because it offends others in public. In such an approach, the offence principle can arguably solve the problem of causing/risking serious offence by the expression of insulting speech. It can be reasoned that this kind of insulting conduct perpetrated against a group breaches the inner peace of a significant section of the public and is thus a breach of public order. In this way, hate speech is criminalised just to prevent instant serious offence to others, rather than to prevent subsequent provoked violence/disorder or remote harms. This approach is more sensible than other approaches since it may be difficult, if not necessarily impossible, to prove there is a likelihood or intention of inciting hatred, violence, disorder or remote harms (such as discriminatory treatments or terrorist attacks).[110]

b. Establishing Serious Offence

Serious offence to an individual victim, group and even to other fellow members of the same community should feature in the normative arguments for criminalising hate speech. This section will establish the relevant grounds for distress, resentment or alarm as the standard or threshold for criminalisation. Hate speech is of a high degree of offensiveness because it attacks the meaning of the very existence of a group of people – such that the caused/risked distress, resentment etc. are categories of offence that are serious enough to warrant criminalisation (as argued in the previous part on indecency).

Firstly, the serious offence that is caused to the individual victim, and the group to which they belong, takes the serious form of distress, resentment or alarm.[111] That is, hate speech impacts upon the unwilling victim and thus causes intense offence (not only resentment, but also alarm or even fear of violence). Also, there is something disturbing about the quality of the speech in itself. That is, even for those audiences consenting to the hate speech, they

[110] Intoxication in a public place can be an interesting analogy. It is invariably criminalised because of 'a reasonable apprehension that he might endanger himself or any other person in his vicinity', punished by 'a fine not exceeding £ 100', in Irish Criminal Justice (Public Order) Act, 1994, s 4. Hate speeches 'intoxicate' people in public, rendering them fanatical, weakening their cognitive and self-control abilities. But it would be difficult to normatively establish a risk of further harm, while it is sensible to find a reasonable apprehension/alarm as a serious offence reaction, with a proportionate penalty.

[111] The offence probably escalates into harm such as emotional damage when intensified to an individual.

should take offence: 'sometimes, however, we think not just that it is reasonable to be offended by X, but that one should be offended by it' because 'it flouts standards that people ought to care about, in a way that people ought to find offensive'.[112] Furthermore, there is serious offence to other righteous members outside the targeted group. They may feel disgust at others being treated without dignity, and outrage at violations of the equality of general humanity.[113] So the conduct is about both inner peace of the public and about dignity of people. When it is not clear that the criminal law in a jurisdiction directly protects dignity of an individual or a group, public order law is the obvious choice. Moreover, even if the self-esteem, self-respect and self-confidence of the target is actually not harmed, the target can be protected from serious offence by public order law.

All the offence may happen when the 'powerful message of intolerance and discrimination' is communicated and received. [114] Criminalisation is designed to prevent such communication. The wearing of Nazi or Fascist or Militarism symbolic representations could be seen as objectively approving of, justifying, preaching, glorifying or inciting relevant insulting conduct.[115] Wearing a band with a swastika on it in a bus may be identified as something which stirs up racial hatred by threatening or insulting words, behaviour or written material,[116] or by 'sign or other visible representation'.[117] Communicating a threat in order to stir up (religious) hatred is an insult and can be separately criminalised.[118]

(iii) Wrongfulness of Offensive Insults

After having identified the serious offensiveness of insults it is now necessary to look at any counterbalancing conflicting interests in the freedom of expression. This section will firstly criticise the inconsistent balancing consideration in English legislation (of insulting a group), and then explain how a reasonableness defence can assist in assessing the balance in some

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[112] R A Duff and S Marshall, 'How Offensive Can You Get?' in *IROB* 63. It is difficult to identify all of these standards. But a core standard is obvious: whether the conduct is against 'our firmest ['moral'] convictions of 'political equality and human dignity'. Robert Amdur, 'Review: Harm, Offence, and the Limits of Liberty' (1985) 98 HLR 1946, 1958-59.

[113] Disgust can occur not only when others 'act without dignity' (harming humanity of people in relation to other creatures), but also when others 'treat others without dignity' (harming equality of people in relation to fellow members). Jonathan H Turner and Jan E Stets, 'Moral Emotions' in Jan E Stets and Jonathan H Turner (eds), *Handbook of the Sociology of Emotions* (Springer 2006) 553.

[114] NY Penal Law, s 485.00.

[115] Two men was punished because of disrupting public order by wearing Japanese military costumes in a Nanjing invading site. See Shuangjiang Luo, 'Spiritual Japanese Search(ed), Lawyers suggesting legislative Detailed', *Yangzi Evening Paper* (Nanjing, 24 Feb, 2018).

[116] See Public Order Act 1986, s 18.

[117] See Public Order Act 1986, s 4A. For the case, see *OTO* 13.

[118] See Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 6(5).

cases, and finally suggest a valid and effective balancing framework to embody the abstract conception and unify its application.

a. Inconsistent Legislation of Free Expression over Offensive Insults

Legislation covering insults does not provide a clear and reasonable framework for recognising counterbalancing interests in free speech. English law seems to have inconsistent and unreasonable protections for freedom of expression in relation to offensive insults.

The law created a new offence to criminalise the use of threatening words or behavior or display of threatening written material to stir up religious hatred,[119] but allows insulting of religion for the 'protection of freedom of expression' by a section added in 2006.[120] So it seems insulting a belief system rather than the group of its adherents can be excluded from criminalisation.[121] But the distinction between a group and a belief system or the beliefs or practices of its adherents is difficult and arbitrary to make (as is that between attacking sexual orientation and attacking members of that group);[122] it is incoherent to criminalise the posting online of statements such as 'Muslims out of UK', while allowing the posting of 'Moslemism fuck off'. Actually, a poster of 'Islam out of Britain' may also be criminalised under section 31 of the Crime and Disorder Act 1998 for the racially aggravated version of the offence under section 5 of the 1986 Act.[123] But it is still not clear how the scope of criminalisable insults of a belief system or the beliefs or practices of its adherents can be determined.

Moreover, it is not clear why the Public Order Act 1986, as well as covering insults and abuses of a group defined by reference to a relevant racial or sexual feature such as colour,

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[119] See POA 1986, s 29B.

[120] See section 29J: 'Nothing in this Part [religious hatred] shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, *insult or abuse* of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.' (emphasis added) Scotland has a similar provision. See Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 7.

[121] See Law Commission, *Hate Crime: The Case for Extending the Existing Offences (A Consultation Paper)* (Law CP No 213, 2013) para 2.119.

[122] See Law Commission, *Hate Crime: The Case for Extending the Existing Offences (A Consultation Paper)* (*Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights)* (Law CP No 213, 2013) para A.90. Displaying 'Stop Immorality', 'Stop Homosexuality and Stop Lesbianism' at the same time is insulting. See *Hammond v DPP* [2004] EWHC 69 (Admin).

[123] *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888; *Norwood v United Kingdom* (2005) 40 EHRR SE 11.

race, nationality (including citizenship) or ethnic or national origins and sexual orientations (sexual conduct or practices), covers insults and abuses of such a feature that defines a group of people while allowing insults and abuses of another kind of feature that defines a group of people such as belief system or the beliefs or practices of its adherents because of freedom of expression.[124] This is an obvious inconsistency within the Act.

Outside the act, there is also inconsistency between Acts. Section 5, Public Order Act 1986 previously also targeted 'insulting' conduct as sections 4 and 4A do, but this word was deleted by section 57 of the Crime and Courts Act 2013 to respond to concerns of 'encroaching on freedom of expression'.[125] If the deletion of 'insulting' in section 5 of Public Order Act 1986 by the 2013 Act was really designed to protect freedom of expression, why not also delete 'abusive' in section 5 and thus allow abuses which are likely to cause harassment, alarm or distress, as the 2006 section allows both insults *and* abuses of religious belief and practice? A clear and reasonable framework to counterbalance free speech is needed.

b. Interpretation of Reasonableness Defence in Legislation

The problem of inconsistent legislation of balancing freedom of expression and insulting conduct may have a solution in existing law, in the reasonableness defence: 'that his conduct was reasonable'.[126] That is, if the interest in free expression can be interpreted to override the right not to be insulted or abused, the insulting or abusive conduct is reasonable. The interpretation of this defence can be effective in analysing some cases.

As mentioned earlier, Ireland targets outrage among a substantial number of the adherents of a religion caused by publication or utterance that grossly abuses or insults matters held sacred by that religion.[127] But the criminalisation comes with a defence, applicable where '… a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates'.[128] Thus it seems that a relevant value in freedom of expression can override the offence. However, since the offence is factual and

[124] See Public Order Act 1986, pts 3 and 3A.
[125] See David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) 1241. So only insults of religion or the beliefs or practices of adherents that meets conditions set in sections 4 and 4A can be covered: the actor intended that or it was likely that another would believe that immediate unlawful violence would be used or provoked, or the actor intended and the act caused harassment, alarm or distress.
[126] Public Order Act 1986, ss 4A(3)(b) and 5(3)(c).
[127] See Defamation Act 2009, s 36.
[128] Ibid.

serious to a substantial number, the value must be overwhelming.[129] So if the value is objectively not the principal content of the publication or utterance, it is does not outweigh the offence.

Another example is New Zealand's prohibition of blasphemous libel.[130] Here the reasonableness of expression in good faith and decent language should be understood in the sense of balancing interests from perspectives of the affected person, the actor and the general public. Why should the language be decent? It is for the avoidance of unnecessary offence. If a speaker is not literary enough to express decently, then the indecent language is necessary for the expression of ideas, and thus the expression is justified, i.e. there is no wrongfulness of the offence. In contrast, plain abuse is surely unnecessary indecent language.[131] The publication is wrong just because objectively the disruption is not necessary.

The good faith of the actor entails some objective meanings and thus embodies reasonableness. The law protects the expression of religious opinions, or the establishment of religious opinions with arguments, in which there is good faith. If the opinion or the argument is without objective sources but fabricated as in the Austrian film,[132] there is no good faith. A journalist's reliance on the contents (that the volume and expansion of cannabis production there 'made Morocco a serious contender for the title of the world's leading hashish exporter') of the uncontested official report is in good faith.[133] If a person does not think a religious subject is true, he can challenge it with objective sources, as an atheist or humanist does or as a scientist does e.g. Darwin or Copernicus. That is the way to discuss or criticize a belief system or the beliefs or practices. To fabricate or vilify is not reasonable discussion or criticism, and thus it is not to be covered as protected freedom of expression. It is not acceptable to oppress objective discussion or criticism of religious matters as shown

[129] The ECtHR ruled that internal authorities could refuse classification certificate to a video sufficiently offensive to Christian convictions. See *Wingrove v United Kingdom* (1997) 24 EHRR 1.

[130] Section 123 of the Crimes Act 1961 prescribes that: '(1) Every one is liable to imprisonment for a term not exceeding 1 year who publishes any blasphemous libel. (2) Whether any particular published matter is or is not a blasphemous libel is a question of fact. (3) It is not an offense against this section *to express* in good faith and in decent language, or to attempt *to establish by arguments* used in good faith and conveyed in decent language, *any opinion* whatever on any religious subject.' (emphasis added)

[131] Then what is the content of the required good faith? Probably the provision requires that the actor is of the belief that the idea is right and the expression is a right. This is another type of reasonableness. But still, subjective element is not to be considered in judging the wrongfulness of offence; it is a problem of normative culpability.

[132] In the film, God the Father is infirm and ineffective, Jesus Christ a 'mummy's boy' and the Virgin Mary a wanton; they plan with the Devil to punish mankind for its immorality. See *Otto-Preminger-Institut v Austria* (1994) Series A no 295-A.

[133] See *Colombani and others v France* app no 51279/99 (ECtHR, 25 June 2002) [65].

by the death of Giordano Bruno, neither it is acceptable to move to the other extreme that connives in wanton vilification. Therefore, implicit insults by fabrication are unacceptable insults.

c. Framework of Offensive Insults Counterbalancing Freedom of Expression

The analysis of abstract reasonableness above may not be clear and consistent enough to be applicable to other cases. It is 'difficult to see how a citizen can properly regulate his conduct in advance on the basis of the current case law'.[134] In *Percy v DPP*, on the justification, the District Judge merely considered whether there was an alternative to the actor while the High Court considered further other factors: 'the accused's behaviour went beyond legitimate protest'; 'the behaviour had not formed part of an open expression of opinion on a matter of public interest'; 'use of a flag had nothing, in effect, to do with conveying a message or the expression of opinion'.[135] A clear framework of balancing offensive insults and freedom of expression that embodies the defence of reasonableness should apply consistently in all cases. The ECtHR has exemplified how to limit the freedom in some cases,[136] but its multiple considerations should be more clearly and reasonably structured as follows.

The threshold problem of freedom of expression is to determine whether the conduct is absolutely excluded from any protection. Article 17 of the ECHR absolutely prohibits abuse of rights and thus some expression ('aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention') are ousted from possibility of protection in article 10. How the 'aim' of the conduct should be interpreted is in dispute.[137] It should be objectively interpreted rather than by resort to the subjective intention/faith of the actor; it means that if the act's sole or primary use is to destruct or limit the 'rights and freedoms' such as reputation, dignity, equality, [138]

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[134] Alex Bailin, 'Criminalising Free Speech?' [2011] Crim LR 705, 711.

[135] See *Percy v DPP* [2001] EWHC Admin 1125 [30]- [32]. However, its consideration of the knowledge of the likely effect is actually not relevant to proportionality here.

[136] See *Otto-Preminger-Institut v Austria* (1994) Series A no 295-A; *Hoffer and Annen v Germany* App no 397/07 and 2322/07 (ECtHR, 13 January 2011).

[137] See Law Law Commission, *Hate Crime: The Case for Extending the Existing Offences (A Consultation Paper)* (*Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights)* (Law CP No 213, 2013) paras A.28-A.40.

[138] This rejects the too high threshold of (a device) being exclusively or specifically designed or the too low threshold of subjective intention. See Council of Europe, *Explanatory Report to the Convention on Cybercrime* (European Treaty Series - No 185) para 73. The ECtHR tend to oust the denial because of its 'main content and general tenor' against the Convention's fundamental values ('basic ideas') i.e. justice and peace in the Preamble ('text and spirit'), contrasting the Human Rights Committee (UN) that considers the claim for protection of the freedom as principally admissible before determining no specific violation. See 'Introduction' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) xxxii-xxxvi.

then its negative value definitely outweighs its positive value and it surely falls out of possibly protectable expression. For example, the ECtHR ruled that an Austrian film's value in free artistic expression should be treated with due regard; but when its content existed primarily to insult others' religious feelings, it was against 'the protection of the rights of others'.[139] In this way, the conduct in the case of hate speech is absolutely excluded from any protection. As argued in chapter 2 (III(iii), extremist speech is inherently in conflict with 'our firmest ['moral'] convictions of 'political equality and human dignity'.[140]

Once past this general threshold, as in a case of insulting speech that is not hate speech e.g. labelling an abortion doctor with the banner 'Then: Holocaust/today: Babycaust',[141] we need to determine the specific protection of the freedom of expression in the progressive framework of proportionality that accords with article 10(2), ECHR. The first step is to check whether the interference with the freedom was necessary for a 'pressing social need'.[142] The need can be one or more of matters prescribed in article 10(2), ECHR.[143] This is to check whether there is harm or offence to legal interests by the expression. For example, there was harm to reputation and dignity and serious offence in the case of labelling an abortion doctor with the banner 'Then: Holocaust/today: Babycaust'. [144] So the interference with the insulting speech was necessary. The second is to check whether the expression is of public value that can outweigh the affected interest.[145] Although freedom of expression outweighs temporary affronts to sensibilities, it usually cannot override personality rights such as the reputation or dignity of an individual. For example, the statements were made in a context of an element of a public debate on abortion, and there should be 'special degree protection afforded' – even to the extent of countenancing 'exaggerated and polemic criticism' such as describing a doctor as a 'Killing Specialist' – but a defamatory and insulting (Holo)caust characterisation was not 'an acceptable element of a public debate'.[146] The third is to gauge whether the mode of expression could have been expected to be less detrimental (the criticism by way of comparing abortion to Holocaust could be easily avoided) – and to check whether the offence could have been easily avoided by the accuser claimant (offensive conduct at the entrance of the clinic cannot be easily ignored by the doctor and his fellows).

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[139] See *Otto-Preminger-Institut v Austria* (1994) Series A no 295-A.
[140] See Robert Amdur, 'Review: Harm, Offence, and the Limits of Liberty' (1985) 98 HLR 1946, 1958-59.
[141] See *Hoffer and Annen v Germany* App no 397/07 and 2322/07 (ECtHR, 13 January 2011).
[142] *Gough v The United Kingdom* (2015) 61 EHRR 8 [164].
[143] See *Hoffer and Annen v Germany* App no 397/07 and 2322/07 (ECtHR, 13 January 2011) [49].
[144] Ibid [47].
[145] Political speech is of enormous public interest, especially important before legislation is passed and elections held. See *Bowman v UK* (1998) 26 EHRR 1 [42].
[146] *Hoffer and Annen v Germany* App no 397/07 and 2322/07 (ECtHR, 13 January 2011) [44]-[45].

It seems that if the banner is available online or in print and does not identity a particular individual doctor, the serious offence caused to the group of abortion doctors can be overridden by freedom of expression consideration.

In short, proportionately balancing freedom of expression and its limits means that it is necessary to consider three steps: the necessity to prevent serious offence being caused by the exercise of the freedom; the balance of values of freedom of expression and the competing need to avoid offence; and the alternatives which might avoid the offence. Obviously, the solid framework of hierarchical steps argued for in indecency cases should still apply in insult cases.

CONCLUSION

There has been increasing acceptance of (likely) serious offence (whether disgust, alarm, distress, etc.) as a justification of criminalisation as well as the harm principle in public indecency laws and the Public Order Act 1986. Legal theorists should try to explain and guide this criminalisation trend of offensive conduct. Order maintenance should focus on the 'direct effects on public order' or quality of life, rather than on the 'indirect effects on serious crime'.[147] This chapter has argued that the offence principle (restated in chapter 2) can independently offer a workable framework to review and elaborate specific criminalisation of categorised offensive conduct.

There are mainly three categories of offensive conduct (threatening, indecent and insulting). Their offensiveness can be specifically analysed and applied in criminalisation. The evils of public indecencies, such as sexual exposure, may not be the (sexual) harm as such, but the serious offence of shock/alarm, disgust, humiliation, distress or indignation/outrage suffered in specific conditions. The evil of insult in hate speech may not be in its harm or its risk (of its causing hatred, prejudice or violence), but in its serious offence. The offence can be confirmed as wrongful by structurally counterbalancing the freedom of expression – even if the values of that freedom override the need to avoid the offence, the resultant balance of the alternative courses of two parties may still decide that the offence is wrongful.

[147] See David Thacher, 'Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning' (2004) 94 J Crim L & Criminology 381, 412.

Chapter 6 Conclusion

In the Preface, I showed how the scope of public order crimes was arbitrary and argued that principled criminalisation can allow us to understand public order crimes in a clearer way. This thesis has examined the moral limits of criminalising conduct which breaches public order, by restating the concepts of harm and offence as applicable to criminalising the conduct. So, the key findings and contributions are two-sided but intertwined.

In the first part of this conclusion I will explain the argument (and its contribution) in relation to public order law – elucidate what this new limited version of public order law would look like, and demonstrate how it would be different from my starting point mentioned in the Preface. By 'limited' I mean that the scope is narrower or constrained in some way – not just that crimes of public safety etc. are excluded – but also how my approach might limit the ambit of remaining crimes of public order.

The second part will show how the limiting process in this domain can illuminate a principled approach to criminalisation more generally. The criminalisation framework has been restated around core concepts that are common in criminalisation literature – specifically wrongs, harms (setbacks to interests) and goods (interests).[1] The moral limits of criminalisation are built on the clear and reasonable relationship amongst them. So, in this part my claim is not about criminalisation theory generally, but about the need to apply it in a hierarchical way, especially in the domain of public order crimes.

It should be clear that the aim of the thesis is merely to identify conduct that should be regulated in some way. In other words, it does not move on to the next step of determining whether the conduct should be the subject of the criminal law or whether where are other effective ways of regulating it (e.g. civil penalties or administrative law). Even for moral limits of criminalisation, the problem of culpability/excuses is not addressed in this thesis to limit the scope of public order crimes.

[1] See John Stanton-Ife, 'What Is the Harm Principle For?' (2016) 10 Crim LP 329, 354. In America, Feinberg's moral limits of criminal law also develop to a relatively full extent around these concepts.

I. A NEW PUBLIC ORDER LAW

I will summarise my argument, with its implications for the scope of public order offences. My starting point is to define the nature of the 'interest' in public order. The key elements of protected public order interests have been defined as conditions for smooth life and categorised into three types: life peace (without disturbing harassments); life convenience (in use); and life amenity/comfort (in enjoyment). Causing or risking inconvenience or discomfort, or breaching life peace, without proper justification, is the factual and normative harm/offence of a public order crime. Arguments which seek to justify criminalisation in respect of public order should thus identify specific setbacks to public order interests (i.e. legally recognisable physical and non-physical nuisances against interests in quality of life) – before moving to normatively balance any possible conflict of interests in social interaction. Therefore, I will explain how identifying the interest more clearly makes it possible to specify more clearly how it might be harmed or offended.

Public order is generally seen as a residual or lump category, comprised of crimes which are necessary, but which are not accommodated elsewhere in the criminal law. However, I have argued that, from the special perspective of everyday life, it is possible to perceive public order as a particular kind of interest. Everyday life consists of activities which members of a society do for the continuation or improvement of their individual lives: sport, study, work, leisure, amusement, worship, traffic, religion, politics, etc.[2] We engage in everyday activities which are not necessarily 'life aims', but which may be central to our lives in important and particular ways. Everyday life can have its own meaning and is itself worth maintaining. Every person needs a kind of life order every day. 'Smooth life' can be literally understood as where relevant life activities are going well and comfortable – free of problems, trouble, unpleasantness or sudden disruptions.

In this way, public order can be seen as central to people's quality of life, and public order law has its own purpose, remit and scope. From this perspective, crimes against public order can be seen as an independent category of crimes in criminal law. Firstly, from this perspective public order is different from public safety or general social administration – so the conduct connected with offensive weapons, fireworks, obscenity and pornography, political uniforms, quasi-military organisations etc., in much 'public order' regulation

[2] See P Sztompka, 'The Focus on Everyday Life: A New Turn in Sociology' (2008) 16 Eur Rev 1, 9 & 11.

mentioned in the Preface (I), is not directly a public order problem. Second, among common law crimes that are commonly regarded as public order offences, public nuisance should be refined or narrowed from its 'catching-all' common law meaning to be formulated as a public order offence that protects life convenience, comfort or peace – or as a public safety offence that protects the physical safety or health of the public.[3] Having explained which sorts of crimes are excluded, the focus of my new category of public order law is conduct that causes or risks specific inner states against smooth life – alarm, distress and annoyance – and conduct that causes or risks external setbacks to smooth life – obstruction, inconvenience, discomfort, loss of amenity, breach of the peace, harassment, disorder and disruption. This sort of criminality remains in the new category of public order law.

It is problematic to understand the publicness of an interest and crime, especially in respect of public order law. Public order law, by its very name and from the perspective of fair labelling, needs to explain what is meant by 'public'. I have tried to limit the publicness to occasions not concerning a specified victim in private – the test of being public is whether many individuals are actually or possibly affected. When many persons, a solitary indiscriminate person, or a singular individual on a public occasion (with by-standers/a third party) are adversely affected in terms of their life convenience, comfort or peace, the interest and crime can be labelled as public. Public order offences, moreover, are not too trivial that they should not be taken seriously by criminalisation theory. Firstly, if we apply the test of publicness outlined above, we can see that the interest is generally not trivial. Where more than one individual's life convenience, comfort or peace is affected, the seriousness of the evil tends to be sufficient for the criminal law to intervene. Secondly, though some of the conduct may be 'trivial' the interest is not – and this therefore justifies thinking about them in terms of criminalisation theory.

Having first identified the life interests in convenience, comfort and peace, the thesis then attempts to map public order offences on to them. Arguably, inconvenience means to make it difficult or even impossible to use a life condition, including obstruction, e.g. the notice 'out of order/use, sorry for the inconvenience', discomfort or loss of amenity will worsen the effect of the use of the life condition, while breach/disruption of life peace (as manifest in distress, alarm, harassment, disorder, etc.) disturbs the original state of peace. Therefore, typical categories of offences against public order potentially include: (a) crimes against the

[3] Or we can simply discard this offence name and enact these two kinds of crimes.

convenient public use of life places, such as blocking a door to prevent entrance or to throwing an object that may disrupt a sporting event, (b) crimes against the convenient public use of life facilities, such as to disrupt the function of post offices and hospitals; (c) crimes against the public enjoyment of general environmental conditions, such as emitting a noise that may disrupt public meetings; (d) crimes against the public communication and the accessing of information, such as the dissemination of false news that may cause public inconvenience; (e) crimes against public external peace, such as the creation of stubborn 'pop up' internet advertisements; (f) crimes against public inner peace, such as involvement in public indecencies or issuing insults. Each category's rationale and meaning has been enunciated. Categories of public order crimes should be put on a consistent and rational basis. This is an important rule to establish and develop a flow of new desires, values and rules in respect of public order which itself is not a fixed concept but is dynamic and evolves with time.

Breaches of this interest in public order must then be understood in terms of either harm or offence to others – in the absence of which there can be no crime. Harm and offence are capable of being identified more clearly once we understand the nature of the interest here. In the particular context of my account of public order as a protectable interest, harm in public order has firstly be understood as objective disruptions to physical interests in life order. This means that various collective interests identified in some criminal offences – such as general security, mutual cooperation, psychological trust in the law, the sense of general security, and respect for official authority – are not public order problems because in these cases we cannot consistently recognise a setback to life convenience, comfort or peace. However, conduct which undermines authority or administration in some cases – such as disregarding police warnings to disperse or entering officially banned or restricted areas – may involve recognisable setbacks to a public order interest, i.e. harmful disruptions to the smooth continuation of certain, specific activities of public authorities.

As a factual setback to a protectable interest, offence is a breach of inner peace that is based on and mediated by normative sensibilities, the breach being caused or triggered by communication. These sensibility and communication mechanisms of offending others can shape the scope of offensive conduct. So-called offences against morality, decency or religion – such as indecent naked rambling, displays of sexual behaviour and public cruelty to animals – should be classified as public order crimes, which breach others' inner peace. Or they otherwise should be repealed or decriminalised if they cannot be justified as public

order crimes – for example, mere thoughts of private immorality such as private incestuous behaviour, or knowledge of the behaviour after the fact cannot offend in the sense required by the communicative mechanism – and no alternative justification for criminalisation exists.

Further, in the area of public order, not all factual disruptions of order are normatively wrongful. There may be good reason to interfere with others' smooth life. Justification can be found in actions which may 'reasonably be expected in the normal course of life' e.g. exercising freedom of expression or freedom of assembly and association.[4] The reason advanced should be principally balanced against the harm or offence in a public order case.

We cannot assume that the disorder or offence was always directly and necessarily caused or risked by the conduct and there is no difficulty with imputing the result to the conduct. Therefore, I have identified new problems of imputing abstract risk of offence, remote risk of offence and remote harm of offence. In respect of all the imputation problems discussed here, a structured approach has been proposed. The first test is formal: i.e. whether the 'parallel people' would react in the same way or whether the risk, compounded by its possible gravity and its probability, is sufficiently severe. The second test is one of substantive justification: i.e. whether the parallel people' reaction is still justified – or whether the severe risk is still acceptable, given the personal importance to the actor and the social value inherent in their conduct.

This new approach to imputation allows us to have a fresh perspective on some longstanding problems in this area of the criminal law. A police officer is still to be regarded as a person liable to be affected by disorderly conduct – in terms of the test of parallel people. But offence caused to a group of parallel people may still not be imputed, because of the failure to pass this test of constitutional value. Begging in the immediate vicinity of an entrance to a public building can pose a substantial risk of obstructing others, and there is no competent justification to refute the imputation of disorder. Similarly, public nudity/sex carries a substantial risk of offending others, and there is equally no competent justification to refute the imputation of offence. In cases of teenagers congregating in public or begging in public, it is difficult to prove that such conduct is very likely to lead to further offensive behaviour. In contrast, the creation or possession of extremist material is inherently likely to lead to onward exhibition – and thereby offence to the public – and there is little counterbalancing

[4] See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) paras 3.60-3.61.

value in creating or possessing extremist material. In extreme cases of offending others there will be the significant risk of physical conflict disturbing the civil life of others – while the conduct has little acknowledgeable personal importance and social value.

Finally, I applied the restated concepts of harm and offence to some typical public order problems in order to demonstrate how this principled approach might work in practice. I have identified some categories of truly intrusive and wrongful begging/loitering conduct that bear on legal interests in convenience and comfort and inner peace. Firstly, soliciting and loitering are not untypical behaviours that may disturb the normal use of public places. Soliciting and loitering are not in themselves harmful to public amenity, nor do they inevitably raise security concerns, but they tend to be associated with causing offence to others or aesthetic harm or increasing crime-rate. However, the suggested harms/risks do not set back a criminally protectable interest. Or they are not criminally imputable because of doctrinal or empirical reasons. Or they are not criminally wrongful because they are justified by personal meaning to the actor and social value to others. Further, I have examined cases of offensive conduct that involve a serious loss of inner peace to members of the public. For the purpose of public order maintenance, I have focused on the direct effects on quality of life rather than on its further effects on serious crime. The evils of public indecencies such as sexual exposure may not be its implicit (sexual) harm – but the serious offence of shock/alarm, disgust, humiliation, distress or indignation/outrage in specific conditions. The evils of insults such as hate speech may not be its harm or its risk (of hatred, prejudice or violence), but its serious offence. By structurally counterbalancing the freedom of expression, the offence can finally be confirmed as wrongful.

Overall, through this method, I have shown that the scope of criminalising typical public order related conduct can be sensibly decided by the steps of limiting criminalisation. The restatement of the concepts of harm and offence, as the construction of structured limitations of criminalisation, is valuable in considering whether current laws on public order crimes – particularly public order acts and relevant ‘catch-all’ common law offences – are consistent and coherent, whether they need to be simplified or harmonised and whether more categories of public order crimes need to be created.

II. A NEW HIERARCHICAL FRAMEWORK OF LIMITING CRIMINALISATION

The framework for limiting criminalisation in respect of public order is based on the argument that criminalisation hierarchically requires a *wrongful, imputable, recognisable setback to a protectable (public order) interest*. The hierarchical requirement provides a new possibility to reflect on existing internal frameworks of criminalisation. Though theorists have tried to provide diverse frameworks of limiting criminalisation – with clarified prescriptive definitions and even coherent conceptions – they typically fail to provide the framework hierarchically, i.e. step by step – and thus may fail to clearly guide the criminalisation practice. More importantly, they fail to apply the framework to a category of crimes consistently, and thus may fail to persuasively show their applicability in criminalisation practice. Public order law with its defects has been a useful illustrative example to thread through the hierarchical framework of principled criminalisation.

The first requirement of criminalisation is to identify a legal *interest* to be protected. Theorists can readily reach this consensus because criminalisation aims at something that can be understood in terms of interests to be protected. However, theorists may disagree on what an appropritate interest in criminal law is – and the conception of public order as a revevant interest provides an appropriate opportunity to answer the question. Feinberg has tried to construct a system of protectable individual interests. Though this thesis follows his individualistic understanding of interests, little benefit is derived from his near-arbitrary listing of a series of interests. If legal interests are to be protected by law, then the law must be prudent and set standards to determine their scope. 'However, comparatively little progress has been made in developing normative criteria for the recognition of a legitimate *Rechtsgut* [legal interest/good].'[5] This thesis has tried to follow Eser's three steps to find and argue for the interests in public order – they should be socially-founded and factual, socially recognised and constitutionally consistent.[6] Legal interests in criminal law are substantive, specific interests for the conduct of peoples' lives and should be consistent with civil law and constitutional law.[7] In this way, this thesis has constructed public order interests as categorised life convenience, comfort and peace.

Secondly, only when we identify *a setback to a legal interest*, caused or risked by the act, can we have a reason to consider criminalisation. Setbacks to interests (goods) are criminal *evils*. This thesis follows Feinberg's parallel thought process that two criminal evils can

[5] *CHW* 29.
[6] See Albin Eser, 'The Principle of ''Harm'' In the Concept of Crime: A Comparative Analysis of The Criminally Protected Legal Interests' (1965-1966) 4 Duq U L Rev 345, 413.
[7] See M Zhang, *Preliminarily on Legal Interests* (CUPLP 2000) 162-67.

justify criminalisation – harm to others and offence to others. Harm and offence are considered from the perspective of classifying criminal infringements of interests.[8] I have consistently compared and contrasted harm with offence in arguing the constitution of each – viz., the interest concerned; the recognisable setback; the imputable setback; and the wrongful setback. As of the interests set out in the first chapter, all the life convenience and comfort interests and outward peace are physically manifest and can be conceptualised as objects of harm – while inner peace is psychological and thus the object of offence. Public order refers to the dimension of legal interests, and *disruptions of public order* refers to two kinds of evils – either harm or offence.[9] Thus, I have firstly defined public order as specific types of legal interest and have then applied principles of criminalisation in the ensuing chapters.

Therefore, the nature and scope of legal interests limit that of harm/offence. Only when we identify a legal interest, can we recognise an evil setting back it. Both the interest and the consequential evil are needed to truly understand a crime. To solely research on harm and offence without referring to what (interests) to harm and offend is neither persuasive nor logical. Thus, Feinberg defines harm as setbacks to interests and also explains interests in detail.[10]

Conversely, the theory of harm/offence can also affect that of legal interests. As for comprehending the publicness of a legal interest, in so far that there may still be room for doubt I simply follow the individualistic approach to define public order interests. Why not try a general approach to understanding public order as an interest which cannot be reduced to individual interests, but rather as a kind of common good, such as morality, civility or efficient administration? It may not be clear that my work in Chapter 1 completely challenges this sort of conception, because it is, admittedly, difficult to argue that morality, civility or efficient administration are not a socially-founded, socially factual interest for

[8] Parallel harm and offence are more understandable and workable than one single notion of 'legal interest infringement' in China (or 'setbacks to interest' in Feinberg's words or *Rechtsgutsverletzung* in German) in analysis of criminalisation.

[9] When Feinberg considers 'the relation between offense and privacy' (*OTO* 5), he does so in terms of there being something between a category of infringements (or evils) and a kind of infringed legal interests (or goods).

[10] In this sense, Feinberg's first chapter of four volumes on the moral limits of criminal law, 'Harm as Setbacks to Interest', should be reorganised by reordering his sections' titles in his chapter: '*3. Interests and Wants'; '2. Welfare Interests and ulterior Interests'; '6. The Concept of an Interest Network'; '7. Legally Protectable Interests';* '4. Harms, Hurts and Offenses'*;* '1. Meaning of Harm'*;* '5. The Way Acts and Other Events Affect Interests When They Harm Them'. The italic sections are on goods while the left sections are on evils.

good life and thus are not protectable. Therefore, in Chapter 2, this thesis has argued for an important step in limiting criminalisation – setbacks to a legal interest should be *recognisable*, given the requirement for legal certainty and clarity of the clarity of criminal provisions. Harm or offence 'to others' should be recognizable. This requires that the harm should be a setback to a categorised and substantive interest by an objectively measurable force – and that the offence be an affront to sensibility by initiating socially meaningful communication. In this step, if public order were something general as morality, civility or efficient administration, its setbacks cannot be clearly and consistently recognised in legislation and justice. Thus, public order cannot be defined as a communitarian good.[11]

Thirdly, it is unfortunate that, while theorists may agree on the normative need for imputation and wrongfulness, they disagree on the meaning of each and their interrelation. The requirement of normatively *imputable* harm/offence has been outlined in restating the concepts of harm to others and offence to others – and applied to cases of harmful disorder and offensive conduct. Normative imputation has been structured. Some recognisable setbacks to protectable interests are too abnormal, aggregative or remote to be imputed to the conduct – so they may simply be excluded from the scope of criminalisation. Additionally, we may need to consider further whether the conduct is substantively justifiable, even if the setback were normally caused or substantially risked.

Some setbacks are clearly imputable and may directly face the problem of identifying *wrongfulness*.[12] Wrong is a concept in criminal law whose meanings will depend on the context.[13] Here wrong is principally based on evil (harm and/or offence) to others. But we still need to move from a factual evil (a setback to a legal interest from the perspective of the victim) to normative wrongfulness – that the setback is unjustified – that when considered from the perspective of the actor, they had no good reason to create it. In (direct) harm to others, the evil is construed to be wrong except in cases of e.g. exercising a

[11] This is where the question of whether moralism in criminal law is reasonable can be solved as the question of whether the moral perception of a group of people can be a kind of legal interest in criminal law. If not, of course, no direct harm/offence is involved. But if so, then its setbacks should be legally recognisable.

[12] Wrong is principally necessary for criminalisation. Prohibition with a censuring function is based on the wrong as criminal law's moral voice (see *CHW* 19). Because a citizen has wronged others, the state can and should punish them as a representative of others. The wrong in criminal law is an important and necessary way to maintain and nurture mature, rational and responsible citizens, when every citizen with assumed autonomy and dignity should suffer predictable consequences for committing a wrong. The wrong need not be justified in moral terms. It could even be justified in political terms. But I do not address political justification here as Duff when he proposed public wrong as a requirement for a citizen to answer for each criminal offence (see Ian Leader-Elliott, 'A Critical Reading of R A Duff, Answering for Crime' (2010) 31 Adel L Rev 47, 47).

[13] See *CHC* 80-81.

recognised right. In offence to others, the communication-based evil may be counterbalanced by the right to freedom of expression. If no *justification* were claimed and accepted, the identification of a wrong as a normative evil is fulfilled. It is not a solid criminalisation theory to dwell on the matter of wrong without analysing an evil in depth. Neither is it sensible to anchor justification of criminalisation on evils, without further examining possible justifications of the conduct that may negate wrongfulness.[14]

In public order, freedom of expression is a particularly important justification in excluding wrongfulness of causing/risking inconvenience, discomfort or breaching of inner peace. It provides an opportunity to reflect on Feinberg's framework of balancing conflicting interests, particularly his consideration of the moral quality of each interest.[15] The thesis has refuted the understanding of the immorality of an interest – the interest is immoral and thus of lesser value in the balance of interests.[16] It is because the immoral interest is not socially recognised that it is not a protectable interest at all. However, the idea of immorality is still worthy of consideration, if we understand it as meaning that since the measure to exercise the freedom is not proportionate, it evidences a lack of consideration in social cooperation – and is thus immoral and not worthy of protection.

In sum, this thesis has attempted to argue for a limited scope of public order crimes by restating and applying a hierarchically-principled framework of criminalisation. It has narrowed the scope of public order (crimes) by eliminating some misconceptions and ambiguities regarding their scope.[17] The summarised language of concepts and the adoption of a hierarchical approach to limiting criminalisation has certain advantages over Feinberg's theory. The preliminary conclusions regarding the scope of public order crimes and the framework of limiting criminalisation remain to be elaborated in future work.[18]

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[14] It seems Feinberg overly focuses on harm and offence (see *HTO* and *OTO*) while Semesters and von Hirsch proportionately emphasise wrong (see *CHW*). The authors claim that they do not 'allow the normative to take over' (see A P Semester, Andreas von Hirsch, 'On the Legitimate Objectives of Criminalisation' (2016) 10 Crim LP 367, 377). This thesis embraces this position but it is doubtful whether, without hierarchical steps between two ends, they have done that.

[15] See *HTO* 204-06.

[16] ibid 205-06.

[17] Hopefully, laws on other crimes such as public safety crimes can also be elaborated in the hierarchical framework of limiting criminalisation.

[18] 'Criminalisation is a central issue—may be the central issue—for criminal law and criminal theory.' *MMCL* 303. Principled criminalisation deserves more research than has thereto been undertaken.

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