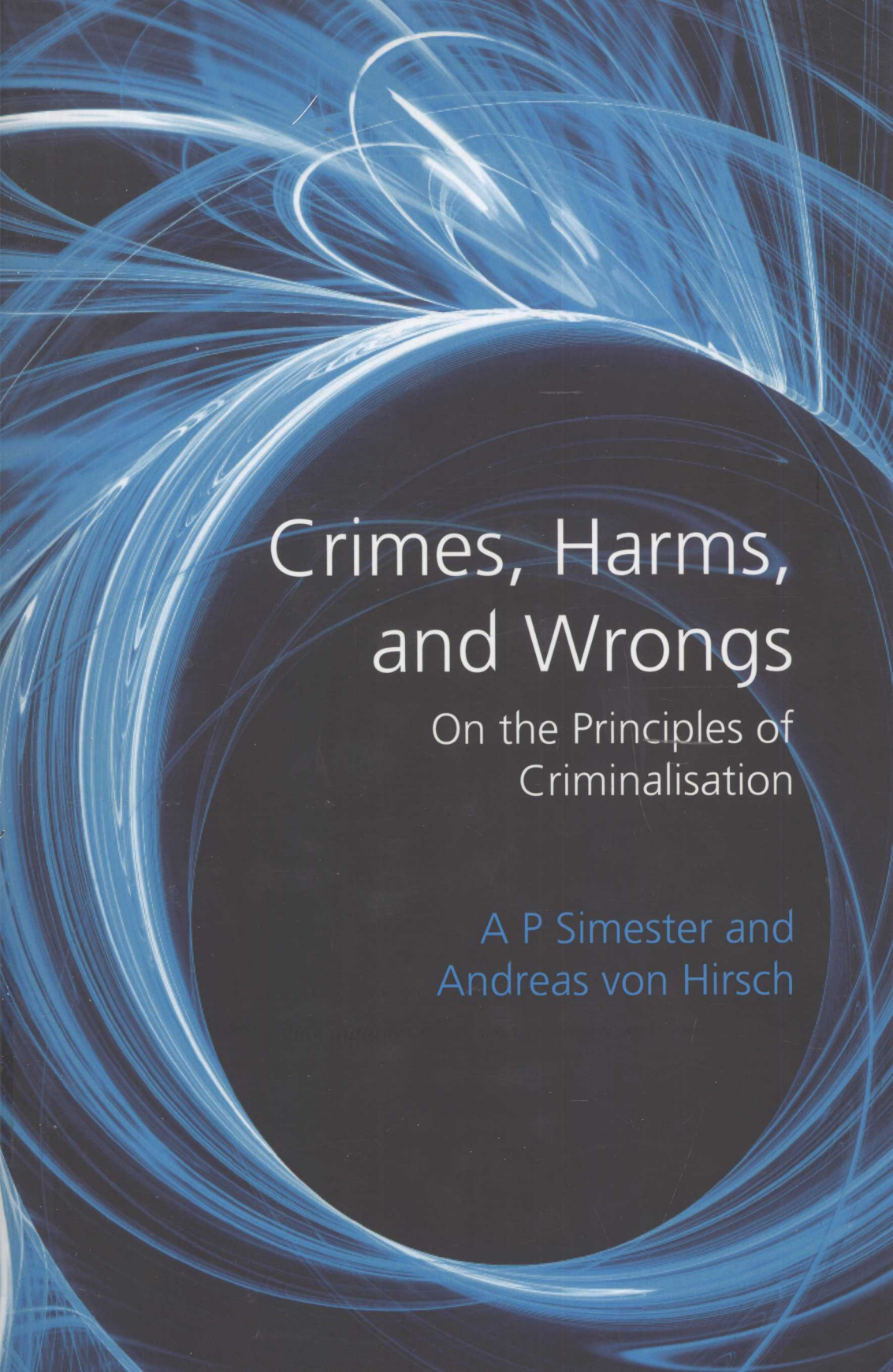


The background of the cover is a dark, almost black, field filled with numerous bright blue, glowing, and swirling lines. These lines create a sense of dynamic movement, resembling a nebula or a complex web of energy. A large, prominent swirl dominates the left side, curving around the central text area. Other smaller, more chaotic swirls are scattered across the top and right portions of the cover.

Crimes, Harms, and Wrongs

On the Principles of
Criminalisation

A P Simester and
Andreas von Hirsch

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Preface

A.T.H Smith, our colleague and friend, introduced us at Cambridge in 1993. APS had just arrived from Oxford to take up a Research Fellowship at Gonville and Caius College, while AvH had joined the academic staff of the Institute of Criminology after two decades' working at Rutgers University in the United States. At that time, AvH was developing an interest in criminalisation issues, following on from his earlier research on sentencing theory, while APS was working primarily in substantive criminal-law theory. Together, we instituted a new LL.M. course at Cambridge, on the Philosophy of Criminal Law, finding in the process that many of our ideas—and values—overlapped in a way that was both stimulating and instructive. Many of our early discussions centred around remote harms, since AvH was working on the paper that subsequently appeared in the 1996 collection, *Harm and Culpability*, edited by Simester and Smith.

Thereafter, we worked together from time to time, publishing a number of papers on criminalisation topics, including offence and paternalism as well as harm. Some of the papers were published individually, some jointly; and we worked also with other colleagues who shared our interest—yet invariably discussed the issues with each other in the course of our writings. The upshot of this approach was a rather unsystematic body of writings, but the process itself was invaluable in shaping our thinking on criminalisation. That changed at the beginning of 2009, when we resolved to try to synthesise our various ideas into a more coherent work.

The present book was conceived of as a monograph rather than an essay collection. We quickly discovered that its preparation called for considerably more thought and effort than was originally anticipated. Many of our earlier arguments required substantial revision and refinement. Juxtaposing them revealed additional issues needing to be addressed. And the entire project demanded a coherent theoretical structure. In short, we needed to write a new account, not just a synthesis of our earlier ideas. At the same time, we have not aimed in this book to be comprehensive, or to develop a complete theory of criminalisation. Our main concern is with the structure of criminalisation questions, with general principles rather than details. So the present effort is unavoidably selective. It leaves many questions to the future.

Along the way, we have incurred substantial debts of gratitude. Andrew Ashworth and Douglas Husak supplied extensive and detailed comments on an entire draft manuscript. Matt Matravers, Antje du Bois-Pedain, Victor Tadros, and Bob Sullivan all gave us valuable advice on individual

chapters. Regular visits to Uppsala University supplied the opportunity to exchange ideas with an impressive group of criminal-law theorists working (or visiting) there and nearby, especially Petter Asp, Nils Jareborg, Claes Lernestedt, Nina Peršak, and Magnus Ulväng. AvH also worked with several German colleagues on related German-language criminalisation projects, including Ulfrid Neumann, Tatjana Hörnle, Kurt Seelman, Klaus Günther, and Vivian Schorscher. To all these friends and colleagues, we owe our sincerest thanks.

There was also valuable institutional support. We benefited by excellent secretarial assistance from Ann Phillips. Our meetings at Cambridge and Uppsala were facilitated by the Centre for Penal Theory and Penal Ethics at the Institute of Criminology in Cambridge, and by a Singapore Ministry of Education Tier One Research Grant (R241000045112). Perhaps most importantly of all, election to a fellowship at Wolfson College enabled APS to continue returning regularly to Cambridge, teaching the Philosophy of Criminal Law course and working together with AvH on the book. We hope that all those who have contributed, in so many ways, to this project will be pleased with the result.

A.P.S.

A.v.H.

Michaelmas 2010

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In writing this book, we have drawn directly or indirectly from a number of our existing articles and book chapters, some of which were co-authored with other colleagues. These various sources include:

- ‘Betrachtungen über Moral und Paternalismus’ [‘Reflections on Morality and Paternalism’] in A. von Hirsch and U. Neumann (eds), *Paternalismus im Strafrecht: Die Kriminalisierung von selbstschädigendem Verhalten* (Baden-Baden: Nomos Verlagsgesellschaft, 2010) (A.P. Simester)
- Criminal Law: Theory and Doctrine* (3rd ed., Oxford: Hart Publishing, 2007) (A.P. Simester and G.R. Sullivan)
- ‘Direct Paternalism: Criminalizing Self-Injurious Conduct’ (2008) 27 *Criminal Justice Ethics* 25 (A. von Hirsch)
- ‘Enforcing Morality’ in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2011) (A.P. Simester)
- ‘Extending the Harm Principle: “Remote” Harms and Fair Imputation’ in A.P. Simester (ed.), *Harm and Culpability* (Oxford: Oxford UP, 1996) (A. von Hirsch)
- ‘Harm and Offence: Schädigungsprinzip und Belästigungsprinzip als Kriterien für die Kriminalisierung von Verhalten’ [‘Harm-Principle and Offence-Principle as Criteria for the Criminalisation of Conduct’] in H. Putzke (ed.), *Strafrecht zwischen System und Telos: Festschrift für Rolf Dietrich Herzberg zum siebenzigsten Geburtstag* (Tübingen: Mohr Siebeck, 2008) (A. von Hirsch)
- “‘Indirekter’ Paternalismus im Strafrecht am Beispiel der Tötung auf Verlangen (§ 216 StGB)’ [“‘Indirect’ Paternalism in Criminal Law: Punishing Killing on Request’] in A. von Hirsch and U. Neumann (eds), *Paternalismus im Strafrecht: Die Kriminalisierung von selbstschädigendem Verhalten* (Baden-Baden: Nomos, 2010) (A. von Hirsch and U. Neumann)
- ‘Indirekter Paternalismus und § 216 StGB: Weitere Bemerkungen zur Bedeutung und Reichweite des Paternalismus-Begriffs’ [‘Indirect Paternalism and the Prohibition of Killing On Request: Further Comments on Scope and Meaning of the Concept of Indirect Paternalism’] in A. von Hirsch and U. Neumann (eds), *Paternalismus im Strafrecht: Die Kriminalisierung von selbstschädigendem Verhalten* (Baden-Baden: Nomos, 2010) (A. von Hirsch and U. Neumann)
- ‘Nachwort: Indirekter Paternalismus und die normative Basis des Tötung-auf-Verlangen-Verbots’ [‘Postscript: Indirect Paternalism and the Moral Basis of the Prohibition of Killing on Request’] in A. von Hirsch and

- U. Neumann (eds), *Paternalismus im Strafrecht: Die Kriminalisierung von selbstschädigendem Verhalten* (Baden-Baden: Nomos, 2010) (A. von Hirsch and V. Schorscher)
- 'Injury and Exasperation: An Examination of Harm to Others and Offence to Others' (1986) 84 Michigan LR 700 (A. von Hirsch)
- 'The Mental Element in Complicity' (2006) 122 LQR 578 (A.P. Simester)
- 'The Nature and Rationale of Property Offences' in R.A. Duff and S.P. Green (eds), *Defining Crimes: Essays on the Criminal Law's Special Part* (Oxford: Oxford UP, 2005) (A.P. Simester and G.R. Sullivan)
- 'The Offence Principle in Criminal Law: Affront to Sensibility or Wrong-doing?' (2000) 11 King's College LJ 78 (A. von Hirsch)
- 'Penalising Offensive Behaviour: Constitutive and Mediating Principles' in A. von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) (A. von Hirsch and A.P. Simester)
- Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford UP, 2005) (A. von Hirsch and A. Ashworth)
- 'Regulating Offensive Conduct Through Two-Step Prohibitions' in A. von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) (A.P. Simester and A. von Hirsch)
- 'Remote Harms and Non-constitutive Crimes' (2009) 28 Criminal Justice Ethics 89 (A.P. Simester and A. von Hirsch)
- 'Rethinking the Offense Principle' (2002) 8 Legal Theory 269 (A.P. Simester and Andrew von Hirsch)
- 'Is Strict Liability Always Wrong?' in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford UP, 2005) (A.P. Simester)
- 'Toleranz als Mediating Principle' ['Tolerance as a Mediating Principle] in A. von Hirsch, K. Seelmann and W. Wohlers (eds), *Mediating Principles: Begrenzungsprinzipien bei der Strafbegründung* (Baden-Baden: Nomos, 2006) (A. von Hirsch)

Abbreviations

The following abbreviations for standard textbooks and statutory materials are used in the text and footnotes.

<i>Harm to Others</i>	J. Feinberg, <i>The Moral Limits of the Criminal Law</i> , vol. 1: <i>Harm to Others</i> (New York: Oxford UP, 1984)
<i>Harm to Self</i>	J. Feinberg, <i>The Moral Limits of the Criminal Law</i> , vol. 3: <i>Harm to Self</i> (New York: Oxford UP, 1986)
Husak, <i>Overcriminalization</i>	D. Husak, <i>Overcriminalization: The Limits of Criminal Law</i> (New York: Oxford UP, 2007)
<i>Incivilities</i>	A. von Hirsch and A.P. Simester (eds), <i>Incivilities: Regulating Offensive Behaviour</i> (Oxford: Hart Publishing, 2007)
<i>Offense to Others</i>	J. Feinberg, <i>The Moral Limits of the Criminal Law</i> , vol. 2: <i>Offense to Others</i> (New York: Oxford UP, 1985)
<i>On Liberty</i>	J.S. Mill, <i>On Liberty</i> (London: Parker, 1859)
<i>Proportionate Sentencing</i>	A. von Hirsch and A. Ashworth, <i>Proportionate Sentencing: Exploring the Principles</i> (Oxford: Oxford UP, 2005)
Roxin, <i>Strafrecht AT</i>	C. Roxin, <i>Strafrecht AT</i> (4th ed., München: Verlag C.H. Beck, 2006)
<i>Simester and Sullivan</i>	A.P. Simester and G.R. Sullivan, <i>Criminal Law: Theory and Doctrine</i> (3rd ed., Oxford: Hart Publishing, 2007)
StGB	<i>Strafgesetzbuch</i> (German Penal Code)

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Part I

Criminalisation and Wrongdoing