

## Comment on Andreas von Hirsch: The Roles of Harm and Wrongdoing in Criminalisation Theory

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**Abstract** Whereas liberals tend to emphasize harm as the decisive criterion for legitimizing criminalisation, moralists take a qualified notion of wrongfulness as sufficient even when no harm is at hand. This comment takes up Andreas von Hirsch's "dual element approach" requiring both harm and wrongfulness as necessary conditions for criminalisation and argues that Joel Feinberg's account of harming as violation of moral rights is perfectly compatible with it. Subsequently, two issues from the liberalism-moralism debate on criminalisation are examined: The difficulty of how to determine wrongfulness beyond the scope of harming, and the so far disregarded question of whether the democratic legislator is free within the framework of constitution to criminalise whatever conduct he wants to prevent irrespective of philosophical constraints.

**Keywords** Criminalisation · Harm · Wrongfulness · Joel Feinberg

In recent years, political and penal theorists from different countries have diagnosed a tendency towards increasing criminalisation. Punishment is not only used as a means to prevent and to avenge a classic set of crimes against individuals or state institutions, but also to control the multitude of abstract risks arising in industrialised societies—and even to enforce moral convictions. This tendency gives rise to a vivid debate among moral and legal philosophers on how to legitimize criminal provisions.

Two notions play a crucial role in this discourse: A *harm* constituting an objectionable result of a certain action, and the *wrongfulness* of the action itself. Whereas liberals in the tradition of John Stuart Mill and Joel Feinberg stress the requirement of harm as both a legitimizing and punishment-limiting tool, legal moralists consider wrongfulness to be a sufficient criterion for rendering a conduct punishable.

In his paper, Andreas von Hirsch focusses on these two crucial criteria of the criminalisation debate, suggesting how they should be combined in order to provide a detailed

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