

‘Abstract Endangerment’, Two Harm Principles, and Two Routes to Criminalisation

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1. Introduction¹

For a long time, theorists discussing the relationship between harm and criminalisation, or other kinds of state coercion, talked about ‘the harm principle’—as if there was just one, univocal principle that they were discussing, advocating, applying, or criticising. In fact, however, the discussions tended to slide between (at least) two distinct principles — principles which differ in their meanings, their implications, and the ways in which they can lead to decisions about criminalisation. We will argue that a better understanding of the differences between the two principles will help us to avoid some confusions in criminalisation debates, and to get clearer about the different ways in which criminalisation can be justified.

Before embarking on that argument, however, we should emphasise that we are not here arguing in favour of one harm principle and against the other — as if we must adopt

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one or the other version as our guide to criminalisation: each principle can play a role (a different role) in deliberations about what kinds of conduct we should criminalise. Nor do we suppose that these are the only principles that bear on such deliberations: our own view is that whilst each principle has a (limited) part to play in such deliberations, other principles and values are no less important. Nor indeed is the phenomenon we discuss here unique to ‘the harm principle’: as we will note in part 5, we can distinguish two distinct kinds of guiding principle whatever values or ends we posit to determine the proper scope of the criminal law. We focus here on the harm principle(s) partly in a spirit of rational reconstruction, to show that accounts of criminal law that focus on harm need to recognise the two different roles that considerations of harm can play in structuring the substantive criminal law; and partly as a convenient way of illustrating a general point about the different ways in which we can deliberate towards criminalisation, whatever the principles or values with which we begin.

After distinguishing the two principles in part 2, and showing how they generate different results, in virtue of their different logical structures (and briefly comparing our distinction with other distinctions between harm principles that others have recently drawn), we show in part 3 how the criminalisation of so-called ‘abstract endangerment’ is problematic for one of the principles. By turning to the other harm principle, we can resolve (or dissolve) those problems, but only by revising the principle significantly —as we will see in part 4. Finally, part 5 will point out the wider ramifications of this argument.

2. The Two Harm Principles

The failure to distinguish two harm principles can already be found in John Stuart Mill’s classic discussion, once we read beyond the passage that is always quoted. According to what has become the canonical formulation of ‘the harm principle’,

the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.

But Mill goes on, in the same paragraph, to explain the implications of this principle:

To justify [any kind of coercion], the conduct from which it is desired to deter him must be calculated to produce evil to some one else.²

Later, in similar vein, he tells us that—

As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no

² Mill, *On Liberty* (Parker 1859) ch. 1, para. 9.

room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.³

Joel Feinberg, in his classic modern treatment of the topic, makes a similar move. He provides an official formulation of 'the harm principle'—

It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor ..., and there is no other means that is equally effective at no greater cost to other values.⁴

When he then goes on to discuss the implications and application of this principle, however, he focuses on the harmfulness of the conduct that is to be criminalised: *Harm to Others* is about the criminalisation of conduct that is, in the relevant sense, harmful to others; later volumes discuss whether we can also have good reason to criminalise conduct that is not harmful to others, but that is, for instance, offensive to others,⁵ or harmful to the agent,⁶ or simply immoral or evil.⁷

Similarly, and more recently, Andrew Simester and Andreas von Hirsch begin their chapter on 'the harm principle' with the 'familiar tenet of liberalism' that Mill '[f]irst articulated':

the state is justified in intervening coercively to regulate conduct only when that conduct causes or risks harm to others.⁸

But they also quote Mill's dictum about 'the only purpose', and Feinberg's official version of 'the harm principle', as apparently different ways of formulating one and the same principle. We find the same phenomenon in many discussions of 'the harm principle'. What we actually have, however, are two different principles.

The first principle, which we can call the Harm Prevention Principle, is the principle classically formulated (in slightly, but crucially, different ways) by Feinberg and by Mill. A first and rough approximation of it would be—

³ *Ibid.*, ch. 4, para. 3.

⁴ Feinberg, *Harm to Others* (Oxford University Press 1984), p. 26.

⁵ Feinberg, *Offense to Others* (Oxford University Press 1985).

⁶ Feinberg, *Harm to Self* (Oxford University Press 1986).

⁷ Feinberg, *Harmless Wrongdoing* (Oxford University Press 1988).

⁸ Simester & von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011), p. 35. We pick this book as a recent clear example of a pervasive tendency in Anglo-American criminal law theory.

We have good reason to criminalise a given type of conduct if [and only if] doing so will efficiently prevent harm to others.

Three brief clarifications (which will also apply to the second principle) are in order. First, whereas Feinberg is concerned only with criminalisation ('penal legislation') Mill's concern is with the exercise of any kind of political (or indeed social) power or coercion: we will see the significance of this difference in part 4. Second, the principle talks (as Mill and Feinberg talk) not of what justifies criminalisation, but of what gives us good reason to criminalise. Several hurdles lie between 'we have good reason to criminalise Φ ing' and 'we ought all things considered to criminalise Φ ing', including countervailing reasons of principle not to criminalise Φ ing, the costs (material, social, moral) of criminalising Φ ing, and the possible availability of other and better ways of preventing the harm in question;⁹ the most a harm principle should aim to specify is what gives us good reason, in principle, to criminalise a type of conduct. Third, the '[and only if]' distinguishes Millian from Feinbergian versions of the principle: for Millians, harm prevention is the only good reason for collective coercion; for Feinbergians it is one among other possible sources of good reasons to criminalise.

The second principle, which we can call the Harmful Conduct Principle, is what von Hirsch and Simester identify as a 'familiar tenet of liberalism': as a first approximation—

We have good reason to criminalise a given type of conduct if [and only if] it is harmful to others.

The points noted above about criminalisation and other kinds of coercion, 'good reason', and '[and only if]' apply to this principle as well; we will say more about 'harmful' shortly.

The failure to distinguish these two principles is a mistake, and a source of confusion that can be avoided once we distinguish them. It is, of course, a non-trivial mistake only if the principles generate different results: if they do not, if the Harm Prevention Principle gives us reason to criminalise all and only the types of conduct that the Harmful Conduct Principle gives us reason to criminalise (all and only types of conduct that are harmful to others), we might say that these are not two separate principles, but two versions of what is in substance the same principle. However, they do generate different results; the mistake is not trivial.

If a system of criminal law has some preventive efficacy, whatever the Harmful Conduct Principle gives us reason to criminalise is also, in principle, criminalisable under the Harm Prevention Principle: an effective way of preventing harm is to reduce the incidence of kinds of conduct that cause harm; by criminalising, and so reducing the inci-

⁹ See e.g. Simester & von Hirsch *op. cit.*, chs 11-12; Edwards, Harm Principles, in 20 *Legal Theory* (2014), pp. 253 ff., at 255 and 259-62.

dence of, conduct that falls under the Harmful Conduct Principle, we also serve the aims of the Harm Prevention Principle. But the Harm Prevention Principle is wider than the Harmful Conduct Principle, since it can, as we will see, give us good reason to criminalise types of conduct that are not themselves harmful. It seems plausible that we can efficiently reduce the incidence of various harms caused by road accidents by setting strict limits on driving speeds and drink-driving and by criminalising breaches of such limits: but in doing so we will be criminalising some conduct that is not itself in the relevant sense harmful (as we will see in more detail in part 3).

That might suggest that we really need just one principle, the Harm Prevention Principle: that the Harmful Conduct Principle (in its permissive, Feinbergian, version) is not a separate principle, but a more specific application of the Harm Prevention Principle. It is still useful to distinguish the two principles, however, for two reasons. First, while the Harm Prevention Principle implies a Harmful Conduct Principle, one can espouse a Harmful Conduct Principle for reasons unrelated to the Harm Prevention Principle: we need not think that the reason for criminalising harmful conduct is to prevent the harm it causes; we could instead hold that the primary reason for criminalising such conduct is that it constitutes a kind of wrongdoing that should be censured by the criminal law, for which its perpetrators should be called to public account. Second, the principles identify two different routes to criminalisation — two different ways in which we can come to see good reason to criminalise a type of conduct.

We could, it is true, combine the two principles. Thus we could, for instance, formulate a Harmful Conduct Principle as a constraint on the Harm Prevention Principle: we have reason to criminalise conduct if doing so will efficiently prevent harm, but we may do so only if the conduct that we criminalise is itself harmful; we may not criminalise harmless conduct even if doing so would efficiently prevent harm. Or we could treat the Harm Prevention Principle as a constraint on the Harmful Conduct Principle: we have reason to criminalise conduct that is harmful, but may do so only if criminalising it would efficiently prevent harm. For reasons to be given shortly, we will not discuss the latter possibility here. As to the former possibility, we will argue that it does not do justice to the way in which a Harm Prevention Principle can generate good reasons for criminalising conduct that is itself harmless.

Before we move to more detailed discussion of the two harm principles that we identify here, we should comment briefly on the relationship between these two principles and other variants that have been suggested recently.

There has been something of an epidemic of harm principles in recent years. Victor Tadros suggests, as we are suggesting, a modest two principles—

HP1. It is wrong to criminalize some conduct v if v does not cause or risk harm.
*HP2. It is wrong to criminalize some conduct v if criminalizing v does not prevent harm.*¹⁰

These two principles are clearly close relatives of, but also crucially different from, the two that we identify. In particular, HP1 and HP2 are negative, constraining principles, about when we may not criminalise. The Harm Prevention Principle and the Harmful Conduct Principle, by contrast, are both positive principles, about what can give us good reason to criminalise—although we saw above that they can easily be turned into negative principles.

Patrick Tomlin goes further, to suggest that we should distinguish not two, but four harm principles (or ‘versions of the harm principle’)—

Mill’s Harm Principle (HP₁): 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.

Harmful Wrongs Principle (HP₂): the state may criminalize only harmful wrongs—conduct that is both wrong and harmful (or risks harm) to others and is wrong because it is harmful (or risks harm) to others.

Necessary Condition Harm Principle (HP₃): it is a necessary condition of criminalizing conduct that the conduct is harmful (or risks harm) to others.

*The Legislation Harm Principle (HP₄): it is a necessary condition of criminalizing conduct that criminalizing the conduct will prevent harm.*¹¹

James Edwards has escalated the harm principles race further: he distinguishes, in the end, no fewer than 24 possible harm principles, which we will not list here.¹² The factors that serve to distinguish the various principles include, *inter alia*, whether what matters is that the conduct to be criminalised is harmful, or that criminalisation will prevent harm; whether the principle is to play a positive role, as specifying reasons to criminalise, or a negative role, as specifying when (in Edwards’ terms) a reason not to criminalise is ex-

¹⁰ Tadros, Harm, Sovereignty, and Prohibition, in 17 *Legal Theory* (2011) pp. 35 ff., at 37 and 49: each principle is then revised, in ways that need not concern us here. John Gardner and Stephen Shute have also noted these two ways of reading ‘the harm principle’, but think that only one is correct: ‘the liberal “harm principle” ... forbids the attaching of legal sanctions to wrongdoing except to the extent that this is necessary to prevent harm’; and it ‘is enough to meet the demands of the harm principle that, if the action were not criminalized, that would be harmful’ (The Wrongness of Rape, in *Oxford Essays in Jurisprudence, 4th Series*, ed. Horder (Oxford University Press 2000), pp. 193 ff., at 195, 216). We need not inquire into the relationship between ‘criminalizing Φ will prevent harm’ and ‘not to criminalize Φ would be harmful’ here; but it is surely clear from the history of discussions of ‘the harm principle’ that the Harmful Conduct Principle has as much right to be called a ‘harm principle’ as does the Harm Prevention Principle.

¹¹ Tomlin, Retributivists! The Harm Principle is Not for You!, in 124 *Ethics* (2014), pp. 272 ff., at 279-83.

¹² Edwards *op. cit.*

cluded; and whether the principle is broad or narrow in scope—whether it is concerned only with harm to other people, or with harm to anyone, including the agent who causes the harm. We need not, for our purposes in this paper, engage with all these variations, or with all four of Tomlin’s principles; but we should make clearer just how the two principles we identify fit into this framework (though each will also need to be revised in what follows).

First, as we have already noted, both the Harm Prevention Principle and the Harmful Conduct Principle are positive principles: they specify what can constitute a good reason to criminalise a type of conduct. We will not be concerned in this paper with negative versions of either principle, or what role (if any) they might properly play, although we doubt whether a negative version of either principle is persuasive (the argument of this paper will indeed suggest that we should not accept a negative version of the Harmful Conduct Principle, since we can have good harm-based reasons to criminalise conduct that is not itself harmful): for that reason, in what follows we will omit the ‘[and only if]’ qualification in each principle. By contrast, Tomlin’s four principles, like Tadros’ two principles, are negative constraints on criminalisation. The principle (HP1) that Edwards defends against various familiar objections to ‘the harm principle’ is a dual principle: although in its stated form it is negative (‘ Φ ing is permissibly criminalised only if criminalising Φ ing would probably prevent some harm’), he argues that it ‘is most plausibly viewed as a positive constraint’ — ‘the prevention of harm is most plausibly viewed as a (normative) reason to criminalise.’¹³ Our concern here, however, is only with positive versions of the principle.

Second, the principles with which we are concerned are addressed to criminalisers: they are to guide decisions about what to criminalise. We might have said that they are addressed to legislators, but that could mislead, as implying that criminalisation is always a matter for legislatures: if we understand criminalisation in substantive terms, as a matter of bringing it about that the conduct in question is treated as criminal (that it is investigated by the police, prosecuted, and renders its agents substantively as well as formally liable to conviction and punishment), then the class of criminalisers is far broader than that of formal legislators—it includes police officers, prosecutors, and judges.¹⁴ Insofar as such agents exercise discretion in deciding what to treat as criminal, they are criminalisers, and either or both of the harm principles we identify could guide their decisions. This role is sometimes made explicit: thus § 2.12 of the Model Penal Code, on ‘De Minimis Infractions’, requires courts to dismiss the prosecution if the defendant’s conduct ‘did not actually cause or threaten the harm or evil sought to be prevented by the law defining

¹³ Edwards *op.cit.* at 272, note 81 and 275 (citing, for the ‘positive constraint’ view, Simester and von Hirsch *op.cit.*, p. 35).

¹⁴ See Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, in 72 *Modern Law Review* (2009), pp. 936 ff.

the offense’;¹⁵ sensible police officers would use this as a guide in deciding what to investigate and how far; sensible prosecutors would use this as a guide in deciding when to prosecute. But even in the absence of any such explicit doctrine, police and prosecutors can appeal to a harm principle in deciding how to exercise their discretion about what to treat as criminal.

Third, we specify the principles in terms of reasons to criminalise (rather than in terms, for instance, of when it is permissible or impermissible to criminalise) partly because, as we noted above, we are not concerned with whether criminalisers should—in the end, all things considered—criminalise a certain type of conduct, but only with the reasons, or some of the reasons, for criminalising that might figure in their deliberations. These are clearly normative reasons—reasons that should guide criminalisers’ decisions. As such, they help to determine (as Mill saw) the purposes for which criminalisers should act: if I criminalise Φ ing because (for the reason that) doing so will efficiently prevent harm, my purpose in criminalising Φ ing is to prevent harm.

It is time now to turn to the examination of the two harm principles that we identified: to show more clearly how their structure and implications differ, how they mark quite different routes towards the decision to criminalise, and why any plausible account of the proper scope of the criminal law must find a place for a Harm Prevention Principle as well as the Harmful Conduct Principle. We will begin with the Harmful Conduct Principle: this is the version that is most often applied in discussions of criminalisation under ‘the harm principle’, and that highlights the problem of ‘abstract endangerment’.

3. ‘Abstract Endangerment’ and the Harmful Conduct Principle

Before we turn to the problem of ‘abstract endangerment’, we should note two necessary amendments to, or clarifications of, the Harmful Conduct Principle: one narrows its scope, while the other expands it. One familiar line of objection to ‘the harm principle’ is that this expansion makes it far too broad, or indeterminate, in its scope: that objection applies most forcefully, as we will see in part 4, to the Harm Prevention Principle. The key problem for the Harmful Conduct Principle on which we will focus is that, even when expanded, it is in some ways too narrow—it cannot give us reason to criminalise conduct that surely should be, in principle, criminalisable under a harm-oriented criminal law.

The contraction arises from the need to build in a wrongfulness constraint. The criminal law is a punitive, censoring institution, which is therefore properly mobilised only against wrongful conduct: thus whilst the Harmful Conduct Principle, as simply expressed above, would allow for the criminalisation of any harmful conduct, it should be

¹⁵ On this see Husak, The De Minimis “Defence” to Criminal Liability, in his *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010), p. 362.

interpreted to permit the criminalisation only of wrongful conduct.¹⁶ One way to do this is to build the constraint into the principle's own specification of 'harm'. Thus Feinberg specifies the 'sense of "harm" as that term is used in the harm principle': 'only setbacks of interests that are wrongs ... are to count as harms in the appropriate sense'.¹⁷ Or we could specify a 'wrongfulness constraint' distinct from the Harmful Conduct Principle: conduct that is to be criminalised must be both harmful and wrongful.¹⁸ Even if we do specify a distinct wrongfulness constraint, however, the wrongfulness of the conduct must be grounded in, or closely related to, its harmfulness: if what gives us reason to criminalise a type of conduct is that it is harmful, but only wrongful conduct may be criminalised, the wrongfulness that makes criminalisation permissible must be grounded in the harmfulness that gives us positive reason to criminalise.

The expansion of the Harmful Conduct Principle's scope flows from closer examination of what it is for conduct to be in the relevant sense 'harmful'. Conduct is of course harmful if it directly causes harm, or would directly cause harm if it was committed;¹⁹ but no one thinks that the Harmful Conduct Principle permits the criminalisation only of actually harm-causing conduct. If we have good reason to criminalise conduct that actually causes harm, we have just as good reason, of just the same kind, to criminalise conduct that creates a direct risk of the relevant kind of harm: conduct, that is, that would, were the risk actualised, directly cause that harm. Whether our interest is in harm-prevention, or in the formal censure of wrongfully harmful conduct, and whether or not we think that 'resulting harm' makes a difference to the character or the seriousness of the wrong that is committed, the reasons that we have to criminalise actually harm-causing conduct also apply to conduct that creates a direct risk of harm.

In fact, we must distinguish two kinds of case. I drive round a blind corner on the wrong side of the road, not knowing whether another car is approaching in the other direction. In one case another car is coming: even if we luckily miss each other I have directly endangered the other driver. In the other case no other car is coming, and my conduct does not endanger any other person: but I take the risk that it will do so, and so have still driven dangerously; I have taken a risk of endangering, and thus of harming,

¹⁶ We take it that any plausible theory of criminalisation must include a version of 'negative legal moralism': see Duff, Towards a Modest Legal Moralism, in 8 *Criminal Law and Philosophy* (2014) pp. 217 ff., at 218-9.

¹⁷ Harm to Others *op.cit.*, p. 36. See also Husak, Overcriminalization: The Limits of the Criminal Law (Oxford University Press 2007), p. 71.

¹⁸ See *ibid.*, pp. 72-6, on the 'wrongfulness constraint'; Simester & von Hirsch *op.cit.*, pp. 22-4, on the 'Necessity Thesis'.

¹⁹ By 'directly' we mean that the harm would flow from the conduct without mediation by further human actions or unforeseeable events: but nothing significant for present purposes hangs on 'directly'. Compare Gross, A Theory of Criminal Justice (Oxford University Press 1979), pp. 428-36.

others. We might say that in the first case I create a risk of harm, whilst in the second I take a risk that I am creating a risk: but we can in both cases describe my conduct as dangerous. I would be guilty of ‘dangerous driving’ under English law.²⁰ I would also, if aware of the risk, be guilty of ‘recklessly endangering another person’ under the Model Penal Code, since I ‘recklessly engage[] in conduct which places or may place another person in danger of death or serious bodily injury’.²¹

The first case is an example of what German criminal law theorists count as ‘concrete endangerment’: there is someone who is put at risk of harm—who is endangered. The second case would be counted as an example of ‘abstract endangerment’: conviction of an offence of abstract endangerment does not require proof that ‘an individual ... was actually endangered ... , and the offender cannot escape conviction by arguing that in the specific situation he or she in fact endangered no one’.²² The distinction between these two kinds of endangerment is exemplified in §§ 315c and 316 of the German Criminal Code. § 316 convicts of an offence of ‘abstract endangerment’ a person who ‘*drives a vehicle in traffic ... although due to consumption of alcoholic beverages or other intoxicants he is not in a condition to drive the vehicle safely*’; such a person is guilty of the more serious, ‘concrete endangerment’, offence defined by § 315c if he ‘*thereby endangers the life or limb of another person or property of significant value belonging to another person*’.²³ We will shortly consider another kind of ‘abstract endangerment’ offence—but will also suggest later that this label is unhelpful.

These two amendments to the Harmful Conduct Principle produce a revised version, which will be our focus in what follow—

We have good reason to criminalise a given type of conduct if it wrongfully causes or creates a danger of causing harm to others.

²⁰ Road Traffic Act 1988, s. 2.

²¹ Model Penal Code § 211.2: as the Commentary to § 211.2 makes clear, covers both cases in which there is an identifiable other person whom my conduct places or might place in danger, and those in which there might be another person whom my conduct would place in danger (*Commentary to Part II §§ 210.0 to 213.6*, 203). To call my conduct ‘dangerous’ might imply not merely that it creates some risk of harm, but that that risk is one that it is unreasonable to take or to create; or—since we can sometimes be justified in acting dangerously—that it is one that it is presumptively unreasonable to take: to sustain an accusation (either legal or moral) of dangerous driving, one needs to do more than show that the person was driving, and that driving is an activity that always creates some risk of harm. When we talk hereafter of conduct that is dangerous or that creates or takes a risk, this qualification—that the risk is of a kind that it is normally unreasonable to take or to create—should therefore be understood.

²² Dubber & Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014), p. 591.

²³ Translation by Bohlander, *The German Criminal Code* (Hart Publishing 2008). The § 315c offence carries a maximum sentence of five years, the § 316 offence a maximum sentence of one year.

Thus far, the Harmful Conduct Principle might seem unproblematic: if a type of conduct is wrongfully harmful, or wrongfully dangerous as a potential direct cause of harm, we have reason to criminalise it;²⁴ and so long as we insist on both direct danger and wrongfulness as conditions of criminalisation, we can resist the accusation that ‘the harm principle’ becomes over-expansive,²⁵ if the principle in question is the Harmful Conduct Principle. A different problem with this principle, however, is that it seems to be too narrow: it does not seem to give us reason to criminalise some kinds of conduct that—or so it is often thought—should be at least in principle criminalisable under a harm principle. The problem arises in relation to so-called ‘remote harms’: harms, or risks, which ‘are remote in the sense that they involve certain kinds of contingencies.’²⁶

Von Hirsch describes three kinds of remote harm, which are ‘remote’ from the conduct whose criminalisation is at stake in very different ways. Our main focus will be on what he calls ‘abstract endangerment,’²⁷ although it is a different kind of abstract endangerment from that identified above; as we will see later in this section, the other two kinds of ‘remote harm’ also lead us, insofar as they cannot be dealt with by the Harmful Conduct Principle, into the realm of this kind of abstract endangerment.

The simplest example of this species of ‘abstract endangerment’ is drink-driving.²⁸ If we define a drink-driving offence in terms of being ‘unfit to drive through drink or drugs,’²⁹ we meet the requirements of the Harmful Conduct Principle: one who drives while unfit to drive thereby creates an unacceptably higher risk that he will cause serious harm to others (even if in fact he luckily neither harms nor endangers anyone); his conduct is wrongfully harmful. But if we instead define it as driving ‘after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit,’³⁰ the matter becomes much less straightforward. A rational legislature will of course set the ‘prescribed limit’ at a level above which many drivers would suffer significant impairment of their fitness to drive—although depending upon our assessment

²⁴ We would still need, of course, to provide a satisfactory account of ‘harm’: that is not a task on which we can embark here. We also leave aside here the question of whether there are kinds of harm, or of harmful conduct, that should count as ‘private,’ and thus in principle beyond the reach of the criminal law.

²⁵ Harcourt, *The Collapse of the Harm Principle*, in 90 *Journal of Criminal Law & Criminology* (1999), pp. 109 ff.

²⁶ von Hirsch, *Extending the Harm Principle: “Remote” Harms and Fair Imputation*, in *Harm and Culpability*, eds Simester & Smith (Oxford University Press, 1996), pp. 259 ff., at 263; also Simester & von Hirsch *op. cit.*, ch. 4.

²⁷ See von Hirsch *op. cit.*, at 263-4; Simester & von Hirsch *op. cit.*, at 57-8.

²⁸ This is a simpler example than speeding: with speeding we may need to attend to the effect of D’s speeding on others who see it, and to the extent to which road users rely on drivers not to speed.

²⁹ Road Traffic Act 1988, s 4(1); and see German Criminal Code § 316 (at n. 23 above).

³⁰ Road Traffic Act 1988, s 5(1).

of the harms in prospect, and of the extent to which a strict limit infringes individual liberty, we might not insist that the level must be such that *most* of those with a higher proportion of alcohol would have their fitness impaired.³¹ There will thus be many who, in committing the offence, do act in a wrongfully harmful (risky) way that is in principle apt for criminalisation. There will be others who do not in fact suffer an impairment of their fitness to drive by consuming enough alcohol to put them over the limit, and whose driving therefore does not actually create a unjustifiable risk of harm, but who do not know that this is true: like one who drives round a blind bend on the wrong side of the road, they too can be said to take an unjustified risk of causing the relevant harm; they take a risk that their capacities are impaired, and thus that they will endanger other road users. There will, however, be some who *know* that drinking that much alcohol does not impair their fitness—their capacities and willingness to drive safely (perhaps they have even taken tests that show them to be thus immune to the effects of that much alcohol). How could the Harmful Conduct Principle justify criminalising their conduct?³²

The problem here is concealed by talking of ‘abstract endangerment’, as if it were a kind of endangerment distinct from ‘concrete endangerment’—as if these were two species of the genus ‘endangerment’. The kind of ‘abstract endangerment’ noted earlier, when I drive round a blind corner on the wrong side of the road, is indeed a type of dangerous conduct, even if no one is in fact endangered (put at risk). Even then it might be misleading to talk of ‘abstract endangerment’, since that suggests that I do still endanger others—albeit ‘abstractly’ rather than ‘concretely’. In the case of someone who knows that she can still drive safely with more than the prescribed level of alcohol in her blood, however, such talk is even more misleading: such a driver endangers no one; she neither takes nor creates an unreasonable risk of harming others. Her conduct might, as we will see, be wrongful; but it is not wrongfully harmful or dangerous, or wrongful in virtue of being harmful or dangerous. Harm might ensue from the impaired driving of other less competent drivers whose fitness is impaired by the alcohol they have drunk; but such harm cannot be fairly imputed to her even if she is over the limit (unless her example encouraged others to drink more). Harm might ensue from her driving, if she has an accident; but we could fairly impute it to her, to count her conduct as wrongfully harmful, only if she acted wrongfully in driving as she did, which we have not shown. It might be true that ‘the conduct underlying the offence is generally highly dangerous’,³³ if by that we mean that many or most tokens of the defined type of conduct (driving with more

³¹ Contrast von Hirsch *op.cit.*, at 264, on the Swedish limit of 0.2; also Husak *op.cit.*, at 110-11, on ‘the majoritarian condition’ that more than half of those who commit such an offence must actually cause harm or create an unjustified risk.

³² See Husak *op.cit.*, at 106-12; Duff, *Answering for Crime* (Hart 2007) pp. 166-72 (to which this paper is a partial corrective).

³³ Bohlander, *Principles of German Criminal Law* (Hart 2009), p. 34, on abstract endangerment offences.

than the specified level of alcohol in one's blood) are dangerous; and, as we have seen, it might follow that my conduct is also dangerous if I engage in that type of conduct without knowing that I can do so safely: but it does not follow that 'engaging in that conduct is deserving of punishment *eo ipso*',³⁴ at least as far as the Harmful Conduct Principle is concerned, since I might engage in it because I *know* that I can do so without taking or creating the kind of risk against which the legislation is aimed. We will see in part 4 that such conduct might indeed deserve punishment: but that is not because it is wrongfully harmful or dangerous.

We are not assuming that the creation of such drink-driving offences is justifiable; for all we have shown so far, we might conclude that they are not. The point so far is that it is very hard to see how they could be justified by the Harmful Conduct Principle. Even if the limit is set so that most people with more than that amount of alcohol in their blood will suffer some significant impairment of their capacity to drive safely, there will still be people who know that their capacities are not impaired when they are above the limit, whose conduct therefore is not dangerous. A legislature might try to meet this concern by labelling the offence as one of driving when 'unfit through drink', but creating a legal presumption that anyone with more than the specified level of alcohol is unfit to drive.³⁵ If they are to stay true to the Harmful Conduct Principle, however, they must allow that presumption to be rebutted by evidence that in the case of this particular driver that amount of alcohol does not have that effect.³⁶ Or it might be argued that we can justify our existing drink-driving offences only by overriding 'the constraints of justice' to meet the urgent need to prevent the harms that flow from drink-impaired driving:³⁷ to convict a driver who knows that her fitness is not impaired by drinking (somewhat) more than the legal limit does her an injustice—but maybe a necessary injustice. All we have argued so far, however, is that the Harmful Conduct Principle gives us no good reason to create drink-driving offences of the kind we now have, since they criminalise kinds of conduct that are not wrongfully harmful. As we will see, the Harm Prevention Principle provides a more plausible route to the legitimate creation of such offences.

Similar points emerge when we consider the two other kinds of 'remote harm' that von Hirsch identifies: 'intervening choices', and 'accumulative harms'. In the case of 'intervening choices', what makes the harm 'remote' is that whether it will occur depends

³⁴ Ibid.

³⁵ See Colorado's provisions (Colo. Rev. Stat. § 42-4-1301(6)(a)(IV) (2013)) for 'permissible inferences' from blood alcohol level to impairment (thanks to Jordan Hogness for this reference).

³⁶ Compare Prevention of Corruption Act 1916, s. 2; Terrorism Act 2000, s. 57(1). We leave aside here the further problem that it might be hard for drivers to know whether they are over the limit: a legislature that is to respect the requirements of fair notice must either enable drivers to find out, or argue that the law really says 'Don't drink and drive', so that those who drive after drinking must know that they are driving 'on thin ice' (see Duff 2007 *op.cit.*, at 167, 255-7).

³⁷ See von Hirsch *op.cit.*, at 271.

not just on what I do, but on what others will do as a result of what I do: my conduct facilitates or assists their directly harmful conduct. I leave a gun in my car, with its ammunition; someone might break into the car, steal the gun, and use it to cause harm to others.³⁸ If such harm eventuates, my conduct will have played a role in its occurrence, and we could reasonably say that in leaving my gun in the car I take the risk that something like this will happen. Liberal individualists, especially those wedded to a strict version of '*novus actus interveniens*', will ask whether in such cases the (actual or potential) harm can be fairly 'imputed' to me, so that the Harmful Conduct Principle would allow the criminalisation of my conduct. Is imputation legitimate only if I had 'some form of normative involvement' in the further actions that cause the harm —if, for instance, I left the gun in my car in order to assist or encourage the person who takes it in his criminally harmful conduct?³⁹ Or could we say that we have a civic responsibility to attend not merely to the harms that our conduct might directly cause to others, but to at least some of the ways in which it might facilitate the commission of harm by others? The latter view will seem especially plausible if we take the idea of associative duties seriously,⁴⁰ and would make it easy to bring such cases within the scope of a Harmful Conduct Principle: if I should attend to the risk that my conduct might enable someone else to cause harm, I can be held responsible both (in part) for that harm if it occurs, and for taking the risk of enabling it.

However, a problem with using this as a basis for criminalisation is that it is likely to be radically unclear, or controversial, just what the scope of those duties should be. Even if we agree that we should accept some such responsibility, we are likely to be quite unsure, or in disagreement, about just what kinds of precaution we should take, and what kinds of risk we should not take; if all that the law says is that we should take reasonable care not to make it too easy for others to cause harm, we will have little idea, and little agreement, about what we may or may not do. In part for that reason, a prudent legislator will see reason to create more specific and detailed regulations: regulations about, for instance, who may or may not own a gun, and under what conditions (which might include regulations requiring a licence to own a gun, and specifying grounds on which licences may be refused); about where, under what kinds of security, guns may be kept or used; and so on. Regulations of this kind are, however, likely to reach far beyond the Harmful Conduct Principle's scope. A person who holds a gun without a licence might in fact be, and might know that she is, as safe as anyone who obtains a licence, and might create no

³⁸ We can leave aside here the distinct question of whether the risk that the agent himself will go on to cause harm can give us good reason to criminalise the conduct; and the point that, at least in this kind of example, the 'intervening agent' might be a non-responsible agent (a young child, for instance), onto whom we could not so readily shift responsibility for the potential subsequent harm.

³⁹ See Simester & von Hirsch *op.cit.*, at 80-85.

⁴⁰ See e.g. Dworkin, *Law's Empire* (Fontana 1986), pp. 195-216.

unacceptable risk of harm: if her conduct is to be criminalised,⁴¹ this cannot be justified by the Harmful Conduct Principle; the same will be true of some who violate regulations concerning the secure storing of guns, and so on. Once again, it might be said that such offences are ones of ‘abstract endangerment’, as if this would suffice to bring them within the scope of the Harmful Conduct Principle:⁴² but again this would be unhelpful, concealing the fact that we are now criminalising some conduct that is neither harmful nor dangerous—agents who neither create nor take an unreasonable risk of causing harm.

Similar points apply to the third type of ‘remote harm’: ‘accumulative’ harm, when the prospective harm will be significant enough to warrant the criminal law’s attention, or (in the case of threshold harm) will ensue at all, only if many people engage in the relevant conduct. If enough people dispose of their garbage in the river, there will be a real threat to health; but if only I do it, there will be no such threat.⁴³ Here too, the actual occurrence of the relevant harm depends on a ‘contingency’ to do with the conduct of others: but this case differs from that of ‘intervening choices’, first, in that their conduct does not depend upon what I do; and second, in that if the harm or risk does ensue, I will have made a direct and immediate causal contribution (albeit a minimal one) to it. We could try to bring such cases within the reach of the Harmful Conduct Principle by talking about our civic responsibility to take care that we do not contribute, even minimally, to the risk of such serious accumulative harms—although such a responsibility will also be grounded in ideas of fairness as well as of avoiding creating risks of harm; but given the predictable uncertainty and disagreement about just what such a responsibility amounts to or requires, a government is likely to see good reason (when the prospective harm is serious enough) to introduce regulations specifying just what we may or must do in such contexts. Such regulations, however, will predictably be over-inclusive, in that they will prohibit not only conduct that does contribute to the risk of harm, but also some that does not; or they will require conduct that is not always necessary to avert that risk (i.e. whose omission would not contribute to that risk). If breaches of those regulations are then to be criminalised, their criminalisation cannot be justified by the Harmful Conduct Principle; nor will it help to say that such offences are offences of ‘abstract endangerment’.⁴⁴

One response to such cases is of course to treat the Harmful Conduct Principle not just as a positive principle about what can give us good reason to criminalise, but also as a

⁴¹ As it is in England under s. 1 of the Firearms Act 1968.

⁴² See text following note 32 above.

⁴³ See von Hirsch *op.cit.*, at 265; Feinberg 1984 *op.cit.*, at 193-99, on ‘aggregative harms’.

⁴⁴ This is nonetheless a common way of using the notion of ‘abstract endangerment’, for instance in relation to environmental offences: see, *e.g.*, Mandiberg & Faure, A Graduated Punishment Approach to Environmental Crimes, in 34 *Columbia Journal of Environmental Law* (2009), pp. 447 ff., at 453-4. A similar criticism applies to Duff’s talk of ‘implicit endangerment’ (see Duff 2007 *op.cit.*, at 166-8).

negative principle declaring that we should not criminalise conduct that does not at least create a risk of harm to others; and on that basis to argue either that such regulations are unjustified, or at least that we should not criminalise breaches of them. We will argue that such a response is too hasty: although such regulations can easily become over-extensive, and although there are serious questions about whether or when they should be included in or backed by the criminal law, we cannot simply reject the criminalisation of their violation by appealing to a negative version of the Harmful Conduct Principle.

To see how the creation of such regulations, and the criminalisation of breaches of them, can be justified, at least in principle, we must turn from the Harmful Conduct Principle to the Harm Prevention Principle.

4. The Harm Prevention Principle and Regulatory Offences

The Harm Prevention Principle is, as we noted, a version of the principle classically formulated by Mill and by Feinberg:⁴⁵

We have good reason to criminalise a given type of conduct if doing so will efficiently prevent harm to others.

Such a principle seems to provide a very simple way of justifying the creation of such criminal offences as driving with more than a specified level of alcohol in one's blood. If we can show that such a law will be not only effective in reducing the kinds of harm that drunken driving can cause, but also efficient in doing so (i.e. more cost-effective than a law that criminalises only driving when one's capacities are provably impaired), it seems that we can justify that law by appeal to the Harm Prevention Principle; and it seems plausible that we can show just this, given the greater deterrent efficacy of such a law.⁴⁶

However, this seems to make the justification of new criminal offences too easy: it lacks the wrongfulness constraint that a plausible theory of criminalisation should include,⁴⁷ and it invites the charge that it leads to an over-expansive criminal law. The mere fact that we could efficiently prevent harm by criminalising a type of conduct cannot render that conduct either harmful or wrongful, let alone wrongfully harmful. Nor will it help to say, with Feinberg, that the harm to be prevented must be wrongful harm. For, first, the fact that criminalising a type of conduct will prevent wrongful harms does not make that conduct itself wrongful: but the wrongfulness constraint requires that the con-

⁴⁵ See at notes 2-4 above.

⁴⁶ For an interesting discussion of the rationale for, and the effects of, the introduction of the new-style drink-driving offence in England, showing inter alia that it was not only aimed at increased deterrent efficacy, see Bottoms, Civil Peace and Criminalization, in *Criminalization: The Political Morality of the Criminal Law*, eds. Duff et al. (Oxford University Press 2014), pp. 232 ff., at 261-4.

⁴⁷ See at notes 16-18 above.

duct to be criminalised must be wrongful, and thus deserving of the censure that criminalisation implies. Second, such a limitation on the Harm Prevention Principle's reach seems unwarranted. Some of the harms that we could use the criminal law to prevent will certainly be wrongful harms, and that wrongfulness will be part of what gives us reason to seek to prevent them: it is a state's proper task to protect its citizens against wrongful attacks or endangerments that expose them to unreasonable risks of harm. But if our starting point is harm prevention, as a justification for coercive intervention by the state, we will not attend only to wrongful harms. We will see reason to use the law to protect ourselves against a wide range of harms, including natural or accidental harms, that can be averted or reduced by legal regulation: not just by regulations prohibiting conduct that causes or threatens such harms, under some version of the Harmful Conduct Principle, but (as we began to see in discussing 'abstract endangerment' and will see in more detail below) by regulations that encompass some conduct that is neither harmful nor dangerous. It is a state's proper task to help protect us against threats to our lives or health, as well as to our property and other resources, whether those threats arise from natural causes, or from non-wrongful accidents, or from wrongful human conduct; we cannot rule out in advance the possibility that the criminal law can play a role in such protection. If we are to justify the criminalisation of a type of conduct via the Harm Prevention Principle, whilst still taking the wrongfulness constraint seriously, we must show that it is wrongful in a way that connects to the reason for criminalising it: but its wrongfulness cannot now lie in its harmfulness (that is the difference between the Harmful Conduct Principle and the Harm Prevention Principle), and it is not yet clear where it could lie.

To see how the Harm Prevention Principle can ground a justification for criminalisation, and how we can incorporate an appropriate wrongfulness constraint into that justification, we must return to the key difference between Mill's Harm Prevention Principle and Feinberg's. Feinberg's Principle is a principle of criminalisation: 'It is always a good reason in support of *penal legislation* ...'⁴⁸ Mill's Principle, by contrast, concerns any kind of coercion by the state, or by one's fellow citizens: for it precludes any 'compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion', unless the purpose is to prevent harm to others.⁴⁹ If we are to justify criminalisation by appeal to a Harm Prevention Principle, we must begin with a Millian version: with a Harm Prevention Principle as a principle not (directly) of criminalisation, but of regulation—

We have good reason to regulate a given type of conduct if doing so will efficiently prevent harm to others.

⁴⁸ Feinberg 1984 *op.cit.*, at 26 (emphasis added).

⁴⁹ Mill 1859, ch 1, para 9.

To ‘regulate’ a type of conduct might be to prohibit it altogether, or to subject it to some set of restrictions: we ‘regulate’ the possession of certain kinds of drug by prohibiting it; we ‘regulate’ the activity of driving by creating restrictive regulations about who can engage in it, and about how they may engage in it.

The line of argument that leads us from this Harm Prevention Principle to the recognition of good reason to criminalise conduct that is not itself harmful is roughly this. We take it as a collective aim, which the state should pursue, to reduce the incidence of a particular kind of harm. We see that one means towards that end is to regulate certain kinds of human conduct: kinds of conduct that are liable to cause such harm, or kinds of conduct whose regulation can help to prevent it. Such regulations will sometimes prohibit conduct that is itself harmful or dangerous: conduct which is already harmful prior to and independently of the regulation, or conduct which becomes harmful once the regulation is in place (as driving on the right hand side of the road is typically harmful once we have in place a requirement to drive on the left). But they will also sometimes prohibit conduct that is not itself harmful: regulations aimed at harmful conduct can be over-inclusive in that the type of conduct that they prohibit is known to include many non-harmful tokens; other regulations may be concerned with what is needed to ensure the efficient working of the regulatory system, so that breaches of them are remote removed from any risk of harm. Now such regulations are not yet, as far as the logic of their introduction is concerned, part of criminal law (not all regulatory law is criminal law); but we might then see reason to criminalise, when we ask how we should respond to breaches of the regulations. We have reason to criminalise such breaches if they are wrongful in a relevant way; but surely they are thus wrongful. For if those regulations were legitimately created, as a means to the legitimate goal of harm prevention, they are regulations that we ought to obey as citizens of the polity whose law this is and whose aims we should share; we thus do wrong in breaching them—a wrong that is a public wrong, as a breach of our public regulations, and that thus merits a formal, public, censoring response. Such breaches are thus, in principle, candidates for criminalisation: this is not to say that we should criminalise them, all things considered, since other ways of dealing with them might be more efficient or appropriate; but it is to say (which is all that the Harm Prevention Principle says) that we have good reason to criminalise them.⁵⁰

This pattern of deliberation towards criminalisation can be discerned in several areas—for instance in matters to do with health and safety at work; with financial trans-

⁵⁰ Two glosses should be noted. First, many such regulations are also binding on non-citizens who are within the jurisdiction of the polity’s law: the normative description relevant to them is not citizen but guest (see Duff, Responsibility, Citizenship and Criminal Law, in *Philosophical Foundations of Criminal Law*, eds. Duff & Green, (Oxford University Press, 2010), pp. 125 ff., at 141–3. Secondly, matters are less straightforward when the regulations are not well suited to their purported aim; see part 5 below.

actions; with the systems of taxation and social security; with environmental safety and pollution. It can be simply illustrated, however, by looking again at the case of driving.

Driving is an activity which creates significant risks of serious harms, but in which we think it beneficial for individuals to be able to engage—and to engage not only if they are highly trained experts acting in a professional capacity, but as (as it were) amateurs. We also think it beneficial for them to be able to engage in it in ways that are very far from maximally safe: for instance, to drive at speeds at which collisions are likely to cause serious harm, in vehicles that do not have the kinds of protective build and equipment that would make such harm very unlikely. Of course, such judgments are controversial: people have different views about the extent to which, for instance, private motoring should be allowed or encouraged, about eligibility to drive, and about speed limits and car safety requirements. But if we are to allow driving at all, we must engage in a process of weighing harms and benefits: what kinds of risk should we collectively accept for the sake of the benefits that flow from the conduct that creates those risks, and what precautions should we take to limit those risks?

Those precautions will include attempts to guide or regulate the conduct of drivers, so as to promote safe driving and prevent or discourage dangerous driving. If we think about how we can best do this, we might begin naïvely by producing a set of public exhortations, which would urge drivers to make sure that they are competent to handle the kinds of vehicle they plan to drive, that the vehicles are in safe and roadworthy condition, that they are fit to drive, that they exercise appropriate care in driving, and that they are able to pay for any harms for which they may be liable. However, such exhortations will be predictably ineffectual, for two reasons. First, they will often fall on deaf ears, or ears that are not attentive enough. Second, even when they fall on attentively conscientious ears, they will not offer sufficient guidance. There are coordination problems that cannot be solved if each driver acts on the basis of her own judgments of safety. There will be uncertainty or disagreement about just what counts as reasonably safe conduct: even well-intentioned drivers might be unsure what kinds of check one should make on one's own and one's vehicle's fitness, for instance, or what speeds are appropriate under what kinds of condition, or how much one can safely drink and still drive.

The first of these defects in a purely exhortatory scheme can be remedied by turning the exhortations into legal regulations: we can make laws requiring drivers to take the kinds of care that the exhortations encouraged them to take. Since what the regulations require is that drivers take due care to avoid creating or taking unreasonable risks of harming others, we can also see good reason to make them part of the criminal law, under the aegis of the Harmful Conduct Principle: someone who drives when he knows that he is or might be incompetent or unfit to do so, or drives what he knows is or might be an unsafe vehicle, or drives without due care, or fails to ensure that he can meet any liabilities he might incur for damage he causes, risks causing harm to others, and acts as he should

not act; he is a harmful wrongdoer. This remedy will not, however, deal with the second defect, since it will not cure the uncertainties or disagreements that will persist about what should count as reasonably safe conduct: drivers who are both well-intentioned and reasonably competent might still be unsure about how they should behave, whilst those who are stupid, or not well-intentioned, will behave dangerously (encouraged, in the latter case, by the thought that it might be hard to prove what would need to be proved to convict them of an offence of endangerment).

A first step towards dealing with the second defect might be to issue sets of more detailed guidance or guidelines—recommendations about what kinds of conduct are most likely to be safe, and about what kinds of conduct to avoid. There could for instance be recommendations about appropriate speeds under different conditions, posted as road signs; recommendations about how much (or how little) alcohol to drink before driving; recommendations about how to make sure that one is competent to drive and that one's vehicle is safe (perhaps supported by making optional driving tests and vehicle safety checks available); and so on. These too, however, will predictably be ineffective: drivers will predictably be too ready to ignore such guidelines, or to think that they can safely ignore the recommendations, given what they take to be their own superior knowledge or skill (and it is well known that drivers are often prone to exaggerate their own competence).

We might then think that we need to create and enforce new regulations, which will give more effective force to such guidelines: regulations, for instance, specifying mandatory speed limits, or permissible levels of alcohol in the blood, or what counts as an unsafe vehicle; or regulations requiring regular safety checks for vehicles above a certain age, or driving tests for would-be drivers, or requiring drivers to carry third-party insurance. This will produce sets of regulations very like those found in contemporary road traffic laws.⁵¹ To justify such regulations, we need to show both that they would be effective in reducing the incidence of relevant kinds of harm, and that they would not be unreasonably burdensome on those subject to them; but we could surely do this for many such regulations. More precisely, we could do this in relation to those drivers who, if they did not obey the regulations, would create or take unreasonable risks of harming others: such drivers will conduct themselves reasonably safely only if they obey the regulations; we can hope to create regulations that will impose on such drivers burdens that are not

⁵¹ A range of illustrative examples of such regulations can be found in the English Road Traffic Act 1988. We should note, however, that the Act creates criminal offences, whereas we are so far concerned only with creating regulations, which (for all we have so far shown) need not be part of the criminal law. We will also see reason to create regulations for those who manufacture and sell cars, and special regulations for drivers engaged in particularly demanding or potentially dangerous kinds of driving (bus drivers, lorry drivers, ...); but our focus here is on the regulations we might create for ordinary drivers.

disproportionate to the gains in safety that they bring, and that we can therefore expect them to accept.

However, we now face a crucial (for present purposes) question. Regulations of the kind suggested above will, as we know, be over-inclusive, since they will be designed to deal with those who are not especially competent or careful. We can be sure that there are some (highly competent and conscientious) drivers who can (and who know that they can) drive safely at speeds well in excess of the posted limits, or with levels of alcohol in their blood significantly above the specified limit; who can be sure of their own competence to drive, and of the safety of their vehicles, without the need for formal tests; and so on. If they violate the regulations, when they know that it is safe to do so, they do not create or take any unreasonable risk of causing harm. The conduct of many who violate the regulations falls within the reach of the Harmful Conduct Principle; but the conduct of these drivers does not. Might they not then argue that the burdens imposed on them by the regulations are unreasonable, because they are unnecessary? Might they not protest, in effect, that the regulations are unjustifiably broad, in so far as they extend beyond the legitimising scope of the Harmful Conduct Principle, and prohibit conduct that is not itself harmful or dangerous?⁵²

Perhaps we could in some cases, though not in all,⁵³ adapt the regulations so as to exempt highly competent and conscientious drivers from them. We cannot do this simply by adding an exception clause to each regulation, along the lines of ‘You must obey the posted speed limits unless you can safely exceed them’, or even ‘... unless you know that you can safely exceed them’: for that would encourage over-confident or stupid drivers to treat the exception clauses as applying to them; part of the point of the regulations is that we should treat them as strict regulations, not merely as guidelines that we need not follow if we think it safe not to. But we could, perhaps, make provision for drivers who think that they know that they could safely violate such regulations to gain exemptions from them, for instance by passing suitable tests. Someone who passed a suitable advanced driving test would receive a licence allowing them, at their discretion, to ignore some of the regulatory limits to which most drivers are still to be subject (they would of course still face liability for dangerous or careless driving if they misused that discretion); or to

⁵² They might, that is, apply a version of one of Husak’s ‘external constraints’ on criminalisation as a critique of such regulations, arguing that they are ‘more extensive than necessary to achieve [their] objectives’: that a more narrowly tailored set of regulations, which exempted them, would be no less effective in preventing the relevant kinds of harm. See Husak *op.cit.*, at 129, 153-6.

⁵³ Compare Husak’s discussion of ‘epistemic privilege’, and of why the law cannot always so craft offences that the epistemically privileged are exempt (*Ibid.*, 155-6). Since Husak is concerned (while we are not yet concerned) not merely with regulation but with criminalisation, such cases are problematic for him, since they involve criminalising conduct that does not bring about a ‘nontrivial harm or evil’: that is why he says that ‘this result is unfortunate and should be tolerated reluctantly—even if it is a practical necessity’ (156). Our argument here should show that these cases are not as problematic as Husak thinks.

drive with more than the specified proportion of alcohol in their blood (they would still of course face liability if they drove when impaired by alcohol).

A proposed scheme of this kind would raise various questions. Might it have deleterious effects on other drivers who could not benefit from it? How would it be implemented—and who would pay for it? It would involve significant resources: if their cost would be borne by the state, we would need to ask why we should collectively pay to provide these exemptions; if their cost would be borne by those benefitting from the scheme, it would be another way in which the rich could buy exemption from regulatory burdens that fall on the less well off. We need not pursue these questions here, however, since such a scheme of exemptions would not avoid the main issue that concerns us here. Such a scheme would still involve regulations—regulations requiring those who seek exemption from the ordinary rules to provide a requisite kind of proof that they should be exempt by (in the most plausible kind of scheme) taking the appropriate kind of test. Those regulations would thus still impose a regulatory burden, and prohibit conduct that was not itself harmful or dangerous: drivers who wanted to secure such exemptions would have to accept the burden of taking whatever tests (and paying whatever fees) were required; drivers who drove as if exempt without securing the formal exemption would still be in breach of the regulations even if they knew their driving to be competent and safe.

We must conclude (which is hardly surprising) that the most efficiently harm-reductive method of regulating driving will involve the creation and enforcement of regulations whose scope is—from the point of view of a Harmful Conduct Principle—over-inclusive: they will impose burdensome restrictions on the conduct not only of drivers who would otherwise, if they disobeyed, create or take unreasonable risks of harming others, but also on some drivers whose driving would otherwise still be reasonably safe; they will prohibit conduct that is not itself harmful or dangerous. This point is reinforced when we note the need for a further type of regulation in order to improve the system's efficiency: regulations to do with verifying that other regulations are being obeyed. Would-be drivers must not only pass a test, but must also obtain a licence, and be ready to produce it on reasonable demand. They must not only have their vehicles checked and licensed, but have the documentation to prove it; and so on. These kinds of regulation do not directly serve the aims of harm prevention, nor does conduct that violates them create a direct risk of harm: but if they make the regulatory system easier to manage, and thus make the regulations easier to enforce, and so long as they do not impose unreasonable burdens on those subject to them, we can surely be justified in creating them. More generally, while we should be reluctant to weaken the conditions of *criminal* liability for the sake of administrative convenience,⁵⁴ considerations of efficiency in administration and

⁵⁴ A point often made in discussions of strict liability (at least for 'real' crimes): the fact that making liability strict would ease the prosecutor's burden or improve cost-effectiveness is not a good enough reason to do so.

enforcement are not so clearly out of place in designing regulations: although we must still attend to the burdens that a proposed regulation would place on those subject to it, and should not readily allow officials' convenience to weigh more heavily than citizens' freedom from regulatory burdens, there is balancing to be done: we can ask whether it is reasonable to ask citizens to accept such a regulatory burden for the sake of the efficient and economical administration of a system from which all benefit.

We have now seen in more detail how a Harm Prevention Principle can give us reason to create regulations that proscribe conduct which is not itself harmful or dangerous, and which is therefore not covered by a Harmful Conduct Principle. We noted above that an objection to using a Harm Prevention Principle as a principle of criminalisation is that it does not respect the wrongfulness constraint that any theory of criminalisation needs to include, and such an objection would indeed be relevant to our argument here, if it was designed to show that and how we can have good reason to create *criminal* regulations—regulations defining criminal offences—of this kind. But that is just what our argument is not yet designed to show, since the regulations we have been discussing need not be criminal regulations, and thus need not respect the wrongfulness constraint. The wrongfulness constraint is relevant, and important, for criminalisation, since to criminalise conduct is to define and censure it as wrong; but in regulating conduct—in creating regulations that constrain or prohibit it—we are not declaring it to be wrong, or censuring it. We often justify regulations, as in the kinds of case we have been discussing here, by showing that they serve a useful purpose, without having to show that the conduct to be regulated is wrongful in advance of its regulation—that we regulate it *because* it is wrongful.⁵⁵

That is not to say, of course, that such regulations need no justification, or none beyond a showing that they efficiently serve the aim of harm prevention or reduction. We can show the benefits of a system of driving regulations that do not try to exempt those for whom they are unnecessary (the competent and conscientious drivers who would drive safely anyway): the greater the discretion we allow drivers to decide for themselves on such matters, the greater the danger that such discretion will be abused by those who are incompetent, or careless, or who think that they will be able to get away with it; the regulations will be harder to enforce, since breaches will be harder to prove; we will lose such benefits as accrue from a system in which everyone can be seen to obey the same set of regulations (versions of these points will apply differentially to different matters). But we must also show, at least, that the undoubted burdens that the regulations impose are reasonable. In particular, we need to show not only that the burdens they impose on those who would otherwise create or take unreasonable risks of harm, those whose

⁵⁵ Indeed, the conduct that is regulated is sometimes not even possible in advance of the regulation. If we are required, by road traffic regulations, to carry our driving licences with us or to produce them on reasonable request, the regulation prohibits me from not carrying or not producing my licence; but such conduct is not possible in the absence of a licensing regime of which these regulations are part.

conduct would otherwise be harmful or dangerous, are reasonable; that should not in principle be hard to do. We also need to show that those burdens are reasonable when imposed on drivers for whom, as far as their own driving is concerned, the regulations are unnecessary. For what we must say to such drivers is not, as we could say to others, ‘You must obey the regulations in order to ensure that you are driving safely’, because we and they know that that is not true; but ‘You must obey these regulations because we need to enforce such a regime in order to make sure that others drive safely’. That we would be imposing this burden is certainly a consideration to which we should attend, as a reason against such strict regulations and in favour of regulations that allowed such competent drivers an exemption (if such regulations would be practicable): but if the burden is not unduly heavy, if it does not impose unreasonable restrictions on their liberty, we can argue that they should accept it for the sake of the common good that the regulations efficiently serve.⁵⁶

Indeed, we can say that they *ought* to accept the burdens, and obey the regulations, as a matter of their civic duty. The basis of that ‘ought’ is of course controversial, as is any basis for any claim about political obligation: but we take it that we do not need to appeal to any general duty to obey ‘the law’ as such to argue that citizens ought, as a matter of duty, to accept and obey regulations that are properly created in order to serve a significant aspect of the common good, at least so long as those regulations do not impose unreasonable burdens on them.⁵⁷ Any political theory according to which we can have some duty to obey some law (any political theory, that is, other than anarchism) will have room for such a duty to obey the legitimately created, common-good-directed, not unreasonably burdensome regulations of one’s polity. In that case, then, we can also say that we have reason to *criminalise* breaches of such regulations: for if the regulations are justified as efficient and not unduly burdensome ways of preventing harm, if they are therefore regulations that we ought to obey, breach of them is wrongful, in a way that properly concerns the polity whose safety these regulations serve; it thus merits formal, public censure. Different accounts could be given of the nature or grounds of that wrongfulness, reflecting different views of the basis and character of political obligation: some might talk in contractualist or contractarian terms, others of the associative duties that we have as members of the polity; we might talk of fairness, or of a readiness to make one’s legitimately assigned contribution to the polity’s common good. We might also give different, more nuanced, accounts of the wrongfulness of breaching different kinds of

⁵⁶ Although we have talked so far (since we are talking about the Harm Prevention Principle) of regulations that aim to prevent harm, we need not suppose that all systems of legal regulation have that as their sole or primary aim; some might serve other aspects of the common good, which cannot without distortion be brought under a harm principle. We cannot embark on that debate here: but see text at notes 65-8 below.

⁵⁷ We will comment in part 5 on what we could say about regulations that are not well or sensibly designed to serve the common good.

regulation, depending on the aspect of the common good they are designed to serve, and the nature of the mischiefs against which they are directed. We need not pursue these points here, however: all we need claim, for the purposes of our present argument, is that citizens have a duty to obey legitimate and well-crafted regulations of these kinds, and that they therefore commit public wrongs in violating them.

This then is a crucial difference between the Harmful Conduct Principle and the Harm Prevention Principle: that the latter can lead, whilst the former cannot, to the criminalisation of breaches of regulations which serve the ultimate aim of preventing harm, but which do so in part by prohibiting conduct that might not itself be harmful or dangerous. These are also offences that consist in conduct whose wrongfulness is post-legal rather than pre-legal: what makes the conduct wrongful is the fact that it violates a legitimate regulation. However, this is *not* to say that the conduct is made wrongful by its criminalisation: criminalisation, if it is to be legitimate, must presuppose wrongfulness, and thus cannot without vicious circularity be said to create it.⁵⁸ What constitutes the wrongfulness is the legal regulation, prior to which the conduct in question might not have been wrongful. Three points should be noted here.

First, we say only that the conduct ‘might not have been wrongful’ prior to its regulation, not that it would not have been: for sometimes regulations prohibit types of conduct many tokens of which are already wrongful because harmful, and prohibit them for just that reason. This is true of such familiar offences as speeding, and driving with excess alcohol. Someone convicted for breaking the regulation, however, is convicted precisely for that breach, not for acting harmfully or dangerously: one whose fitness to drive was impaired by the amount of alcohol he had drunk is convicted of the same offence as someone who drove with the same level of alcohol but knew that it did not impair his fitness. The former commits two wrongs, breaking the regulation and driving when unfit through drink; if our laws include the latter offence as well as the former he could in principle be convicted of both: but his sentence for breaking the regulation should not reflect a judgment about whether his fitness was actually impaired, unless that has been proved.

Second, this provides a partial answer to the suggestion that, even if the regulation should be strict, allowing no exceptions for those who know that they can safely break it, if we then criminalise breaches of the regulation we should allow one who breaks it a defence if she can prove that she knew that she could do so safely: for, it might be argued, the pragmatic reasons that can justify making regulations strict cannot justify making criminal liability strict. Such a suggestion would have force if the convicted defendant was being held liable for an offence of endangerment, since then she could argue that she should be allowed to offer evidence that her conduct was not dangerous. But that is not

⁵⁸ See further Duff 2014 *op.cit.*, at 219-21. Contrast Simester & von Hirsch *op.cit.*, p. 20: ‘Sometimes, the very act of criminalization plays a constitutive role in marking conduct out as wrongful’ (see also p. 72).

what she is held liable for under the scheme we are suggesting here: she is convicted, held liable, for the wrong of breaking a regulation that she had a duty to obey even if she knew that she did not create or take an unreasonable risk of causing harm in breaking it. That liability, for breaking the regulation, is indeed often strict under our current laws, and there are good reasons to argue that it should not be—that criminal liability should not generally be strict, even for such relatively minor offences.⁵⁹ But to preclude strict liability we need not allow the kind of defence being suggested here, since that defence does not bear on this offence; all we need do is to define the offence (of breaking the regulation) so that it requires a *mens rea* of knowledge, recklessness or negligence—not as to the creation of a risk of harm, but as to the fact that I am breaking a regulation.⁶⁰

Third, we have argued that such offences are post-legal, but not post-criminal: what makes the conduct relevantly wrongful is not that it constitutes a criminal offence (rather, it is made into a criminal offence because it is wrongful), but that it violates a legal regulation that we ought to obey. This distinction between ‘post-legal’ and ‘post-criminal’, however, is one of logic, rather than necessarily of chronology. That is, a legislature might simultaneously create the regulation, and criminalise breaches of it, in the same statute. But this does not undermine our argument, which is about the logic of criminalisation—about the logical structure of the kind of practical reasoning whose conclusion could be ‘And therefore we should criminalise Φ ing’. Within that structure, we have argued, a justification of regulation must be logically prior to criminalisation.

Thus even if we take ‘harm’ as our only guide, we find two principles, and two distinct routes to criminalisation—or at least to finding reasons to criminalise. The direct route flows from the Harmful Conduct Principle, which tells us that we have reason to criminalise a type of conduct just so long as it is wrongfully harmful. The indirect route begins with a Millian version of the Harm Prevention Principle: we have good reason to regulate a type of conduct if by doing so we can efficiently prevent harm; and we then have good reason to criminalise breaches of those regulations.⁶¹ It should be noted, however, that this reason to criminalise does not rely on or appeal to harm: for the conduct that we criminalise might not be harmful or dangerous—it might not fall under the Harmful Conduct Principle, and is not wrongful in virtue of being harmful or dangerous; and what the Harm Prevention Principle justifies is not (initially) criminalisation but regulation. To justify bringing the criminal law into play, we must appeal not to harmfulness, nor to wrongful harmfulness, but to wrongfulness.

⁵⁹ The question is of course far more complicated than we imply here, but not in ways that affect the present argument: see ed.: Simester, *Appraising Strict Liability* (Oxford University Press 2005).

⁶⁰ Or (to avoid embroiling ourselves in the question of whether ignorance of law can exculpate) knowledge, recklessness or negligence as to the facts (e.g. my speed) given which I am breaking the regulation.

⁶¹ The distinction between these two routes neatly matches the distinction between ‘*mala in se*’ and ‘*mala prohibita*’: is the criminalised conduct wrongful independently of its regulation?

5. An Objection, a Complication, and an Expansion

There is much more to be said about the distinction we have identified between these two routes to criminalisation—much more than can be said here. We will end, however, by noting and responding to one objection to our argument; by discussing very briefly one complication that we have noted already; and by pointing out the way in which our argument reaches well beyond the (perhaps somewhat parochial) confines of ‘the harm principle’.

The objection is that what we have displayed here are not two distinct routes towards the decision to criminalise, but one route towards criminalisation, through the Harmful Conduct Principle; and a distinct route towards a system of non-criminal regulations, like the German category of *Ordnungswidrigkeiten*, via the Harm Prevention Principle. Granted that we have reason to create regulatory systems whose regulations prohibit conduct that might, prior to the regulations, be neither harmful nor wrongful, why should we bring in the criminal law? Why not just keep them as regulations, enforced by ‘penalties’ rather than ‘punishments’?⁶²

Now there is room for argument about how we should understand, or about how the law should classify and treat, such regulatory systems as *Ordnungswidrigkeiten*. Should they be seen as something quite distinct from criminal law, as this objection presumes—as dealing not with censurable wrongs that are to be punished, but only with breaches of regulations that are to be penalised? Or should they be seen as constituting a type of criminal law, though one that deals with relatively minor offences, which therefore attract relatively mild censure, and relatively mild punishments—and which might therefore also require a less demanding kind of procedure? The Model Penal Code, for instance, divides ‘offenses’ into ‘crimes’ (which are then divided into ‘felonies’, ‘misdemeanors’, and ‘petty misdemeanors’) and ‘violations’: the key substantive criterion for violations is that ‘no other sentence than a fine, or fine and forfeiture or other civil penalty is authorised upon conviction’, but there is no suggestion that ‘violations’ are not part of the criminal law (even though they are not ‘crimes’).⁶³ We need not pursue this discussion here,

⁶² On ‘penalties’ as distinct from punishments, see Feinberg, ‘The Expressive Function of Punishment’, in *ed.* Feinberg (Princeton NJ: Princeton University Press, 1970) 95; for a useful (for those of us not familiar with German law), critical discussion of the distinction between *Ordnungswidrigkeiten* and crimes, see Weigend, ‘The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law’, in 59 *Revue Internationale de Droit Pénal* (1988), pp. 67 ff.

⁶³ Model Penal Code § 1.04. See also the various decisions of the European Court of Human Rights about what should count as a ‘criminal charge’, for the purposes of Article 6 of the ECHR: the fact that a state formally classifies something as an *Ordnungswidrigkeit* is not dispositive; see *Öztürk v. Germany*, Appl. no. 8544/79, 21.02.1984; *Lutz v. Germany*, appl. no. 9912/82, 25.08.1987.

however, since our claim has not been that we should in the end, all things considered, criminalise breaches of harm-preventive regulations.

First, all we have argued here is that we have good reason to criminalise such breaches: the question of whether we should, all things considered, deal with some or all such breaches through a separate system of non-criminal regulatory or administrative law (or another way altogether) will arise when we ask whether that good reason is a conclusive reason.⁶⁴ Second, we think we have shown here that we have good reason to criminalise at least breaches of justified harm-preventive regulations. For we have a civic duty to obey such regulations; in breaking them, we thus do wrong—we wrong our fellow citizens, to whom we owe that duty. That wrong is a ‘public’ wrong, which properly concerns our fellow citizens in virtue of our shared citizenship, as a wrong that falls within the public sphere of our civic life. A central function of the criminal law is to mark and define such public wrongs, as crimes for which we may be called to public account, through the criminal courts, by our fellow citizens. So breaches of such regulations fall, in principle, within the proper scope of the criminal law.

The *complication* is that the argument of the previous section was focused on regulations that had been legitimately made, and that were well designed to serve the relevant aspect of the common good—to efficiently prevent or reduce the kinds of harm or mischief at which they were supposed to be aimed. But legal regulations are not always like that: they can mark reasonable but misguided attempts to serve the common good; they can be aimed at political advantage rather than at the common good; they can be incompetently, or corruptly, created. This problem is not, of course, peculiar to this context, or to our account: any account of the law’s authority (and this is a matter of the law’s authority, not of the criminal law’s authority; it concerns the legal duty whose violation is then a candidate for criminalisation) must have something to say about what obligations, if any, we have to obey legal regulations that we reasonably take to be misguided, inapt, or improper; but that is not something we can discuss further here.⁶⁵ Since we have not suggested that citizens have a general duty to obey the law come what may, we need not say that they can legitimately be convicted for disobeying every kind of regulation that a government might create. We have appealed only to the plausible idea that we have obligations to obey regulations that are well designed to prevent kinds of harm that are the proper business of the polity, and that do not impose unreasonable burdens on those required to obey them: such obligations can be generated by applying the Harm Preven-

⁶⁴ Though we have argued elsewhere that we should not be too ready to go down the *Ordnungswidrigkeiten* route, but should aim for a criminal law and a criminal process that can deal appropriately with minor as well as major wrongs: Duff *et al.*, *The Trial on Trial III: Towards a Normative Theory of the Criminal Trial* (Hart 2007), ch. 6.5.

⁶⁵ For useful discussion, see Markel, *Retributive Justice and the Demands of Democratic Citizenship*, in 1 *Virginia Journal of Criminal Law* (2012), pp. 1 ff., on ‘dumb but not illiberal’ laws.

tion Principle (but not always by applying the Harmful Conduct Principle), and we have reason to criminalise failures to fulfil them.

The *expansion* is that the phenomenon we have been discussing here is not unique to ‘the harm principle’. Suppose we think that the criminal law should be concerned not with harm, but with *Rechtsgüter*: the proper function of criminal law is the protection of *Rechtsgüter*, i.e. of those goods, both individual and collective, that are or should be recognised by the law as meriting protection.⁶⁶ We will then, of course, see reason to criminalise conduct that directly violates or threatens a *Rechtsgut*; but we will also, if the aim is to protect *Rechtsgüter*, and if we accept a Feinbergian version of the Harm Prevention Principle, see reason to criminalise any conduct whose criminalisation would efficiently prevent violations of *Rechtsgüter*, even if the conduct criminalised does not always itself violate or threaten a *Rechtsgut*. The same is true if we take the proper aim of the criminal law to be to protect sovereignty,⁶⁷ or dignity,⁶⁸ or freedom as non-domination:⁶⁹ in each case this can give us reason to criminalise conduct that directly violates or threatens the value that is to be protected; or (on the Feinbergian version of the Harm Prevention Principle) give us reason to criminalise any conduct whose criminalisation would efficiently prevent violations of that value—even if the conduct does not itself violate it.⁷⁰ This might then suggest a related distinction between two types—or two aspects—of criminal law. In its ‘responsive’ mode, the criminal law responds to conduct that is in some relevant way wrongful—conduct that, for instance, wrongfully causes or threatens harm; in its ‘preventive’ mode, the criminal law aims to reduce future disvalue (for instance, harm) by means of prohibitions whose enforcement will efficiently prevent such disvalue.

If the argument of this paper is right, the distinctions drawn in the previous paragraph—between two Feinbergian harm principles, between two aspects of criminal law—are actually mis-drawn. The Harm Prevention Principle, we have argued, should be understood in Millian rather than in Feinbergian terms, as a principle directly concerned not with criminalisation, but with regulation: it does not by itself give us reason to criminalise anything. Similarly, the prevention of future disvalue is not, as such, a central

⁶⁶ On this central idea in German criminal law theory (which has become controversial in much the same way as the harm principle), see Dubber, *Theories of Crime and Punishment in German Criminal Law*, in 53 *American Journal of Comparative Law* (2006), pp. 679 ff.; Persak, *Criminalising Harmful Conduct* (Springer 2007), pp. 104-18; Hassemer, *The Harm Principle and the Protection of “Legal Goods” (Rechtsgüterschutz)*, in *Liberal Criminal Theory* (*op. cit.* at note 1 above), p. 187.

⁶⁷ See A Ripstein, *Beyond the Harm Principle*, in 34 *Philosophy & Public Affairs* (2006), pp. 215 ff.

⁶⁸ See Dan-Cohen, *Defending Dignity*, in *Harmful Thoughts: Essays on Law, Self and Morality* (Princeton University Press 2002), p. 150.

⁶⁹ See Pettit, *Criminalization in Republican Theory*, in *Criminalization* (*op. cit.* at note 46 above), p. 132.

⁷⁰ Compare Edwards *op. cit.*, at 263-6, on ‘instrumental’ v ‘act-centred’ harm principles.

concern of the criminal law, since it cannot directly generate reasons to criminalise: the criminal law's primary mode is, rather, responsive, as providing an appropriate kind of formal response to the kinds of wrong that it defines as criminal. This is not to say that the prevention of future disvalue is irrelevant to the criminal law. Of course it is not: as we argued in part 4, the criminal law can be used to respond to wrongful breaches of regulations whose purpose is to prevent future disvalue; and nothing we have said rules out the suggestion that one good reason for criminalising such breaches is that by doing so we can make the regulations more effective—more effective as preventive measures. All we have argued in this paper is that it is important to distinguish the two kinds of grounding for discussions of criminalisation that are exemplified by the Harmful Conduct Principle and the Harm Prevention Principle—a distinction that can also, as we can now see, be drawn whatever value we take to be foundational; and that once we clearly distinguish the two kinds of principle, we can also see that they form the starting points of quite different deliberative routes towards a decision to criminalise.