Conceptions of Overcriminalization

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This essay seeks to explore Sanford Kadish's concerns about overcriminalization by examining the functions of the criminal law. It is argued that overcriminalization occurs when criminal law goes beyond its legitimate functions, and also when the proper lines between criminal law and regulatory laws are not observed; and that those conclusions can be drawn on grounds of principle as well as through consequentialist analysis.

In three of his early essays, Sanford Kadish raised concerns about the overuse of the criminal law.[1] He criticized the use of the criminal law to enforce moral beliefs (e.g., the criminalization of homosexual behavior, abortion, prostitution, gambling, and narcotics), to enhance social and commercial services (e.g., the criminalization of public drunkenness, and bad check laws), and to provide additional powers for the police to control the streets (e.g., laws against vagrancy and "disorderly conduct"). Although these essays question whether it should be the function of the criminal law to penalize behavior in these categories, the main thrust of the essays is to urge a pragmatic re-appraisal of the *consequences* of using the criminal law in this way. The purport of his consequentialist analysis is conveyed by this passage:

> [H]ave you considered how the inevitable process of actual enforcement of such laws (a) so poorly serves the objectives you have in mind, and (b) in any event produces a variety of substantial costs, including adverse consequences for the effective enforcement of the criminal law generally? These practical considerations are so great that they should persuade you to decriminalize the law in these areas.[2]

Thus, even if readers differ on the question whether it is right for the criminal law to penalize such behavior, Kadish urges them to examine the consequences of that criminalization—requiring the police to engage in intrusive and sometimes demeaning investigations, partial and possibly discriminatory enforcement, a heightened risk of corruption and blackmail, and perhaps lowering general respect

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1 SANFORD H. KADISH, *The Crisis of Overcriminalization; More on Overcriminalization;* and *The Use of Criminal Sanctions in Enforcing Economic Regulations, in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 21–61 (1987).

2 *Id*. at 37.

for the criminal law. A combination of such consequences may lead even the most enthusiastic legal moralist to reconsider the wisdom of using the criminal law.

The need for such a consequentialist audit of criminal laws is no less today, and the spheres of criminal law to which Kadish applied it remain controversial. But there are further grounds for reassessing whether the criminal law is being extended beyond its proper ambit. Although in practice the reach of the criminal law in any particular jurisdiction is politically contingent, it may be possible to identify a number of principles that ought to govern its ambit, however contestable some of the considerations may be.[3] It is right to resist the idea that the criminal law is not simply another tool that legislatures may use in order to further whatever purposes they wish to pursue. To do so, however, we must set out to restate one or more core functions[4] of the criminal law—not in terms of a benchmark that will enable us to determine whether or not conduct of a certain kind may properly be criminalized, but in terms of one or more central functions surrounded and supported by principles relating to the proper reach of the criminal sanction.

I. CRIMINAL LAW AND SERIOUS WRONGDOING

There is a sense that the criminal law is not simply one of a range of techniques available to the legislature for regulating the conduct and activities of subjects. A wide range of regulatory regimes now offer themselves, from licensing to franchising, from financial regulation to environmental standards and so forth. Most modern democracies include a number of statutory regulatory bodies, charged with the task of regulating particular activities. The civil law also regulates conduct in many ways, although it typically leaves it to the aggrieved party to initiate enforcement measures. The criminal law, however, carries with it greater social and moral significance. Conviction of an offense tends to be regarded as something distinctive; it differs from an adverse civil judgment or an adverse regulatory decision in that it involves public censure for wrongdoing. The link between criminal law and punishment is therefore crucial; punishment, in the sense of the imposition of hard treatment, requires justification, which includes, as a necessary condition, the commission of a crime. This argument can and should be taken further; insofar as the punishment involves restrictions on liberty, and certainly if it involves a deprivation of liberty (e.g., imprisonment), only serious wrongdoing can be a sufficient justification for this.

The central function of the criminal law may thus be described as (a) the declaration of forms of wrongdoing that are (b) serious enough to justify (c) the

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[3] *See, e.g.*, Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004).

[4] For the avoidance of doubt, it should be stated that the term "function" is here taken to refer to the "point and purpose" of the law (rather than to the alternative meaning, which refers to the effects of the law); see D.J. GALLIGAN, LAW IN MODERN SOCIETY 196–98 (2006) on functions and functionalism.

public censure inherent in conviction and (d) punishment. To explore this description further, we should begin with (a) the declaratory function. Here we should attend to a distinction between form and substance. Our concern should not necessarily be the form in which crimes are drafted—which is often to provide that "whoever does x shall be liable to conviction and to a maximum punishment of y"—but the function (point and purpose) of the law.[5] That function is chiefly to declare what forms of wrongdoing are crimes and under what conditions. It is implicit that such conduct should not be done, and to that extent the criminal law serves a preventive function, it authorizes law enforcement officials (e.g., police and prosecutors) to take action to prevent such conduct from occurring and to pursue those who are reasonably believed to have committed crimes so as to bring them to court with a view to conviction and sentence. When a new criminal law is enacted, it is clear from the political and media discussion that the criminalized conduct should not be done. But typically there will also be discussion of the maximum punishment, and those who contemplate committing the new crime will be able to see what kind of official consequences (in terms of state punishment) they risk.

We next turn to the questions of (b) seriousness. Since our aim is to identify a central function, there is no need to pursue the inevitably unproductive search for a line or criterion that indicates the appropriate threshold of seriousness. We should be content to note that the Model Penal Code grants some recognition to the point by providing for a de minimis defense in Section 2.12. There will always be contestable lower boundaries—an assault may be minor or "technical," a stealing may involve property of very low value—but the essence of the central function is that major wrongdoing ought to be the subject of criminal offenses. The core conception of the criminal law is surely that it penalizes those who commit major wrongs. Arguments about the appropriate lower boundary for the criminal sanction do not detract from this core. Thus crimes such as murder, rape and robbery are part of almost every modern criminal code, and indeed as *mala in se* they feed the dominant conception of criminal law.

How serious is serious? Leaving that borderline question aside, we come to the point that (c) the conduct must be serious enough to justify the censure inherent in conviction. Now this raises questions of social fact—how much censure or stigma is inherent in criminal conviction? According to what factors does this vary (e.g., the social position of the convicted person, whether he or she has been convicted before)? Assuming that, in general, criminal conviction does carry a significant degree of public censure, it is right that such censure and any associated stigma should not fall on a person for a relatively venial transgression. This tends, therefore, to reinforce the conception of criminal law as a response to *serious* wrongdoing.

Lastly, the wrongdoing should be (d) serious enough to justify punishment. As argued earlier, it is because the criminal law operates as the ground for

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[5] *See* PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 143–56 (1997).

authorizing state punishment that it requires particular justification, and should not be used lightly. Conviction and punishment form the state's most condemnatory response to wrongdoing, and punishment itself is a strong invasion of the subject's autonomy (not to mention the way in which a conviction may have adverse consequences on other aspects of the individual's ability to flourish). Moreover, what requires justification is not only the punishability of the wrong, but also the extent of the maximum punishment. It would be an unacceptable use of state power and an invasion of autonomy for the sentence to be out of proportion to the degree of wrongdoing involved in the offense.

II. FAULT, GRADING AND RESTRAINING PRINCIPLES

This core function of the criminal law is not advanced as the sole legitimate function; for the moment, it stands as one central function that should be able to command wide agreement. But it is not a critical conception, and it does not yet enable us to identify unjustified or excessive uses of the criminal sanction—the overcriminalization that was the target of those early Kadish essays. One part of the internal architecture of this core function is that the crimes should be graded, so that more serious forms of homicide should be distinguished from less serious, and more serious forms of sexual assault from less serious varieties. This part of the function is not primarily relevant to the guidance of human conduct—it should be enough for that purpose to state, "[y]ou may not cause bodily injury or death to another person."[6] But it is an important element in the fair and representative labeling of offenses that can be said to form part of the core function.[7] It would not be enough to have a single offense of causing injury or death to another person because that would fail to reflect the different levels of harm and of culpability that are integral to our moral and social assessments of conduct. Fair and representative labeling should not be taken to mean that offenses should be replete with sub-divisions that are sometimes derided as "a law professor's dream" (I do not know how many law professors have such dreams); all that is required is a level of correspondence between the descriptive label, the maximum penalty, and social conceptions of wrongdoing. These are the kinds of debates that rightly occur when crimes such as murder and rape come up for consideration for reform. The words themselves are overlaid with social meanings and, even though those meanings may not be sharp enough to draw all boundaries, they may be used to exclude certain offense-definitions ("that's terrible but it's not rape"; "I don't think people would call that murder"). It would therefore be an instance of overcriminalization if a heavily stigmatic offense-label were applied to conduct that did not justify such a degree of censure. This may raise questions about very broad offense-definitions; for example, in English law there is a single offense of

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[6] *Id.* at 213.

[7] For discussion, see ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 88–90 (5th ed. 2006).

robbery, with a maximum penalty of life imprisonment, which applies to all forms of violence used (from a push to serious bodily injury), all forms of taking (from a few dollars to millions), and all forms of threat (from no threat to the use of a knife or gun).[8] I would argue that the breadth of this offense results in overcriminalization in the sense that some persons may attract this stigmatic label for conduct that does not deserve it (e.g., a push to snatch a bag, which finds itself labeled in the same way as a large-scale armed robbery).

This brief discussion of the grading of offenses brings us to one element in the core function that is important in its own right as well as in grading—the requirement of fault. Insofar as the criminal law is about wrongs done, it is usually implicit in that use of "wrong" that the offender was at fault, and that the category excludes accidental harm. As Kadish puts it, "[t]he central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable."[9] Most of the controversy about offenses of strict liability arises from the absence, or almost complete absence, of a fault requirement for conviction. Thus, the above reference to (a), the declaration of forms of wrongdoing, should be taken to imply and to include a requirement of fault. That is surely part of the core conception of the criminal law, to punish those who have culpably (rather than accidentally) done wrong. Identifying the minimum requirements of fault to satisfy this account of the core function is, of course, an area of intense controversy. If the orthodoxy is to require that the defendant did the act or omission either purposely, knowingly or recklessly, there remains much debate about the offenses in respect of which it is permissible to criminalize negligence.[10] Moreover, as hinted earlier, the various levels of fault also serve to grade offenses; the internal architecture of the criminal law consists, to a significant extent, of distinctions according to the degree of fault—homicide and assault offenses being prominent examples of this approach.

In the context of a discussion of overcriminalization, we will leave aside the major controversies about the appropriate fault requirements for criminal liability and look instead at constructive liability. In many American jurisdictions, as in England and Wales, many offenses impose criminal liability for a much greater harm than the one that the defendant intended or knowingly risked. The primary American example of this is felony-murder, but there are other examples of constructive liability including misdemeanour-manslaughter and (in England) liability for various offenses of wounding and assault. Are these examples of overcriminalization in the sense that the offender is labeled as a more serious criminal than he or she really is? Those who adhere strongly to the principle of correspondence would argue that this is indeed an excess of criminalization; in principle, the culpability requirement should be on the same level as the harm

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[8] For analysis, see *id.* at 388–89.

[9] Sanford Kadish, *The Use of Criminal Sanctions in Enforcing Economic Regulations*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 40, 51 (1987).

[10] For a thoughtful essay, see A.P. Simester, *Can Negligence Be Culpable*?, *in* OXFORD ESSAYS IN JURISPRUDENCE (Jeremy Horder ed., 2000).

requirement so that the two correspond. If the harm required is death, the culpability requirement should relate to killing, and not to some lesser harm (such as a felony, or serious bodily harm). The argument in favor of correspondence is that, without it, the culpability requirement hangs in the air.[11] All the reasons in favor of a culpability requirement (e.g., punishment without fault is simply not deserved, because it fails to respect individuals as choosing beings, and also removes their ability to predict consequences of doing a certain act) are truly reasons for requiring that the prohibited act or omission was done culpably, and "done culpably" does not simply mean "done with a scintilla of fault that could be related only remotely to the harm." It implies correspondence.

A different view accepts the importance of culpability, in terms of purpose or knowledge, but defends a moderate form of constructive liability. For this form of moderate constructivism, the crucial question is whether the defendant can be said to have changed his or her normative position by intentionally attacking another's protected interests.[12] Once the defendant has passed over this moral threshold, there can be no objection to holding him or her liable for the consequences that ensue because morally the most crucial element is that initial, intentional attack. That is what changes the defendant's normative position in relation to consequences that might otherwise be ascribed to chance. Thus stated, the doctrine could point in the direction of liability for murder on the basis of an intentional (minor) assault, and it is a characteristic of moderate constructivists that they do not embrace such extreme applications. Among the limiting principles that they propose are (a) that the intentional conduct that generates the change of normative position must be the commission of a crime that belongs to the same family as the (unforeseen) elements for which liability is in question, and (b) that there must be a measure of proportionality, or no great moral distance, between the intended wrong and the harm for which the defendant is held liable.[13]

This is not the place to debate the disagreement between supporters of the correspondence principle and moderate constructivists. In terms of overcriminalization, however, two points seem to follow from the preceding paragraphs. First, both approaches reject a full-blown constructivism that would place no limits on the magnitude of criminal liability flowing from an initial intentional act. For example, misdemeanor-manslaughter would be rejected on the

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[11] For a debate about the merit, or otherwise, of the correspondence principle, see ASHWORTH, *supra* note 7, at 87–88; VICTOR TADROS, CRIMINAL RESPONSIBILITY 93–98 (2005); Jeremy Horder, *A Critique of the Correspondence Principle*, 1995 CRIM. L.R. 759 (Eng.); Jeremy Horder, *Questioning the Correspondence Principle—A Reply*, 1999 CRIM. L.R. 206 (Eng.); Barry Mitchell, *In Defence of the Correspondence Principle*, 1999 CRIM. L. R. 195 (Eng.).

[12] The doctrine of "change of normative position" originated with John Gardner, in his *Rationality and the Rule of Law in Offenses against the Person*, 53 CAMBRIDGE L.J. 502 (1994), and was then adopted by Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L.R. 759 (Eng.).

[13] For a critical analysis, see Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 2 NEW CRIM. L. REV. (forthcoming 2008).

ground that there is too great a moral distance between the intentional (minor) assault and the resulting death. That is overcriminalization of an egregious kind. Secondly, supporters of the correspondence principle would wish to go further and characterize any constructive extension of liability as an excess of criminalization—and also, for that matter, as a breach of the principle of fair labeling, insofar as it results in conviction for causing a more serious consequence than was intended.

A further area of controversy is the law of complicity. Section 2.06 of the Model Penal Code holds a person to be an accomplice if, for the purpose of promoting or facilitating the commission of the offense, he solicits, aids or agrees to aid another person in planning or committing that offense.[14] Manifestly this may apply to a person who does only a minor act of assistance to the principal; yet, as in English law, such a person is liable to be convicted and punished as if he were a principal—creating a considerable distance between the culpable act of the defendant and the label of the offense, and thus an instance of overcriminalization. A possible extension to liability for complicity may be found in the burgeoning group of offenses for belonging to organizations; anti-terrorist laws in Britain contain offenses for being a member or professing to be a member of a proscribed organization, and supporting or wearing the uniform of a proscribed organization.[15] Such offenses are based on the proposition that mere membership or other overt support for such a group is a manifestation of sufficient commitment to their ideology and deeds as to justify punishment. Whether this counts as an example of overcriminalization, bearing in mind the right to freedom of expression, turns, to some extent, on the practice of and criteria for proscribing organizations.

III. RISK AND THE PREVENTIVE FUNCTION OF CRIMINAL LAW

Thus far we have adopted, as a working definition, a description of one core function of the criminal law as (a) the declaration of forms of wrongdoing that are (b) serious enough to justify (c) the public censure inherent in conviction and (d) punishment. That formulation implies that the wrongdoing is something that has occurred and that the responses, in terms of conviction and punishment, are justified by reference to what has occurred. However, a growing preoccupation of the criminal law is with risk, danger and the prevention of harm. To accommodate this, it would be necessary either to adapt and expand the core function just described, or to develop a description of a different function. The essence would be that the criminal law has the function of (a) declaring forms of conduct or omission that are (b) prohibited on the basis of their propensity to lead to significant risk or danger to an interest protected by the law, and which (c) justify the public censure inherent in conviction and (d) punishment. This is a preventive

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[14] MODEL PENAL CODE § 2.06(3) (1962).

[15] Terrorism Act, 2000, c. 11, §§ 11–13 (U.K.).

function and, since what are to be prevented are harms and wrongs of the kind that the primary function sets out to penalize, it is fair to describe this as a secondary function of the criminal law.

To explore this secondary preventive function, it is probably best to take together the first two elements: (a) the declaration of forms of conduct or omission that are (b) prohibited on the basis of their propensity to lead to significant risk or danger to an interest protected by the law. Three forms of criminal liability call for justification in this context—preparatory crimes, offenses of possession, and endangerment offenses. The essence of a preparatory crime is a criminal attempt, which (broadly speaking) consists of purposely taking a substantial step towards the commission of a substantive offense.[16] It is noteworthy that each of the elements of a criminal attempt performs both a justificatory and a restraining function. The requirement of a substantial step justifies intervention and conviction, on the ground that the defendant has gone far enough towards the commission of the substantive offense to show a firmness of resolve to commit it; the same requirement excludes the conviction of those who have reached only an earlier stage of preparation, recognizing that they may change their mind. The requirement that the act be done "purposely" is designed to justify intervention and conviction on the ground that it implies a resolve which is likely to result in the infliction of harm unless prevented; it also excludes the conviction of those who, although they may have done acts that amount to a substantial step, have not yet committed themselves to the substantive offense. In terms of overcriminalization, however, questions arise when the criminal law penalizes earlier acts that fall short of a substantial step. For example, in a political climate in which offenses claimed to be necessary "for the fight against terrorism" have been created in some abundance, the English legislature has made it an offense for any person, with intent to commit an act of terrorism or to assist another to do so, [to] "engage in any conduct in preparation for giving effect to his intention."[17] The requirement of purpose remains, but the "substantial step" test[18] is entirely removed in favor of the broadest of act requirements. Since "any conduct" could be neutral or otherwise innocent, the upshot is that liability for the new offense turns largely on proof of "purpose." Some would oppose this on the ground that it encourages the police to put pressure on suspects to make a confession, since little else is required for conviction. Others would oppose this extension of the law on the basis that it comes too close to punishment for thoughts (to which there are well-known objections), and that the other, more established heads of inchoate liability (attempts, conspiracy and incitement) are both adequate to deal with the dangers and incorporate proper safeguards against wrongful conviction. There are strong arguments, therefore, for regarding extensions of preparatory liability beyond the

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[16] *See* MODEL PENAL CODE, § 5.01 (1962).

[17] Terrorism Act, 2006, c. 11, § 5(1) (U.K.).

[18] In England and Wales, the regular test is whether the defendant did a "more than merely preparatory act," with the necessary intention. *See* Criminal Attempts Act, 1981, c. 47, § 1(1) (U.K.).

bounds set by the traditional inchoate offenses as instances of overcriminalization.[19]

Similar arguments may be brought against the extension of the inchoate offense of criminal solicitation or incitement. Section 5.02 of the Model Penal Code states that a person is guilty of solicitation if, with the purpose of promoting or facilitating its commission, he commands, encourages or requests another person to engage in specific conduct which would constitute such crime.[20] A recent British law creates an offense of directly or indirectly encouraging terrorism, including the making of statements that "glorify the commission or preparation of terrorist acts in the past or the future" in a context that people might infer that they are being encouraged to emulate such conduct.[21] Thus, the requirement of purpose or intention is replaced by the objective test of what people might reasonably be expected to infer from the statements made, and the conduct requirement is the vague notion of glorification. No doubt this extension of the criminal law is supported on the basis that, if it did not exist, those making such statements might defend themselves against charges of criminal solicitation or incitement by stating that their purpose was not to promote the commission of a crime but merely to amplify the meaning of a given religious text, or some similar reason. But the result is a potentially far-reaching offense that may (without the safeguard of a requirement of purpose) be regarded as an instance of overcriminalization.

What, then, of offenses of possession? They typically penalize a person for a circumstance (being in possession) that is remote from the commission of a substantive offense, and they typically include no requirement of purpose or intention to commit such a substantive offense.[22] The assumption is that the object or article thus possessed is an unambiguous signal of danger on its own—it is something that indicates an intention to commit a substantive offense and the possibility of doing so. Thus, offenses of possessing a knife, any "offensive weapon," an unlicensed gun, equipment for counterfeiting, and so forth, are all defended as culpable in themselves, in the absence of a good reason for the possession (such as the purpose of handing them over to the police or returning them to their owner). There is room for debate about the strength of the link between possession and illegal use, particularly where some kind of weapon is carried for "self-defense" in a neighborhood where there are good grounds for

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[19] This is not to ignore the argument that the current inchoate offenses are too extensive—an argument made strongly against the offense of conspiracy and also made against aspects of attempt and incitement. For discussion, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 373–423 (3d ed. 2001); ASHWORTH, *supra* note 7, at 395–422.

[20] MODEL PENAL CODE § 5.02 (1962).

[21] Terrorism Act, 2006, c. 11, § 1(3)(a) (U.K.).

[22] *See* Markus D. Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW (R.A. Duff & S.P. Green eds., 2005).

fearing attack. The urgency of that debate increases when a possession offense is combined with a reverse onus provision, penalizing simple possession unless the defendant proves an innocent purpose or reasonable excuse.[23] In view of the remoteness of the harm from the actual possession of an article, there is a strong case for arguing that these offenses should include a requirement of intention or willingness to engage in unlawful use of the article.[24] Slightly different in rationale are those offenses where the possession is an offense in itself because what is possessed is a prohibited article. Prime examples of this would be possession of narcotics or child pornography, which are prohibited for reasons that it is unnecessary to debate here, but are prohibited without the implication that their possession is preliminary to some further invasion of protected interests. Indeed, to some extent, as with possession of stolen property, it is more the implication that the possessor of child pornography assents to the abuse of the child that was necessary to produce the image(s). To that extent, this sub-group of possession offenses might be placed within the primary core function of criminal law rather than the secondary function now being examined.

We turn, thirdly, to the endangerment offenses. Immediately we confront a different paradigm; whereas the central notion in the primary core function is an attack, in the sense of "an action or omission that is intended to harm some value or interest," the central notion here is that of endangerment, arising where "by act or omission I create a significant risk that [another person] will suffer harm (a risk is 'significant' if it provides a reason against acting as I do, or for taking precautions in acting thus)."[25] Antony Duff argues that this indicates a difference in the moral character of the two kinds of conduct: the attacker is guided by the wrong reasons, whereas the endangerer is not guided by the right reasons, i.e. the reasons against acting thus.[26] Endangerments proper are typically reckless or negligent, but the offenses do not necessarily require that someone has actually been put in danger (let alone that the danger has materialized).[27] Two examples from English law are the offense of dangerous driving,[28] which may be committed even though no other person is actually endangered, and that of criminal damage

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[23] An egregious example may be drawn, again, from the Terrorism Act, 2000, c. 11 § 57 (U.K.), which makes it an offense for a person to possess "an article in circumstances which give rise to a reasonable suspicion that [its] possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism." This offense relates to the possession of any article, not necessarily an incriminating article, and the defense is for the defendant to prove an innocent purpose.

[24] *See generally* Andrew von Hirsch, *Extending the Harm Principle: 'Remote' Harms and Fair Imputation*, *in* HARM AND CULPABILITY 259 (A.P. Simester & A.T.H. Smith eds., 1996).

[25] R.A. Duff, *Criminalizing Endangerment*, *in* DEFINING CRIMES, *supra* note 22, at 43–46.

[26] *Id.* at 47.

[27] It is possible to conceive of an *intended* endangerment (such as setting fire to someone's house when they are known to be inside), and that should be categorized as an attack.

[28] Road Traffic Act, 1988, c. 52, § 2 (U.K.).

endangering life,[29] which may be committed recklessly and without anyone actually being put in danger. English law does not contain a general offense comparable to the Model Penal Code's offense of reckless endangerment. That offense, in Section 211.2, is committed where a person "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury," a formula that extends to potential as well as actual endangerment.[30] Concerns could be raised about the degree to which the general offense carries a fair warning; endangerment offenses in specific areas of conduct are typically attached to codes of practice (such as that for driving on public roads, or for safety at work, or for safety in dealing with hazardous substances) and thus carry fair warning, whereas only a general injunction to take care and think about the safety of others operates elsewhere.

The need to recognize the preventive function as one of the central functions of the criminal law is not in doubt; it would not make sense if the criminal law were purely a retrospective, blaming institution, since the seriousness with which it treats wrongs against physical safety, for example, points to the importance of preventing those wrongs from occurring. This supplies the rationale for the inchoate offenses and, less strongly, for many of the possession offenses. But once the argument focuses on prevention, the proper role of the criminal law must be scrutinized with vigor. Bentham, one of the greatest advocates of the preventive function, famously declared that "all punishment is mischief: all punishment in itself is evil,"[31] and went on to argue that punishment is an unjustified response where it is groundless, inefficacious, unprofitable, or needless. The reference to punishment being "unprofitable or too expensive" chimes with Sandy Kadish's argument about taking account of the consequences of criminalizing certain forms of conduct.[32] Our interest here is in Bentham's injunction against "needless" punishment: he wrote of the importance of the legislator considering whether "the purpose of putting an end to the practice may be attained . . . by instruction . . . [or] by informing the understanding."[33] Leaving aside Bentham's somewhat unworldly faith in the power of explanation and reasoning, a modern approach of this kind would be to emphasize the possibility of achieving prevention through design (of housing, shopping malls, transport systems and other public spaces), through the regulation of activities, through social provision (of housing, leisure facilities), and so forth. Criminal law, as the most intrusive and condemnatory state mechanism, should be regarded as a last resort, or as a "back-stop" for other non-criminal measures of prevention.

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[29] Criminal Damage Act, 1971, c. 48, § 1(2) (U.K.).

[30] MODEL PENAL CODE § 211.2 (1962).

[31] J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XIII, para. 2 (1948).

[32] KADISH, *supra* note 1, at 37.

[33] BENTHAM, *supra* note 31, at 287.

Specific endangerment offenses, such as careless or dangerous driving and their aggravated forms (in England, causing death by dangerous driving), may thus be seen as the back-stop to the codes of practice that govern driving and which must be understood before a person can obtain a driving license. Similarly, the offense of driving under the influence of excess alcohol operates as a preventive offense, since it penalizes a distinct source of danger. But what if the law goes further, authorizing civil courts to make preventive orders where they have evidence of undesirable behavior, and then making it criminal to breach such an order? This may be seen as a method of preventing disorderly conduct, but it is a method that raises strong doubts. In England, the most prominent example of this technique is the anti-social behavior order.[34] If a civil court is satisfied (according to civil rules of evidence) that the person has acted "in a manner that caused or was likely to cause harassment, alarm or distress" to others, and that an order is necessary to protect others from further anti-social acts, the court may make an order "which prohibits the defendant from doing anything described in the order" for a minimum of two years.[35] If "without reasonable excuse" a person breaks the terms of an anti-social behavior order, this is a criminal offense with a maximum penalty of five years imprisonment. One consequence of this law is that an order may be made prohibiting non-criminal conduct (such as swearing at others, entering a shopping mall, trampolining in one's garden), amounting to a personal criminal code for the defendant, and yet the penalty for violation is substantial and significantly above the maximum punishment for many substantive offenses, such as assault, drunk driving, dangerous driving and so on. Many objections can be made against this legislative technique—the prohibitions are set in civil proceedings; the prohibitions can be onerous and long in duration; many orders are made against children or mentally disturbed people; the maximum penalty is disproportionate—but it is one that is being adopted increasingly by the British legislature. It is now possible to list several orders that follow this pattern;[36] many of them can also be imposed by a criminal court, on sentence. Insofar as such orders prohibit conduct that is not otherwise criminal, they constitute an effective extension of the criminal law (for the defendant, at least) and therefore raise serious issues of overcriminalization—on the basis that the prohibited conduct has not been regarded as sufficient to justify the criminal sanction generally.

IV. REINFORCING REGULATION

How does one determine the core of the criminal law? Thus far we have discussed descriptions of two central functions of the criminal law, which may for brevity's sake be termed the declaratory and the preventive. But if there were to be

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[34] Crime and Disorder Act, 1998, c. 37, § 1 (U.K.).

[35] *Id.*

[36] *E.g.* Sexual Offences Act, 2003, c. 42, § 104 (sexual offences prevention orders) and § 123 (risk of sexual harm orders) (U.K.).

a purely numerical survey of criminal laws, the result in English law would be that both these central functions would be shown to be eclipsed by a third—that of reinforcing regulation. This was Kadish's topic in his essay on *The Use of Criminal Sanctions in Enforcing Economic Regulations*, although, as is apparent from its title, that essay is focussed on one particular form of regulation. The declaratory and preventive functions have a higher public profile, and convictions for such offenses tend to lead to stronger sentences and to greater public discussion. They are the paradigms, sometimes referred to as "real crime," whereas the regulatory function of criminal law rarely makes the news or the law reports. Even though the number of regulatory offenses on the statute books may be higher than the numbers of declaratory and preventive offenses combined, they account for a minority of convictions in the courts. This is largely because the criminal sanction is often regarded as the last resort in the regulatory sphere and because other methods of enforcement are used more frequently.

The concept of regulation must be approached with some care. Insofar as it refers to the regulation of human conduct, then it might be applied to the whole of the criminal law and many others areas of law too. More specifically, it has been argued that, whereas criminal law "reinforces social standards in condemning harmful actions," conduct subject to regulatory laws is "normally legitimate."[37] Thus, the concept of regulation should be used to indicate:

> the placing of legal restrictions on activities that are legitimate, the point of regulation being to limit or control them in some way and to some degree, but not to prohibit them. The justification is that regulatory standards are based on goals and values important enough to warrant the restrictions. Manufacturing is a valued activity, both economically and socially, but should not cause undue pollution. Similarly, creating employment is a social good, but it should be performed in such a way that the workers are treated fairly and with care for their safety.[38]

If this is the essence of regulatory law, then one of the roles of contemporary criminal law is to provide for the punishment of those who fail to conform to many of these regulations. These are sometimes termed "regulatory offenses," but that term risks ambiguity. Sometimes the connotation is that this class of offenses is less serious, but that cannot be accepted, since there are (in English law, at least) plenty of offenses in environmental protection or in financial market regulation that carry significant maximum sentences such as five or seven years imprisonment. Sometimes the implication is that these offenses are simply *mala prohibita* rather than *mala in se*, raising what Kadish refers to as "the problem of

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[37] D.J. GALLIGAN, LAW IN MODERN SOCIETY 231 (2007).

[38] *Id. See generally* ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY (1994)

moral neutrality."[39] This echoes the idea that the regulated conduct is legitimate, but there is a problem with that description. True as it is that these are not traditional wrongs like murder, rape and robbery, many of the offenses described as regulatory are concerned with reinforcing certain imperatives of the market which ensure fair dealing or with reinforcing environmental standards. In other words, what is regulated could be described as performing a legitimate activity in an illegitimate way. In moral terms conduct that undermines or skews the market may well be worse than some of the traditional wrongs. It is important, then, not to pre-judge the moral content of all regulatory laws; the morality of the market or the workplace can surely justify referring to certain acts as "wrongs."

The main controversy over this group of offenses in contemporary law is the use of strict liability; often, offenses of the kind that are described as regulatory have no fault requirement, or at least an attenuated requirement such as a defense requiring the defendant to prove that he was not at fault. This is the most significant distinction between regulatory offenses (under whatever description) and declaratory or preventive offenses. It was argued earlier that proof of fault is part of the very core notion of criminal law and criminal conviction, echoing Kadish's reference to "the stigmatization of the morally culpable" as the "central distinguishing aspect of the criminal sanction."[40] Those who support strict liability for regulatory offenses tend to argue that this use of the criminal law is justified on consequentialist grounds, that is, that the social benefits of harnessing the swift and punitive aspects of the criminal process outweigh the usual need for proof of fault and other safeguards. As Kadish pointed out, this reasoning is not persuasive:

> The conclusion appears difficult to resist that insistence on the criminal penalty [for these "regulatory" offenses] is attributable to a desire to make use of the unique deterrent mode of the criminal sanction, the stigma of moral blame that it carries. If so, the argument [that this is] regulation rather than penalization turns out in the end to be only a temporary diversion that does not escape the need to confront the basic issue: the justice and wisdom of imposing a stigma of moral blame in the absence of [a requirement to prove the moral] blameworthiness in the actor.[41]

Kadish goes on to argue that the Model Penal Code's approach of inventing a non-criminal category of "violations" seems a worthwhile means of reducing the incoherence.[42] Fault should be required if a criminal conviction is possible, but fault need not be required if the result is a non-stigmatic finding of a "violation," which is not a conviction and which may be followed by only a modest financial

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[39] KADISH, *supra* note 1, at 49.

[40] *Id.* at 51.

[41] *Id.* at 55.

[42] *Id.* at 59–61.

penalty. Such a move would reduce, with one stroke, an enormous amount of overcriminalization resulting from the use of the criminal law as a means of reinforcing regulations. Would it blunt the effectiveness of that regulation? Empirical studies of this particular aspect remain relatively sparse. Reform is currently being proposed in England and Wales, in the name of "better regulation." The draft *Regulatory Enforcement and Sanctions Bill*[43] follows two official reports[44] in providing for certain regulatory bodies to be able to impose (i) "fixed monetary penalties," (ii) "discretionary requirements" (which would include unlimited fines, conditions for operating, and restoration requirements), (iii) permanent cessation of activity notices, and/or (iv) temporary cessation of activity orders.[45] The idea is to give to these regulators powers to levy "alternative civil sanctions" that speed up the process (since they require less preparation and paperwork) and still act as a deterrent to businesses tempted to cut corners in their commercial practices.[46] The bill provides for regulators to publish their sanctioning policies, for a process of negotiation over the terms of the civil orders, and for appeals to a new regulatory body—all of which occurs outside the criminal process and without access to the rights that defendants in the criminal process may claim. Some of the civil penalties could be swingeing deprivations, particularly under the "discretionary requirements," but the thrust of the bill is that, since they do not involve a criminal conviction, the argument in favour of "due process" rights is weakened, and the inconsistency noted by Kadish in his 1963 essay is avoided.[47]

The proposed English scheme would leave the strict liability offenses in the criminal law untouched; the thrust of the reform is that the alternative civil sanctions would be much more effective (and cost-effective) for regulators to use, and that the invocation of strict liability offenses would be rare. Conceptually, however, those offenses would continue in their function of reinforcing regulation, and an alternative civil sanction under the new scheme would be imposed by the regulator *for an offense*. Is this just a subterfuge, designed to reduce the rights of defendants? The European Court of Human Rights has developed a kind of anti-subversion doctrine in order to ensure that the proper safeguards for criminal proceedings are not circumvented. The court holds that the question whether a person is charged with a criminal offense should be decided according to the

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[43] CABINET OFFICE, DRAFT REGULATORY ENFORCEMENT AND SANCTIONS BILL AND EXPLANATORY NOTES, 2007, Cm. 7083 (presented to Parliament in May 2007 by the Minister for the Cabinet Office).

[44] HM TREASURY, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT, 2005, *available at* http://www.berr.gov.uk/files/file22988.pdf; CABINET OFFICE, REGULATORY JUSTICE, MAKING SANCTIONS EFFECTIVE, 2006, *available at* http://bre.berr.gov.uk/regulation/documents/pdf/macrory_penalties.pdf.

[45] *See* CABINET OFFICE, *supra* note 43, at paras. 5–7.

[46] *Id.*

[47] KADISH, *supra* note 1, at 55.

autonomous meaning of that phrase in the European Convention on Human Rights.[48] In other words, the court will look at the substance of the matter, and not allow states to label proceedings "civil," "administrative," or "regulatory" as a means of circumventing the criminal safeguards. Thus, in *Ozturk v. Germany*,[49] the power to impose fines for minor road traffic offenses had been transferred to administrative authorities, as part of the creation of a category of "regulatory offences."[50] The defendant complained that he had been denied the right to a fair trial (denial of an interpreter), and the European Court held that in substance the offense remained criminal and therefore all the "due process" rights applicable to criminal proceedings should have been available to the defendant.[51] In particular, the court noted that the penalty was "intended to be punitive and deterrent in its effect"—echoing the inconsistency point made by Kadish.[52] Similarly, in *Schmautzer v. Austria*,[53] the defendant had received a fixed penalty fine for failing to wear a seat-belt when driving.[54] This was treated as an administrative offense in Austrian law and, although he had the right to appeal against the fine, there was no right to an adversarial trial.[55] The European Court of Human Rights held that the offense was criminal in substance, not least because the administrative fine imposed on the defendant was accompanied by a notice of committal to prison in the event of non-payment, and therefore he should have been accorded the right to an adversarial hearing.[56] There are several other judgments along the same lines and the point is this: the procedure in the draft English legislation provides for an appeal against the imposition of one of these "alternative civil sanctions," but not for an adversarial trial in a criminal court.[57] It is doubtful whether that is compliant with the European Convention on Human Rights. One comparison is with the many "fixed penalty" offenses that now exist in English criminal law, where the police may issue a fixed penalty for various motoring offenses, for public order offenses such as public drunkenness, and even for theft from a shop (where the goods stolen are valued at less than £200).[58] If the defendant is unwilling to accept the fixed penalty he has the right say so and to invite

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[48] The leading judgment is *Engel v. Netherlands*, 1 Eur. H.R. Rep. 647, 677–80 (1976). *See also* HUMAN RIGHTS AND CRIMINAL JUSTICE 191-236 (Ben Emmerson, Andrew Ashworth & Alison Macdonald eds., 2007).

[49] Osturk v. Germany, 6 Eur. H.R. Rep. 409 (1984).

[50] *Id.* at 411.

[51] *Id.* at 424–25.

[52] *Id.* at 424.

[53] Schmautzer v. Austria, 21 Eur. H.R. Rep. 511 (1995).

[54] *Id.* at 513.

[55] *Id.* at 516.

[56] *Id*. at 517.

[57] *See* CABINET OFFICE, *supra* note 45, at paras. 116–17.

[58] For discussion, see Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law*, 2 CRIM. L. AND PHIL. 21, 21–51 (2008).

prosecution in court—where full due process rights will, of course, be available.[59] That avenue is not open to those subjected to an alternative civil sanction under the new bill.

This analysis suggests that this type of "solution" to the vexed problem of strict liability regulatory offenses may not be viable, at least not in a European jurisdiction. If a system is created that is intended to censure the defendant in a punitive manner, it may still be necessary to accord to that defendant the full protections available in a fair trial. This does not mean, however, that there must be a trial leading to a criminal conviction. It means that the proceedings, which may still be civil in character, must at least respect the safeguards set out in the Convention for the Protection of Human Rights and Fundamental Freedoms for persons accused of criminal offenses—presumption of innocence, right to full notice of charge, time to prepare defense, legal assistance (where necessary), right of confrontation, right to an interpreter, and so on.[60] If those safeguards can be incorporated into the administrative proceedings, the system would be compatible with European human rights law. For a government pursuing simplicity and cost-effectiveness, however, such a conclusion would be unwelcome. They want to erect a punitive structure without calling it criminal, and without the concomitants of fault and due process rights. That should be resisted. If a truly civil or administrative approach is to be developed, then the criminal offenses have to be removed, or at least kept separate, and the range of sanctions made compatible with a non-criminal framework. If the criminal offenses are to be retained, then they should be dealt with by courts observing the full criminal safeguards—perhaps with new powers, such as "publicity orders" and "remedial orders" for corporate defendants.[61]

V. CONCEPTIONS OF OVERCRIMINALIZATION

In order to determine whether one has too much of a certain thing, it is necessary to decide what is the right amount. Any discussion of overcriminalization must therefore start from a conception of the mean, of the right amount of criminal law. Accepting the controversy surrounding many criminal laws, it has been argued above that it is still possible to identify some core functions and core doctrines of the criminal law. Three central functions have been described:

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[59] *Id.*

[60] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Apr. 11, 1950, Europ. T.S. No. 005. The European Court of Human Rights has implied other rights into the general right to a fair trial, such as the privilege against self-incrimination and the right not to be entrapped.

[61] Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, §§ 9–10 (U.K.).

A. The Declaratory Function: the declaration of forms of wrongdoing that are serious enough to justify the public censure inherent in conviction and punishment.

B. The Preventive Function: the declaration of forms of conduct or omission that are prohibited on the basis of their propensity to lead to significant risk or danger to an interest protected by the law, and which justify the censure inherent in conviction and punishment.

C. The Regulatory Function: the reinforcement of regulation through the declaration of forms of conduct, often without requiring proof of fault, which amount to non-compliance with a regulatory scheme.

The regulatory function is itself contested, many arguing that it should not have such a prominent place, or indeed any place, in contemporary criminal law. As discussed in Part IV above, better approaches would be either to move this conduct out of the criminal law into a genuinely civil or administrative structure, or to accept that (some of) these offenses belong in the criminal law and therefore to extend proper fault requirements and due process rights to them. However, the regulatory function is prominent in many systems of criminal law, and must be acknowledged as such, even by its opponents.

It has been argued above that, if one takes seriously the declaratory function and the preventive function of criminal law, certain restrictive principles should be recognized as flowing from them. It was argued in Part II above that properly associated with the declaratory function are the fault principle in criminal law, the principle of fair and representative labeling, and the principle of correspondence. Insofar as these principles are not invariably followed, this gives rise to overcriminalization through, for example, conviction and punishment without a fault requirement, labeling offenders as serious when their offenses are relatively minor, and forms of constructive criminal liability (even where the constructivism is only moderate). It was argued in Part III that properly associated with the preventive function are the requirements of purpose and substantial commitment in preparatory crimes, the requirement of purpose in possession offenses, and the requirement of fair warning for endangerment offenses. Insofar as these principles are not invariably followed, this gives rise to overcriminalization through, for example, the introduction of preparatory offenses constituted by "any act" done with a given purpose, and the creation of possession offenses for articles not dangerous in themselves. Towards the end of Part III, a hybrid type of offense was mentioned—a civil preventive order, reinforced by an offense of breaching that civil order. This formed a bridge to Part IV, where other gambits for taking advantage of the censuring power of the criminal law without regard to the normal safeguards and principles were evident (civil offenses, violations, and alternative civil sanctions). These, perhaps, are the new forms of overcriminalization. They are schemes that may pass the Kadish consequentialist test set out at the beginning

of this article—whether the costs and adverse consequences of a new regulatory format are outweighed by the efficiency gains[62]—but they also breach important principles and, in doing so, try to take the benefits of the criminal law without submitting to the burdens. It is fully in the spirit of Sandy Kadish's writings to oppose this.

[62] *See* KADISH, *supra* note 1, at 36–39; *supra* note 2 and accompanying text.