
HARM, WRONG, AND THE LIMITS OF CRIMINALIZATION: A CRITICAL EXAMINATION OF A.P. SIMESTER AND ANDREAS VON HIRSCH'S CONCEPTION OF THE HARM PRINCIPLE

Ajay Jatav, National Law University, Delhi

ABSTRACT

This article examines comprehensively and critically the harm principle as reconceived by A.P. Simester and Andreas von Hirsch in their seminal work, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation (2011)*. Moving beyond John Stuart Mill's foundational but under-specified formulation, Simester and von Hirsch erect a normatively sophisticated framework that demands both harmfulness and wrongfulness as cumulative prerequisites for justified criminal sanction. The article articulates the authors' principal arguments including the tripartite wrongfulness theses, the taxonomy of harm, and the doctrine of fair imputation and subjects each to rigorous critical scrutiny. Drawing on the counter-arguments of Victor Tadros, R.A. Duff, Douglas Husak, Tatjana Hornle, and Vincent Chiao, the article identifies structural tensions within the framework, most notably the ambiguous logical relationship between harm and wrong, the indeterminacy inherent in the fair imputation standard, and the framework's limited purchase over systemic and collective harms. The article further situates the analysis within contemporary Indian criminal law reform, demonstrating the practical salience of the theoretical debates.

Keywords: Harm, Wrongs, Criminalization, Liberty limiting principle, Harm to others.

I. HARM AS A CONCEPT IN CRIMINALIZATION: FOUNDATIONS AND LIMITS

The harm principle occupies a structurally pivotal position in liberal criminal law theory. In its classical articulation, John Stuart Mill declared that the sole legitimate basis for the exercise of coercive state power over an individual is the prevention of harm to others.¹ While this formulation provides a rhetorically powerful bulwark against moral paternalism and legal moralism, it suffers from a fundamental deficiency: it neither defines harm with precision nor specifies the normative relationship between harm, wrongfulness, and criminal liability. Mill's framework offers a negative constraint on criminalization but not a positive theory of it.

Joel Feinberg's monumental *four-volume Moral Limits of the Criminal Law* partially remedied this deficiency by defining harm as the setting back of a person's interests in a manner that leaves them worse off than before.² Feinberg introduced the crucial qualifier of “wrongful harm”: not every setback to interest constitutes harm cognizable by the criminal law, but only those produced by wrongful conduct. This move anticipated the dual-constraint architecture later elaborated by Simester and von Hirsch, though Feinberg's framework remained more permissive in its treatment of offensiveness as an independent ground for criminalization.

Simester and von Hirsch begin precisely where Feinberg's account is most vulnerable. They argue that criminal law must speak in what they describe as a “distinctively moral voice,”³ condemning conduct not merely as socially undesirable but as morally culpable. This communicative function demands that the standards for criminalization be grounded in moral responsibility rather than the bare occurrence of suffering or social cost. A purely consequentialist harm calculus, they contend, would license an unchecked expansion of criminal liability wherever marginal deterrent benefits could be identified, undermining the liberal commitment to individual autonomy and the rule of law.

To illustrate the inadequacy of Mill's harm principle in isolation, consider the paradigm of private defence: if person A, acting in lawful private defence, strikes person B, A's conduct causes harm in the Millian sense, yet it is neither wrongful nor criminal. *Bharatiya Nyaya Sanhita, 2023*, codifies precisely this understanding.⁴ Mill's framework struggles to explain

¹John Stuart Mill, *On Liberty* ch. 1, para. 9 (John W. Parker & Son 1859).

²Joel Feinberg, *Harm to Others* 33 (Oxford Univ. Press 1984).

³A.P. Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 36 (Hart Publishing 2011).

⁴*Bharatiya Nyaya Sanhita*, No. 45 of 2023, s. 34.

why A's conduct escapes criminal sanction; Simester and von Hirsch's account handles the case with ease, since A's conduct, though harmful, is not wrongful. This example reveals that harm and wrong, while frequently co-extensive, are analytically distinct; their conjunction, not either alone, is what the authors insist upon.

II. THE EXAMINATION OF THE HARM PRINCIPLE: THRESHOLD, TAXONOMY, AND NORMATIVE JUSTIFICATION

A. The Harm Threshold and Its Contextual Character

Simester and von Hirsch do not treat harm as a binary concept. Rather, they insist that criminal law's legitimacy requires the prevention of harm weighty enough on the normative scales to warrant the distinctive stigma of public censure.⁵ This threshold principle distinguishes between trivial inconveniences and morally significant setbacks to interests. The filter is not fixed or mechanical; it is contextual, requiring a continuous dialogue between law, social norms, and moral philosophy. Its application in any concrete case involves an evaluative judgment about whether the harm in question reaches the level of moral seriousness that justifies deploying the blunt instrument of the criminal sanction.

The authors further elaborate a taxonomy of harm structured according to degree of directness and moral proximity to the prohibited act.⁶ Direct harms immediately and intrinsically wrong their victims, such as murder and rape (*mala in se*), representing the paradigm case of criminalization. Remote harms involve conduct that is *per se* harmless but which may, through the intervening agency of third parties or causal sequences, generate harmful outcomes. The regulation of acid sales is an instructive example: the purchase of acid is not in itself harmful, but the legislature may justifiably criminalize certain transactions involving it in light of the risk of acid attacks. Secondary or indirect harms occupy an intermediate position, encompassing conduct that, while not directly harmful, causes inconvenience or imposes costs on others.⁷

B. Remote Harms and the Problem of Fair Imputation

The most technically demanding and practically significant contribution of Simester and von

⁵Id. at 43.

⁶Id. at 36-44.

⁷Id. at 47-49.

Hirsch's framework lies in their treatment of remote harms and the doctrine of fair imputation. Modern criminal legislation increasingly targets conduct whose connection to actual harm is mediated through the independent agency of third parties or through extended causal chains: terrorism financing, money laundering, incitement to hatred, the facilitation of cyberattacks, or the passive participation in unlawful activities. If the harm principle is to serve as a genuine constraint on criminalization rather than an infinitely elastic justification for it, it must specify when remote harms may be legitimately attributed to the person whose conduct set the causal chain in motion.

The “standard harm analysis”⁸ proves inadequate for remote harm cases. If applied mechanically, it would license the criminalization of virtually any conduct that lies in the causal ancestry of harm, however attenuated the connection. Simester and von Hirsch respond by introducing the mediating principle of fair imputation: harm must not merely be causally traceable to the actor's conduct but must be morally and legally ascribable to that actor given the nature of the intervening events, the foreseeability of the harm, and the degree to which the actor's conduct was intrinsically wrongful.⁹ This requirement that the actor's contribution be “fair to hold against her” introduces a normative filter that causal theories of criminal liability lack.

Fair Imputation Doctrine: Harm should not merely be a causal consequence of conduct; it must be morally and legally ascribable to the actor given the complexity of intervening events and the intrinsic character of the prohibited conduct. This principle constrains remote harm liability by demanding a closer nexus between the actor's wrong and the eventual harm than bare causation requires.

The practical significance of this doctrine is considerable. It explains why a manufacturer of kitchen knives is not criminally liable when a purchaser uses the knife as a murder weapon, while a person who supplies a knife knowing it will be used to kill is appropriately held to account. The doctrine operationalizes the moral intuition that criminal liability should track moral desert, not merely causal contribution.

⁸ Simester & von Hirsch, *supra* note 3, at 54-56.

⁹ Simester & von Hirsch, *supra* note 3, at 59-61.

C. Harm as Normative Justification: The Communicative Function of Criminal Law

Simester and von Hirsch resist purely consequentialist accounts of why harm matters to criminalization. They argue that the criminal law is not merely an instrument for reducing aggregate suffering; it is an institution that expresses collective moral judgments about conduct.¹⁰ Harm is normatively relevant not because its prevention maximizes utility but because conduct that harms others wrongs them, violating their moral entitlement to have their interests respected, and such wronging merits the public censure that conviction and punishment communicate.

This communicative dimension has important implications. It means that the appropriate response to harmful conduct must also reflect the degree of culpable wrongdoing. A negligent driver who causes death and a reckless driver who causes death may produce identical harm, but their culpability and therefore the communicative message that criminal law should send differs. The framework thus builds culpability into the structure of criminalization theory, not merely into sentencing doctrine.

Jonathan Herring has similarly argued that the harm principle ought to function as a negative constraint identifying what should not be criminalized rather than as a positive guide to what should be criminalized.¹¹ This reading aligns with Simester and von Hirsch's dual-constraint approach: wrongfulness and harm together are necessary, but their conjunction does not automatically justify criminalization; mediating considerations of proportionality, effectiveness, and respect for autonomy must also be satisfied.¹²

III. ANALYSIS OF KEY ARGUMENTS

A. The Tripartite Wrongfulness Theses

Simester and von Hirsch's treatment of wrongfulness is organized around three theses that together define the relationship between wrongfulness and criminalization.¹³ The Necessity Thesis holds that an act must be morally wrongful in order to be legitimately criminalized;

¹⁰Simester & von Hirsch, *supra* note 3, at 100-07.

¹¹Jonathan Herring, *Great Debates in Criminal Law* 12 (3d ed., Palgrave Macmillan 2015).

¹²Simester & von Hirsch, *supra* note 3, at 189.

¹³The Necessity Thesis holds wrongfulness is a necessary but not sufficient condition for criminalisation; the Sufficiency Thesis holds wrongfulness alone is insufficient; the Not-Sufficient Thesis holds the conjunction of wrongfulness and harm does not automatically warrant criminal sanction. See Simester & von Hirsch, *supra* note 3, at 22-23.

wrongfulness is a necessary condition for criminal sanction, though not sufficient.¹⁴ The Sufficiency Thesis holds that wrongfulness alone does not justify criminalization; additional conditions including harm, fair imputation, proportionality, and effectiveness must also be satisfied. The Not-Sufficient Thesis makes the further point that even the conjunction of wrongfulness and harm does not automatically warrant criminalization; the state must also satisfy mediating constraints, including the absence of equally effective but less coercive alternatives.

The significance of the Necessity Thesis is that it excludes from criminal law any conduct that is harmful but not wrongful. This has practical implications for the treatment of lawful conduct that produces harmful side-effects, for the criminal liability of corporations, and for the scope of strict liability offenses. If wrongfulness is a necessary condition for criminalization, then strict liability offenses, which impose criminal sanctions in the absence of any mental element, are in structural tension with the authors' framework.

The Not-Sufficient Thesis preserves space for the principle of minimum criminalization: even when conduct is wrongful and harmful, the criminal sanction should be deployed only as a last resort, where less coercive mechanisms of social control are inadequate. This principle of *ultima ratio* places significant constraints on legislative discretion and challenges the tendency of modern legislatures to use criminal law as a default regulatory instrument.

B. Fair Imputation as Restraining Principle and Its Structural Indeterminacy

The doctrine of fair imputation is Simester and von Hirsch's most creative and contested contribution. By requiring that remote harms be morally and legally attributable to the actor, the doctrine introduces a principled basis for distinguishing between legitimate remote harm offenses such as terrorism financing and facilitation of serious crime, and overbroad criminalization of marginally related conduct.

However, the doctrine's normative indeterminacy is a genuine difficulty. The criterion of "fairness" in attribution is not self-applying; it requires a substantive judgment about what degree of causal remoteness and what configuration of intervening events are consistent with attributing the harm to the actor. Different jurists, operating within the same framework, might reach divergent conclusions about whether a given act of facilitation is sufficiently proximate

¹⁴Simester & von Hirsch, *supra* note 3, at 23.

to the eventual harm. This structural indeterminacy has been emphasized by Victor Tadros, who argues that the fair imputation principle could be manipulated to expand or restrict liability without sufficient normative guidance.¹⁵ Tadros's own "duty view" of punishment, which grounds the permissibility of punishment in duties that offenders acquire in virtue of their wrongdoing, offers a competing framework in which the relationship between wrongdoing and liability is more tightly constrained by duties owed to specific victims.¹⁶

IV. SCHOLARLY DEBATE: COUNTER-ARGUMENTS AND CRITICAL ENGAGEMENT

A. The Harm-Wrong Relationship: Redundancy or Collapse?

Perhaps the most fundamental challenge to Simester and von Hirsch's framework concerns the analytical relationship between harm and wrongfulness. Hamish Stewart has argued that the wrongfulness constraint threatens to swallow the harm principle entirely: if what renders harm criminally relevant is its wrongful character, then harm is doing no independent normative work, and wrongfulness is the real criterion.¹⁷ On this reading, the dual-constraint architecture collapses into a single-constraint theory in which wrongfulness does all the normative labor.

Simester and von Hirsch are themselves aware of this danger and resist the claim that wronging someone is equivalent to harming them. But the difficulty persists. Consider the case of a breach of privacy that causes no measurable harm to the victim's interests: if the conduct is wrongful because it violates a right, does it satisfy the harm threshold? If it does, harm has been assimilated to wrong. If it does not, the harm threshold does independent work but may exclude cases where criminalization is intuitively justified. The framework does not resolve this tension with the precision that a theory of criminalization requires.

A related ambiguity identified in this article concerns the logical priority of harm and wrong within the framework. Two positions are possible. The first holds that conduct is harmful and therefore becomes wrongful: harm drives wrong, such that any significant setback to interest generates a presumption of wrongfulness. The second holds that conduct is wrongful and therefore also harmful: wrong drives harm, meaning only interests protected by pre-existing

¹⁵Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* 88-110 (Oxford Univ. Press 2011).

¹⁶ *Id.* at 115-16.

¹⁷Hamish Stewart, *What Is the Harm Principle For?*, 8 *Crim. L. & Phil.* 149, 152-55 (2014).

duties of non-interference can be harmed in the legally relevant sense. The practical stakes are considerable. Simester and von Hirsch do not articulate a determinate answer, and the framework accordingly lacks a stable conception of the harm-wrong nexus. Furthermore, this gives rise to a second uncertainty: whether a conduct that is only harmful, but not wrongful, attracts no criminal sanction at all. The authors appear to answer affirmatively by virtue of the Necessity Thesis, yet this leaves significant conduct arguably deserving of sanction entirely outside the criminal law.

B. Offensiveness as an Independent Ground: The Chiao Critique

Vincent Chiao has raised a pointed challenge to the authors' treatment of offensive conduct as a legitimate ground for criminalization. Simester and von Hirsch maintain that offensiveness, understood objectively as conduct that treats others with a gross lack of consideration or respect,¹⁸ can justify criminalization when combined with wrongfulness and harm. Chiao contends that this formulation obscures a fundamental ambiguity: is the proposed ground “the harmfulness of offensive conduct” or “the offensiveness of harmful conduct”?¹⁹ If the former, the offense principle is simply a subset of the harm principle, adding nothing distinctive. If the latter, the authors have identified a genuinely independent ground but have not adequately specified the normative criterion that makes offensive conduct independently criminalizable.

Chiao's critique has particular salience in the context of hate speech regulation. Simester and von Hirsch argue that racist speech may justify criminalization because it wrongs its victims by encouraging third parties to regard them as less than full members of society.²⁰ But this argument makes criminalization dependent on a causal claim about the effect of speech on third-party attitudes, a claim that is empirically contested. English law criminalizes incitement to racial hatred regardless of whether the speech is addressed to an all-white audience who harbor no victims; the causal pathway to harm is entirely attenuated. The framework, if taken seriously, would call into question the breadth of existing hate speech legislation.

C. Systemic and Collective Harms: The Duff Challenge

R.A. Duff has identified a further structural limitation in Simester and von Hirsch's account:

¹⁸Vincent Chiao, Review of Crimes, Harms, and Wrongs: On the Principles of Criminalisation, 21 Soc. & Legal Stud. 289, 291 (2012).

¹⁹Id. at 115-16.

²⁰R.A. Duff, Torts, Crimes, and Vindication: Whose Wrong Is It?, in Wrongs and Crimes (Oxford Univ. Press 2016).

the taxonomy of direct, remote, and secondary harms struggles to accommodate harms that arise through markets, social institutions, or collective action processes.²¹ Environmental degradation, systemic financial fraud, the dissemination of disinformation, and the destabilization of democratic institutions involve diffuse causal contributions from multiple actors, none of whom individually causes the harm in the sense required by the fair imputation doctrine. Yet the aggregate harm may be of the highest moral seriousness.

This is not merely a theoretical difficulty. Contemporary debates about corporate criminal liability, platform liability for user-generated content, and the criminal regulation of financial institutions all raise the question of whether the individualistic framework of fair imputation can be extended to institutional actors whose contributions to harm are partial, cumulative, and distributed across time. The authors' framework, anchored in the moral agency of individual persons, offers limited resources for addressing these cases.

D. The Rights-Based Alternative: Hornle's Challenge

Tatjana Hornle has proposed a rights-based alternative to Simester and von Hirsch's harm-centered framework.²² On Hornle's account, the primary criterion for criminalization is the violation of others' rights, understood not as rights granted by positive law but as rights justified in political philosophy. This rights-centered approach has several advantages: it renders the offense principle redundant since offensive conduct wrongs its victims by violating their right to be treated with dignity, and it provides a cleaner account of paternalistic prohibitions since self-regarding conduct cannot violate others' rights and thus falls outside the scope of criminal law except in exceptional circumstances.

The rights-based framework is not without its difficulties; in particular, the identification and justification of pre-legal rights remain deeply contested. But Hornle's challenge illuminates an important weakness in Simester and von Hirsch's framework: if harm matters only because harmful conduct typically violates rights or wrongs its victims, then the rights violation, not the harm, is the normatively fundamental criterion.

²¹Tatjana Hornle, *Theories of Criminalization: Comments on A.P. Simester/Andreas von Hirsch*, 10 *Crim. L. & Phil.* 301, 304-06 (2016).

²²Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 91 (Oxford Univ. Press 2008).

E. Husak's Convergent Critique: Principled Constraints on Remote Liability

Douglas Husak's analysis of overcriminalization converges with Simester and von Hirsch's concerns from a different direction.²³ Husak argues that the expansion of criminal liability to cover remote harms requires principled constraints to prevent it from devolving into arbitrary state power. His “nontrivial harm or evil constraint”²⁴ echoes the authors' gravity filter, and his insistence on proportionality and desert as independent constraints parallels their not-sufficient thesis. However, Husak goes further in insisting that the criminal law should be employed only as a genuine last resort, a position the authors endorse but do not operationalize with equal specificity.

Husak's analysis of drug offenses illustrates the practical stakes: the criminalization of drug possession creates millions of criminal convictions for conduct whose connection to harm is remote, whose victims are frequently the users themselves, and whose deterrent effect is empirically uncertain. On the authors' framework, such criminalization would require demonstrating that drug possession is both wrongful and harmful to others, and that the harm is fairly imputable to the possessor. These are demanding requirements that existing drug legislation rarely satisfies.

V. SYNTHESIS AND APPLICATION

A. The Structural Tension and its Partial Resolution

The preceding analysis reveals a central structural tension in Simester and von Hirsch's framework. The dual constraint of harm and wrongfulness is designed to ensure that each principle limits the excesses of the other: harm prevents wrongfulness from collapsing into bare legal moralism, while wrongfulness prevents harm from collapsing into pure consequentialism. But the relationship between the two constraints is underspecified. Whether wrongfulness is conceptually prior to harm or whether harm generates a presumption of wrongfulness has significant practical implications that the framework does not resolve.

A partial resolution may be found in the authors' own emphasis on the communicative function of criminal law. If the criminal law's role is to express collective moral censure of wrongful

²³Husak, *supra* note 16, at 65-67.

²⁴Husak, *supra* note 16, at 147-51.

conduct, then wrongfulness is, in a functional sense, primary: it is the wrongful character of harmful conduct that makes it appropriate for the criminal law, rather than tort law, regulatory law, or informal social sanction, to respond. Harm then operates as the threshold condition that ensures criminal law's censure is reserved for conduct that materially damages the interests of others. On this reading, the framework is stable, though it assigns the harm principle a more modest role than its prominence in liberal legal theory might suggest.

B. Application to Contemporary Criminalization

The framework's practical implications are most usefully examined through contemporary examples that engage both the wrongfulness and fair imputation conditions:

The manufacture and supply of contraband narcotics satisfy both conditions: the conduct is wrongful in that it knowingly enables the ingestion of substances harmful to neurological function, and the harm is fairly imputable to the manufacturer because the causal pathway from supply to ingestion is direct and the actor's knowledge of the harmful end-use makes the harm morally ascribable to her.

Stalking presents a paradigm case of psychological harm: the invasion of another's privacy and persistent surveillance of their movements constitutes a wrongful violation of their autonomy and causes recognized psychological harm. The framework clearly supports criminalization.

Acid attacks illustrate the extension of the fair imputation doctrine to regulatory criminalization: the requirement that acid vendors maintain records of purchases is justified because the regulation is necessary to prevent conduct that is both paradigmatically wrongful and directly harmful, and the regulatory obligation fairly imputes to vendors a degree of responsibility for preventing foreseeable misuse of their products.

Mob lynching represents a clear case of direct, intrinsically wrongful harm. The collective character of the wrongdoing does not affect its criminalizability; each participant's contribution to the wrongful killing is sufficient to establish both wrongfulness and harm. The principal challenge, which the framework does not fully address, is the appropriate apportionment of criminal liability among participants whose individual contributions vary.

Fugitive offenders who commit financial fraud and abscond cause harm to identifiable victims; the wrongfulness and fair imputability of the harm are clear. Yet the prosecution of the

fugitive's conduct as a continuing offense raises questions about whether the harm of evasion itself, distinct from the original fraud, independently satisfies the framework's conditions.

C. Future Directions: Digitalization, Collective Agency, and the Expanding Harm Horizon

The most significant challenge facing Simester and von Hirsch's framework in the coming decades is the extension of criminalization to domains where the categories of harm, wrongfulness, and fair imputation are tested to their limits: cybercrime, algorithmic harms, environmental offenses, and the criminal regulation of artificial intelligence. In each of these domains, the individualistic moral architecture of the framework confronts the reality of distributed, cumulative, and statistically defined harms that resist attribution to any individual wrongdoer.

CONCLUSION

Simester and von Hirsch's reconceptualization of the harm principle represents the most philosophically sophisticated contribution to criminalization theory since Feinberg's *Moral Limits of the Criminal Law*. By insisting that criminal sanction requires both harm and wrongfulness, by elaborating a nuanced taxonomy of harm, and by developing the doctrine of fair imputation as a principled constraint on remote harm liability, the authors have provided a framework that is at once philosophically rigorous and practically useful.

Yet the framework is not without its difficulties. The logical relationship between harm and wrongfulness remains underspecified, threatening the collapse of the dual-constraint architecture into a single-constraint theory. The fair imputation doctrine, while analytically elegant, is normatively indeterminate in ways that create risks of both under- and over-inclusion. The framework's individualistic architecture limits its purchase over systemic and collective harms. The role of the offense principle remains contested, with significant implications for the criminalization of hate speech and other expressive conduct. And the question of whether harmfulness without wrongfulness can ever justify criminal sanction is left unresolved, creating a lacuna in the authors' otherwise comprehensive account.

These difficulties do not undermine the framework's value; they identify the agenda for its further development. The authors themselves describe their contribution as foundational rather

than final, an invitation to rigorous analysis and humane legal practice. This article has sought to honor that invitation by engaging the framework's arguments with the critical seriousness they deserve, identifying its structural tensions with precision, and situating it within the broader landscape of contemporary criminalization theory. The debate about the proper limits of the criminal law is, as it must be, ongoing; Simester and von Hirsch have advanced it substantially.

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Bharatiya Nyaya Sanhita, No. 45 of 2023 (India).