The Right Not to be Criminalized

Demarcating Criminal Law's Authority

Dennis J. Baker

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Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

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Tom Campbell
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Preface

This book is aimed at legislators, as clearly even liberal courts such as The Warren Court (The Supreme Court of the United States between 1953 and 1969), will find themselves hamstrung by some of the technicalities imposed by our ancient constitutional texts. But it is hoped that the courts will continue to do what they can, as the United States Bills of Rights and also the European Convention for the Protection of Human Rights and Fundamental Freedoms, to a large extent, constitutionalize the moral right not to be criminalized. Nevertheless, much more needs to be done. It is time for twenty-first-century legislatures to push for constitutional reform. Our existing charters have not kept pace with social change, and this has been exacerbated by a lack of innovation in our higher courts. Of course courts cannot usurp the role of the legislature, but they should not go too far the other way either. The piecemeal innovations of Warren Court have largely been read down by later courts. The Bill of Rights needs to be amended to make it easier for judges to apply it to modern problems, as the current text leaves too much discretion to the judges—discretion which is not always used wisely. It means that rights are contingent on the makeup of the court; then on the makeup of the next court and so forth.

The Warren Court expanded civil rights liberties and judicial powers in an extraordinary way, but in recent decades the pendulum has been swinging against human rights; unless the rights violation has involved high profile terrorists and people of a similar ilk. If the media is present, then so too are the human rights lawyers. Everyday citizens are by and large ignored by those who make a living by promoting human rights. We all know that it is wrong to send a person to jail for 50 years for shoplifting, but such a sentence is possible in America. Alas, we ask China and other countries to follow our standards, but in doing so we must surely be asking the international community to follow some draconian practices.

If the Supreme Court is legally and constitutionally bound to read down rights so as to allow a person to go to jail for 50 years for shoplifting, then it is time for the legislature to take an active role to bring our rights into line with the expectations of people living in the twenty-first century. Senator Jim Webb of Virginia has sponsored legislation that would create a commission to look at the state of criminal justice in America. (It is hoped that the government of the United Kingdom will do the same.) That legislation arose in large part from the Senator's knowledge of criminal justice and his concern about the great number of criminal statutes in the United States and the extensive incarceration of individuals in United States prisons. The legislation has passed the House of Representatives and will most likely clear the Senate before this book goes to press.

In this book, I try to ascertain what external constraints are available for ensuring that criminal laws are just. The legitimacy and justice of criminalization is an area that has been largely overlooked by criminal law theorists, politicians and criminal justice and human rights practitioners. In the 1960s, Sanford Kadish referring to a list of victimless crimes complained of a 'crisis of overcriminalization.' Douglas N. Husak has conceptualized the problem as one of both 'overcriminalization' and 'unjust criminalization.' In this book, I treat the problem as a 'crisis of unjust criminalization,' as the number of criminal laws is not an issue so long as those laws are a just, proportionate and necessary legislative response to a genuine social problem. Criminalization should serve some kind of legitimate social purpose, as criminal laws are effectively the majority of a given community making claims on the freedom of individuals within that community.

The State is merely society as a collective and we need to know why the commands of the collective as expressed in criminal laws have authority over us as individuals. In this book, I argue that this is predominantly explained by pointing to an offender's culpability and the badness and harmfulness of his or her acts/actions. The harm might be indirect and thus attack the preservation of the community (State) by diminishing the good results that flow from communal cooperative living, as is the case with crimes such as bribery and perjury; or the harm might be directly victimizing as is the case with murder, theft, rape, and so forth. The issue of indirect or collective harm is controversial as it could include any activity that causes social conflict and disagreement of a kind that would attack the harmonious balance of the given community. For example, exhibitionism is not inherently harmful, but it does flout social customs and decriminalizing it suddenly might cause conflict and cooperation problems between various sectors within a plural community. That is, if masses were to change their social practice of wearing clothes, which is not likely. Social norms seem a sufficient regulator. However, in some cases the social custom will involve treating a minority as less than full members of the community and rapid change will be necessary, as was the case with the decriminalization of many sexual morality offenses.

In this book we will see that many activities that are deemed bad, and often as harmful, by the State (the collective) involve little more than someone flouting a social custom, as is the case with exhibitionism or with wearing a burqa. The French plan to ban the burqa, and exhibitionism is already an offense: but are not prohibitions against such practices merely laws telling us how to dress? In this book, I attempt to explain the legitimacy of just criminalization. I argue that certain acts/actions are deserving of the crime label because they produce bad consequences (or risk producing bad consequences as is the case with attempts, endangerment, *etc.*) of an avoidable (avoidable in that the wrongdoer culpably aimed for the bad consequences and could have chose otherwise) for others. It is the gravity of the wrongness of certain actions that make criminalizing them justifiable. Justified criminal laws have authority over us as they protect our genuine human interests in socialized, cooperative, plural societies. More significantly, I argue that the right not to be criminalized is not merely a cardinal human right found in morality,

but is also a constitutional right. In this book, I reinterpret a number of existing constitutional and international rights to demonstrate that these texts incorporate a constitutional right not to be criminalized. The limits of asking the courts to do all the work are obvious, so greater advances will require the legislators to get involved, but legislators often lack the temerity to tackle the problem.

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Acknowledgments

This book pulls together and adds to the theories that I have developed in a number of essays to provide an evocative and compelling explanation of the morality of good criminalization and of the normative foundations of the cardinal right not to be criminalized.

Large sections of some of my earlier essays have been incorporated into this book. Therefore, I would like to acknowledge a number of publishers for allowing me to reuse parts of that material here. I acknowledge the Journal *Criminal Justice Ethics*, John Jay College, New York for allowing me to incorporate large sections from 'Constitutionalizing the Harm Principle,' (2008) 27(2) *Criminal Justice Ethics* 3; the Regents of the University of California, California University Press for allowing me to incorporate large sections from 'The Moral Limits of Consent as a Defense in the Criminal Law,' (2009) 12(1) *New Criminal Law Review* 93; Taylor & Francis Group Publishing for allowing me to incorporate an extensive part of 'Collective Criminalization and the Constitutional Right to Endanger Others,' 28(2) *Criminal Justice Ethics* (2009); and the *Australian Journal of Legal Philosophy* for allowing me to reuse 'The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalization,' (2008) 33 *Australian Journal of Legal Philosophy* 66.

I am especially grateful to Professor Andrew von Hirsch LL.D. for reading several earlier drafts of this book. It was his inspiring lectures in the philosophy of punishment that aroused my interest in this topic. In particular, I would like to thank him for the immense effort he put into directing the earlier stages of this project during my time working with him at the University of Cambridge. His input helped me to conceptualize and analyze the issues with greater logicality, convincingness and consistency. The numerous discussions I had with Andrew stimulated my thinking and provided me with many original ideas. I am also grateful to Professor Michael Tonry, Mrs. Nicola Padfield and Mr. Peter Glazebrook for their assistance during my time in Cambridge. I am also immensely grateful to Dr. Xia Zhao for her support during the course of this project. I also acknowledge Mr. Charles Oh, Professor Geoff Harcourt A.O., Laurie Baker and Jason Baker.

If you have ten thousand regulations you destroy all respect for the law.

Sir Winston Churchill

It is quite easy to state what may be right in particular cases (*quid sit juris*), as being what the laws of a certain place and of a certain time say or may have said; but it is much more difficult to determine whether what they have enacted is right in itself, and to lay down a universal Criterion by which Right and Wrong in general, and what is just and unjust, may be recognized. All this may remain entirely hidden even from the practical Jurist until he abandon his empirical principles for a time, and search in the pure Reason for the sources of such judgments, in order to lay a real foundation for actual positive Legislation. In this search his empirical Laws may, indeed, furnish him with excellent guidance; but a merely empirical system that is void of rational principles, is like the woodenhead in the fable of Phaedrus, fine enough in appearance, but unfortunately it wants brain.

Immanuel Kant[1]

1 Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated from the German by William Hastie, *The Philosophy of Law* (Edinburgh: T. & T. Clark, 1887) at p. 44.

Contents

Chapter 1
Unprincipled Criminalization

There is a vast array of literature on the moral limits of the criminal law. In this book my goal is not merely to discuss the moral limits of the criminal law. Instead, the focus is on the legal limits of the criminal law. This book takes a different approach by trying to show how the moral criteria for constraining unjust criminalization can and have been incorporated into constitutional human rights and thus provide us with a legal right not to be unfairly criminalized. The aim of the book is to set out the constitutional limits of the substantive criminal law. As far as specific constitutional rights operate to protect *specific freedoms* (free speech, freedom of religion, privacy, *etc.*), the right not to be criminalized has proved to be a rather powerful justice constraint in the U.S. The general right not to be criminalized has not been fully embraced in either the U.S. or Europe, but it does exist. In this book, I set out the legal foundations of that right and the criteria for determining when the state might override it.

In the period since publication of J.S. Mill's Harm Principle, constitutional courts in North America and Europe have taken critical steps toward the decriminalization of sexual activities, abortion, begging, marijuana use and so on. I devote a substantial degree of attention to this subject; indeed, the pattern of decisions in favor of the decriminalization of such offenses is so pronounced that anyone writing within the Millsian tradition would of course feel substantial pride in the impetus that Mill provided for judicial conclusions along these lines. But presenting the right not to be criminalized as a legal rather than as a mere moral right requires caution, in part because the constitutional texts (in particular, the Canadian Charter of Rights and Freedoms, the American Bill of Rights, and the European Convention on Human Rights) are worded differently, and also because the courts interpreting these have taken different approaches even to largely similar textual terms. Everyone has a constitutional right not be criminalized without good reason, but different courts will adopt different interpretive strategies depending on the exegetical traditions of constitutional law in the given jurisdiction to identify it. This means that in some jurisdictions the courts are better equipped to enforce such a right, whereas in others constitutional reform may be required to make the right more effective. Nonetheless, it is undeniable that the U.S., European and Canadian courts are more open to considering persuasive precedents from other jurisdictions than they once were.

Culpable harm-doing provides the core justification for overriding a person's right not to be criminalized. But as we will see, harm is a very wide concept. Some scholars have tried to provide objective accounts of harm, but much more work is needed. If the constitutional right not to be criminalized is going to succeed in

ensuring that people are only criminalized when they deserve it, then we need a fairly clear picture of harm. We need reasonably objective accounts of harm; otherwise any harm claim could be used to justify overriding a person's right not to be criminalized. The right's constitutional effectiveness depends on proper accounts of harm being put forward. The problem is that harm is conventionally contingent. This poses a real difficulty when it comes to soft harms or acts which cause umbrage such as exhibitionism. But even where the act does in fact cause harm, a given community might be willing to tolerate it for some conventional reason. For instance, in London (or at least in fashionable parts of the city) foxes are deemed worthy of protection and fetuses are not; in many regional parts of England, fetuses are deemed worthy of protection and foxes are not. I confess to deep skepticism about even the possibility of advancing a convincing theory that does any more than reinforce the preferences of these different communities; and I further confess to a misgiving that the theory-creating classes will almost always be convinced by a protracted argument that supports their preferences (in this instance, foxes/yes; fetuses/no). Throughout this book, I try to set a framework for identifying sound harm claims, because the constitutional right not to be criminalized is only useful if the argument used to override it is a good one.

The Problem: Unprincipled Criminalization

In positivistic terms a crime is any act that is labeled as criminal.[1] In a purely legal sense it is wrong to engage in any conduct that has been labeled as criminal, even if the conduct is not morally wrong. In this book, I argue that people have a general right not to have their choices restricted by criminalization. The right is not only about having the freedom do as one chooses so long as it does not wrong others, but also about not being subjected to the harmful consequences that flow from unfair criminalization (detention, penal fines, conviction, stigmatization, *etc.*). Criminalization has harmful consequences for those who are labeled as criminals and therefore people have a right not to be criminalized unless it is fair to override their right. I aim to set out criteria for identifying when the right may be overridden in order to justify criminalization.

1 Henry M. Hart, 'The Aims of the Criminal Law,' (1958) 23 *Law & Contemporary Problems* 401 at p. 404.

The detrimental side effects of criminalization are well documented.[2] The overcriminalization phenomenon and its causes are also well documented.[3] I do not intend to survey that literature in this work. Instead my aim is to address the problem identified in the literature by developing checks for constraining unjust criminalization. The bulk of the literature addressing the overcriminalization problem merely discusses the case for decriminalizing crimes that are usually victimless.[4] Numerous writers have produced instrumental arguments for decriminalizing crimes such as law enforcement costs, but few have developed arguments for ensuring that criminalization decisions accord with the constitutional requirements of fairness and justice.[5] Richards[6] notes: 'Certainly, if there are good

2 Nigel Walker, *Punishment, Danger and Stigma* (Oxford: Basil Blackwell, 1980) at pp. 142 *et seq.*; Jonathon Schonsheck, *On Criminalization* (London: Kluwer Academic Publishers, 1994) Chapter 1; Hilary Metcalf *et al.*, *Barriers to Work for Offenders and Ex-Offenders* (London: Department of Work and Pensions, Research Report 155, 2001); Anthony E. Bottoms and Roy Light, *Problems of Long-Term Imprisonment* (Aldershot: Gower, 1987).

3 For a comprehensive and excellent overview of some of the causes of the current overcriminalization phenomena, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008). Husak argues that the cause of the overcriminalization phenomena is multifaceted. It stems from mislabeling morally innocuous acts as criminal, from prosecution discretion, from overcharging, and from law schools failing to teach or conduct research in the criminalization area. The problem is no less acute in England, see Andrew Ashworth, 'Is the Criminal Law a Lost Cause,' (2000) 116 *The Law Quarterly Review* 225.

4 Sanford H. Kadish, 'The Crisis of Overcriminalization,' (1967) 374 *The Annals of the American Academy of Political and Social Science* 157; Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968); Sanford H. Kadish, 'More on Overcriminalization: A Reply to Professor Junker,' (1971–1972) 19 *U.C.L.A. Law Review* 719; Jerome H. Skolnick, 'Criminalization and Criminogenesis: A Reply to Professor Junker,' (1971–1972) 19 *U.C.L.A. Law Review* 715; Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: Chicago University Press, 1970); Arval A. Morris, 'Overcriminalization and Washington's Revised Criminal Code,' (1972–1973) 48 *Washington Law Review* 5; and John M. Junker, 'Criminalization and Criminogenesis,' (1971–1972) 19 *U.C.L.A. Law Review* 697. See also the symposium papers on 'Overcriminalization: The Politics of Crime' in the 2005 volume of the *American University Law Review*.

5 The exception is Joel Feinberg. Feinberg wrote four groundbreaking volumes on the topic of criminalization in the 1980s. See Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (New York: Oxford University Press, Vol. I, 1984); Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (New York: Oxford University Press, Vol. II, 1985); Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (New York: Oxford University Press, Vol. III, 1986); and Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (New York: Oxford University Press, Vol. IV, 1988).

6 David Richards, 'Drug Use and the Rights of the Person: A Moral Argument for Decriminalization of Certain Forms of Drug Use,' (1980–1981) 33 *Rutgers Law Review* 607 at p. 614.

moral reasons for criminalizing certain conduct, quite extraordinary enforcement costs will be borne.' In practice, high costs have had little bearing on criminalization and punishment decisions. Notwithstanding the injustices and disproportional fiscal costs involved in implementing populist punitive policies such as three strikes and you-are-out,[7] politicians and legislatures have clutched such policies with alacrity.[8] Instrumental (the costs and benefits of enforcement and so on) arguments would not outweigh the compelling costs of trying and sentencing a murderer. Efficiency arguments are something to be considered at an instrumental level once there is a *prima facie* moral justification for criminalization. Such arguments are likely to tip the scales in cases where the conduct only involves trivial criminality.

An obvious moral basis can be found for criminalizing non-borderline conduct that clearly involves moral wrongdoing and serious harm such as theft, rape, murder, terrorism and so on. A more complex moral analysis is required for ascertaining the fairness and justice of criminalizing borderline wrongdoing such as exhibitionism, fox hunting,[9] *etc.* At the other end of the scale, it is not clear why the crime label has been applied to range of apparently innocuous activities such as passive begging,[10] feeding the homeless,[11] fornication,[12] possessing sex toys,[13] homosexuality,[14] possessing marijuana for personal use,[15] and attending live strip shows.[16] The majority in some societies may not approve of homosexuality,

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7 Peter W. Greenwood *et al.*, *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law* (California: Rand, 1994).

8 Anthony E. Bottoms, 'The Philosophy and Politics of Punishment and Sentencing,' in Christopher M.V. Clarkson and Rod Morgan, *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) at pp. 39–40.

9 Hunting Act 2004 (U.K.).

10 The free speech right has been used to decriminalize begging in the United States. See *Benefit v. Cambridge*, 424 Mass. 918 (1997). Cf. *Loper v. New York City Police Dept.*, 802 F. Supp. 1029, 1042 (S.D.N.Y. 1992). It is worth noting that in jurisdictions such as England, old anti-begging laws are still in force and have been enforced vigorously by the Blair/Brown governments to crack down on passive begging. See section 3 Vagrancy Act 1824 (U.K.).

11 Randal C. Archibold, 'Las Vegas Makes It Illegal to Feed Homeless in Parks,' (New York: *New York Times*, 28 July 2006).

12 See for example, *Lawrence v. Texas*, 539 U.S. 558 (2003) at pp. 586; 592–594 per Scalia J.

13 *Williams v. Pryor*, 240 F. 3d 944 (2001) at p. 949.

14 *Lawrence v. Texas*, 539 U.S. 558 (2003).

15 *Malmo-Levine* [2003] S.C.C. 74.

16 *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560 (1991) at pp. 574–575 per Scalia, J. His Honor noted that: '[T]he dissent confidently argues, that the purpose of restricting nudity in public places in general is to protect non-consenting parties from offense ... Perhaps the dissenters believe that "offense to others" ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking that it was written into the Constitution ... Our society

prostitution, marijuana use or homelessness, but majority mores do not tell us why it is fair to criminalize such conduct. Why are those who engage in such activities deserving of criminal censure? If lawmakers want to criminalize this type of conduct then they have to demonstrate that there are objective moral[17] justifications for doing so. The objectivity of justifications for criminalization can be tested by subjecting them to the inter-subjective scrutiny of communally situated moral agents. Such a process allows stakeholders to question non-genuine justifications (unreasoned harm arguments *etc.*) for criminalization.

> What it is rational for one person to do, to believe, or to value will thereby also of necessity be equally rational for the rest of us who might find ourselves in the same circumstances. For rationality is inherently 'objective': it does not reconfigure itself to meet the idiosyncratic predilections of particular individuals. To be sure, objectivity will have *to take context into account*, seeing that different individuals and *groups confront very different objective situations*. Rationality is universal, but it is circumstantially universal—and objectivity with it. ... The contextuality of good reasons can be reconciled with the universality of rationality itself by taking a hierarchical view of the process through which the absolutistic (and uniform) conception of ideal rationality is brought to bear *context-differentially on the resolution of concrete cases and particular situations.*[18]

Inter-subjectively, members of even the most advanced societies are not so rational that they can identify objective truths or universal standards. Nonetheless, we can scrutinize the harm, badness and wrong claims by drawing on our deep conventional understandings of harmfulness, badness, wrongness and so on. This level of objectivity is not of the indefeasible kind envisaged by Kant and other moral realists, but it may be all we have.

What objective criteria are currently used for ensuring fair and principled criminalization? The concepts that the edifice of the criminal law was built upon are multifaceted and complex. It is clear that outside of the basic constitutional prerequisites (which are predominantly procedural) there is no principled content or composition that the substantive criminal law must have. Ashworth notes

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prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral.'

17 Complete objectivity is impossible, but the reasons put forward for criminalization must be scrutinized by moral agents who are communally situated via an inter-subjective deliberation process—as far as that is possible in Western political systems. See Chapter 6 *infra*.

18 Nicholas Rescher, *Objectivity: The Obligations of Impersonal Reason* (Notre Dame, IL: University of Notre Dame Press, 1997) at p. 3. 'Objective judgments are those that have a cogency compelling for everyone alike (or at least all normal sensible people), independently of idiosyncratic tendencies and inclinations.' *Id.* at p. 7.

that, '[t]he contours of ... criminal law are "historically contingent"—not the product of any principled inquiry or consistent application of certain criteria but largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups, and so forth.'[19] This unprincipled and politicized approach to criminalization is a major cause of the current unjust criminalization crisis in Britain and the United States. More than 8,000 criminal offenses now exist in England and Wales.[20] Many of these offenses criminalize activities that do not involve moral turpitude. In the United States there are 4,000 Federal offenses, and a comparable number of criminal offenses in the individual states.[21] Likewise, in the U.S.A. there is also a third stratum of criminalization at the local level.[22]

Governments eager to capitalize on the political advantages of engaging in penal populism have developed a plethora of politicized and unprincipled policies about what to criminalize.[23] The media also plays a major role in populism inspired criminalization by inculcating members of the public '[w]ith a powerful set of ideological images of immorality, heroism, evil, efficiency and justice. The political values and interests integral to the censure of crime in television crime drama daily reinforce State definitions of crime, the value of censure and punishment, and the importance of State violence for our comfort and safety.'[24] Criminal laws do not just appear out of thin air, someone has to provide the stimulus for their enactment. This is especially so with harmless conduct. But even when the conduct is objectively harmful, '[t]he harm must be discovered and pointed out. People must be made to feel that something ought to be done

19 Ashworth, *op. cit. supra*, fn. 3 at p. 226.

20 *Ibid.*

21 See John S. Baker, *Measuring the Explosive Growth of Federal Crime Legislation* (Washington, D.C.: Federalist Society for Law and Policy Studies, Crime Report, 2004); John S. Baker, 'Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes,' (2005) 54 *American University Law Review* 545 at p. 548 *et seq.* Luna estimates a similar number of offenses in the individual states. See Erik Luna, 'The Overcriminalization Phenomenon,' (2005) 54 *American University Law Review* 703 at pp. 718 *et seq.* See also Paul H. Robinson and Michael T. Cahill, 'Can a Model Penal Code Second Save the States from Themselves?,' (2003) 1 *Ohio State Journal of Criminal Law* 169.

22 See for example, the *Las Vegas Municipal Code*, which prohibits mobile soup kitchens or members of the public from feeding the homeless. These misdemeanors carry fines and jail terms.

23 Julian V. Roberts *et al.*, *Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2003). The authors argue that politicians are more interested in capitalizing on the public fear of crime than they are in seeking workable solutions—they exploit anxiety for political advantage.

24 'Censures are revealed as quite complex compositions of images of personal deviance and images of political priority.' Colin Summer, *Censure, Politics and Criminal Justice* (Milton Keyes: Open University Press, 1990) at pp. 8–9.

about it. Someone must call the public's attention to these matters, supply the push necessary to get the law enacted.'[25]

A recent political campaign emphasizing the alleged harmfulness of homeless people was used in Las Vegas to justify the enactment of an ordinance, which makes it a crime for members of the public and charitable organizations to feed homeless people in the city's parks. This is a stark example of unprincipled criminalization. The Las Vegas City Council argues that the criminal law is needed to prevent people from feeding homeless people, because feeding homeless people allegedly lures them to the public parks. This apparently 'led to complaints by residents about crime, public drunkenness and litter.'[26] The ordinance bans members of the public and mobile soup kitchens from providing food or meals to indigent people in the city's parks. The law carries a maximum penalty of $1,000 and a six-month jail term. The Mayor has argued that the crackdown was necessary as families were allegedly too scared to use the park.[27]

If the public are fearful of some perceived harm, politicians tend to enact laws in response without considering whether the conduct is in fact harmful. Such a response materializes into votes at the ballot box. Professors Kelling and Wilson[28] authored the broken windows thesis, which holds that conduct such as street prostitution and begging are harmful because these activities are allegedly a part of a self-perpetuating cycle of decay dragging more serious crime into neighborhoods. Recently, the British government[29] used the broken windows thesis to justify a crackdown on begging in England and Wales. It referred to the broken windows type of harm to emphasize the harmfulness of homelessness; and has adopted 'zero tolerance policing.'[30] The espousal of such policies with an emphasis on the harmfulness and intolerableness of so-called nuisance behavior has resulted in the criminal law in that jurisdiction being extended through the use of the civil law. The Crime and Disorder Act 1998 (U.K.) and the Anti-Social Behaviour Act 2003 (U.K.) have been used in tandem to indirectly extend the scope of prohibitions backed by the criminal law. These Acts allow the police and local authorities to seek civil injunctions and Anti-Social Behaviour Orders (hereinafter ASBOs), which are effectively civil injunctions, to bar people from

25 Howard S. Becker, *Outsiders* (Glencoe, IL: The Free Press, 1963) at p. 162. See also Joseph R. Gusfield, *Symbolic Crusade* (Urbana: University of Illinois Press, 2nd ed. 1986).

26 Randal C. Archibold, *op. cit. supra*, fn. 11.

27 *Ibid.*

28 James Q. Wilson, and George Kelling, 'Broken Windows: The Police and Neighborhood Safety,' (1982) *Atlantic Monthly* 29.

29 *Respect and Responsibility—Taking a Stand Against Anti-Social Behaviour* (London: Home Office, White Paper Cm 5778, 2003) at paragraphs 1.8, 3.40–3.44. The broken window thesis has also had a substantial influence on policing practices. Debra Livingston, 'Police Discretion and the Quality of Life in Public Places: Courts, Communities, and New Policing,' (1997) 97 *Columbia Law Review* 551 at p. 584.

30 *Ibid.*