

The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation

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Abstract

In this paper, I consider Ripstein and Dan-Cohen's critiques of the 'harm principle'. Ripstein and Dan-Cohen have asserted that the harm principle should be jettisoned, because it allegedly fails to provide a rationale for criminalising certain harmless wrongs that ought to be criminalised. They argue that Kant's second formulation of the categorical imperative and his concept of 'external freedom' are better equipped for ensuring that criminalisation decisions meet the requirements of fairness. Per contra, I assert that Kant's deontological theory is about identifying morally wrongful and rightful conduct: it does not tell the legislature which of those wrongs justify a criminal law response in accordance with the requirements of fairness and justice. Some wrongdoers deserve censure and the stigma that results from criminalisation, but others do not. Kant's deontological theory does not limit the scope of the criminal law merely to those wrongs that deserve a criminal law response. Fair and principled criminalisation requires more than mere wrongdoing. I assert that it is only fair to criminalise wrongs when further normative reasons can be invoked to justify the use of the criminal law as a means for deterring the unwanted conduct. While 'harm to others' is not the only normative reason that can be used to demonstrate that it is fair to criminalise a given act, it is the justification that has the greatest reach. It

^{*} (MPhil., Ph.D. Jesus College, Cambridge). I would like to thank Professor Andrew von Hirsch for his comments on an earlier draft of this paper; Dr. Nigel Simmonds for his suggestions and many valuable discussions on this topic; and Professor Baroness O'Neill for her helpful advice on the prospects of developing a Kantian theory for ensuring fair criminalisation.

would not be fair to criminalise mere wrongdoing (that is, every violation of freedom: trespass to goods etc. or every violation of the categorical imperative: every false promise etc.). Nor is it possible to distinguish one violation of freedom from the next, as freedom is not measurable. Thus, murder and trespass to goods would be equally wrong and equally criminalisable in Kant's scheme. A further problem with Dan-Cohen's use of the second formulation of Kant's categorical imperative is that it aims to be an inclusive criterion for identifying conduct that is prima facie criminalisable, but this inclusive approach does not explain the wrongfulness (or in Dan-Cohen's use of the categorical imperative the criminalisableness) of harming animals. In this paper, I demonstrate that the harm principle is able to meet the challenges raised by Ripstein and Dan-Cohen. I also demonstrate that it offers superior criteria for ensuring that criminalisation decisions are fair, just and principled than is offered by Kant's deontological theory.

Kantian Criteria for Limiting Criminalisation-I.

A. Introduction

Dan-Cohen and Ripstein have argued that the harm principle should be jettisoned as a normative principle for ensuring principled and fair criminalisation. I have argued elsewhere that the aim of the harm principle is to ensure that criminalisation decisions meet the requirements of fairness and justice.¹ Conduct is criminalisable when it involves wrongful harm that is fairly imputable to the person being (criminalised) blamed for that harm.² Dan-Cohen³ asserts that the harm principle should be replaced with what he calls the 'dignity principle', that is, 'the main goal of the criminal law ought to be to defend the unique moral worth of every human being'. According to this theory it is fair to criminalise an agent's actions when they use another person as mere means to an end. Ripstein draws on Kant's philosophy more generally

¹ Dennis J. Baker, 'The Moral Limits of Criminalising Remote Harms,' (2007) 10(3) *New Criminal Law Review* 370; Dennis J. Baker, 'The Moral Limits of Consent as a Defense in the Criminal Law,' [2008] 11 *New Criminal Law Review*.

² I generally refer to fairness and justice in the traditional sense, *i.e.*, fairness is about making decisions based on notions of justice. And the concept of justice means treating people as they deserve, that is in accordance with just deserts. As von Hirsch and Ashworth note with respect to fairness in the sentencing context: 'The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor's conduct': Andrew von Hirsch and Andrew Ashworth (ed), *Proportionate Sentencing: Exploring the Principles*, (2005), 4.

³ Meir Dan-Cohen, 'Defending Dignity' (2002) Paper 99 *Boalt Working Papers in Public Law*, University of California, Berkeley.

and proposes a ‘sovereignty principle’, which holds that violations of ‘equal freedom’ provide the basis for fair, just and principled criminalisation.⁴ They claim that the harm principle is under-inclusive in that it only criminalises harmful wrongs. They erroneously argue that there are certain wrongs that cannot be criminalised under the harm principle, because they are harmless wrongs. In this paper, I demonstrate that the harm principle can meet the challenges outlined by Ripstein and Dan-Cohen. I also show that the harm principle offers superior criteria for ensuring fair and just criminalisation.

Dan-Cohen and Ripstein seem to overlook the fact that the harm principle is not merely about minimizing criminalisation, but rather it is about ensuring that criminalisation decisions meet the requirements of fairness and justice. Hence, the harm principle is not merely about limiting the scope of the criminal law. Instead, it is about limiting the criminal law by imposing appropriate moral limits on it, that is, demanding that conduct only be criminalised when it is normatively fair and just to do so. Kant’s deontological philosophy emphasizing ‘moral autonomy’ and ‘respect for persons’ does not tell the legislature which wrongs can be fairly criminalised. Nor can this type of deontological theory explain what is special about the punitive response. As Murphy notes: ‘The purpose of law is to maintain a system of peace wherein each citizen will enjoy the most extensive liberty compatible with like liberty for others. This is the only reason why rational autonomous persons would contract to give up liberty and only in terms of this end is state coercion justified. The role of criminal punishment in such a system is *instrumental*—it is justified solely by reference to the end of maintaining a peaceful system of ordered liberty’.⁵

While the harm principle could be invoked to increase the scope of the current criminal law, its growth would reach an ultimate limit and meet the requirements of fairness, because the harm principle only criminalises intentional wrongdoing that poses a real risk of harm. There are some wrongful torts that involve intentional wrongdoing such as some forms of defamation. However, it would not be unjust or unfair to criminalise intentional defamation that results in harm, as it would be fair to punish the defamer for her wrongful wrongdoing.⁶ It is worth bearing in mind that there

⁴ Arthur Ripstein, ‘Beyond the Harm Principle,’ (2006) 34(3) *Philosophy & Public Affairs* 216.

⁵ Jeffrie G Murphy, ‘Does Kant Have a Theory of Punishment’ (1987) 87 *Columbia Law Review* 516.

⁶ To some extent this is attributable to the way in which the criminal and civil law evolved out of one body of law. For a convenient and compendious overview of the criminal law’s historical development and its relation to tort law see Carleton Kemp Allen (ed), *Legal Duties* (Clarendon Press, Oxford, 1931) 221-252; JA Jolowicz (ed), *Lectures on Jurisprudence* (Athlone Press, London, 1963) 344-358. See also David G Owen (ed), *Philosophical*

are not many torts that would be brought within the purview of the criminal law just because they result in wrongful harm. Firstly, the harm principle is supplemented with an elaborate set of mediating principles that would speak against criminalising most civil wrongs.⁷ Secondly, the requirement of intention (*mens rea* or gross recklessness) removes a vast range of harms from the scope of the criminal law. The requirements of the *mens rea* doctrine prevent harms that result from accidents or mere negligence from being criminalised.⁸ Nevertheless, some *intentional* wrongs that are currently dealt with pursuant to the civil law could be brought within the purview of the criminal law without violating the requirements of fairness. The problem with Dan-Cohen and Ripstein's use of mere moral wrongdoing as a basis for criminalising conduct is that it would allow a range of mere wrongs to be brought within the purview of the criminal law regardless of the requirements of fairness. The harm principle, at least, requires any expansion of the criminal law to meet the requirements of fairness.

As I noted above, Ripstein draws on the idea of equal freedom that is derived from Kant's *Universal Principle of Right*⁹ in an attempt to develop a theory of freedom (sovereignty), which he claims provides a superior criterion

Foundations of Tort Law (Clarendon Press, Oxford, 1995).

⁷ It is important to point out that these proposed coercion-legitimising principles do not even purport to state necessary and sufficient conditions for justified state coercion. A liberty-limiting principle does not state a *sufficient condition* because in a given case its purportedly relevant reason might not weigh heavily enough on the scales to outbalance the standing presumption in favour of liberty. That presumption is not only supported by moral and utilitarian considerations of a general kind; it is also likely to be buttressed in particular cases by appeal to the practical costs...': Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, Vol. I (O.U.P., New York, 1984), 10; 187-190; 215-216. See also Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others* Vol. II, (O.U.P., New York, 1985). Generally, Carelton Kemp Allen is correct in holding that: 'Crime is crime because it consists in wrongdoing which directly and in *serious degree* threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured': *ibid.* 233-235. This publicness of criminal wrongs distinguishes them from private wrongs and would be a factor that would weigh heavily when applying Feinberg's mediating maxims. Similarly, a pragmatic application of the mediating principles would speak against criminalising intentional wrongful harms (*i.e.*, some forms of defamation) that have historically been dealt with under the civil law.

⁸ Baker, above n 1.

⁹ Ripstein calls his principle the 'sovereignty principle'. He asserts that the most forceful expression of it is found in 'Kant's political philosophy, particularly in the *Doctrine of Right*, Part One of the *Metaphysics of Morals*': Ripstein, above n 4, 215.

for ensuring that criminalisation decisions meet the requirements of fairness. Dan-Cohen adopts the narrower criterion offered by Kant's second formulation of the *Categorical Imperative*. Before I outline Dan-Cohen and Ripstein's arguments for jettisoning the harm principle, I will briefly outline the core elements of Kant's idea of human dignity and freedom as laid down in the *Groundwork*. I do this to demonstrate that neither Dan-Cohen nor Ripstein provide a normative argument for ensuring fair criminalisation, but rather they merely apply Kant's deontology to a normative problem (ensuring that criminalisation decisions are fair and principled), which it is not equipped to deal with. If they are not arguing that conduct should only be criminalised when it is fair to do so, then they have misunderstood the purpose of the harm principle as a constraint on criminalisation. I will deal with the two arguments separately even though there is some overlap in their claims. I will start by outlining what is meant by respect for persons. I will then consider this in the context of the arguments presented by Dan-Cohen. In the second part of this paper, I will outline and critique Ripstein's sovereignty principle and defend the harm principle in light of it.

B. Dan-Cohen's Use of Kant's Categorical Imperative as a Principle for Ensuring Fair Criminalisation

According to Kant, duty requires that we treat others, and ourselves, in a manner that is consistent with human dignity.¹⁰ The aim of Kant's theory is to provide a precise criterion for making moral judgments, not for judging whether it is fair to criminalise conduct that has been judged as wrongful. The core question is: how can we determine what actions are consistent with moral respect for ourselves, and others? Kant argued that our capacity for rational thought provides a sound basis for making such determinations. The basic idea behind Kant's moral law is that whenever a moral agent acts in an intentional manner, the agent's action implicitly warrants (or "wills") the same action for everyone, and if a moral agent's act complies with his or her moral duties (e.g., the duty to respect humanity as an end in itself), then the action is one that he or she could *rationally* (that is, consistently) recommend (or will) for all other moral agents.¹¹ In the first section of the *Groundwork*,¹² Kant attempts to derive his core principle of morality from ordinary moral thought.

¹⁰ Carl Joachim Friedrich (ed), *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings* (The Modern Library, New York, 1949) 140 et seq.

¹¹ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785), translated from the German by Herbert James Paton, (ed), *The Moral Law* (Hutchinson University Library, London, 1972) 57 et seq.

¹² *Ibid.*

Specifically, he attempts to derive this principle from considerations concerning what is unconditionally good.¹³

Kant claims that the only thing that is unconditionally good is a 'good will'. Kant asserts that the consequences of an action done with a good will and the aims and inclinations of the agent with the good will are morally insignificant. What, then, is it to act with a good will? It is, Kant argues, a matter of doing one's duty for duty's sake, regardless of one's feelings and the consequences of doing so. One acts for duty's sake (rightfully) when she acts from principles that accord with the fundamental principle of morality.¹⁴ This is expressed in the first formulation of the fundamental principle of morality: *The Formula of Universal Law*: 'Act only on that maxim through which you can at the same time will that it should become a universal law'.¹⁵

The general thrust of this command is that those maxims that are universalizable are in accord with duty; to act out of them would be morally creditable.¹⁶ Universalizable maxims are those that we can act on.¹⁷ For example, making false promises is wrong and is not universalizable, because every rational being would not adopt such a law as a principle of action.¹⁸ Likewise, it would not be morally acceptable for *x* to rape *y*, because the victim could not act on *x*'s maxim of rape.¹⁹ A person can will her maxim as a universal law if she can do so without contradiction.²⁰ The maxim that, 'One should rape others when it is expedient to do so' could not become universal law, because the victim is being asked to serve an end in which she cannot be given adequate reasons for sharing or sanctioning. She is being asked to allow herself to be treated as a mere means, which degrades her humanity.²¹ For Kant that categorical imperative can only exist if we are able to base it on something that has an absolute worth.²² That something is the existence of rational beings, which, he says, is an end in itself. This leads to Kant's preferred formula for applying the moral law, that is, *The Formula of*

¹³ Ibid. chapter 1.

¹⁴ Ibid.

¹⁵ Onora O'Neill (ed), *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, Cambridge, 1989) 126-127.

¹⁶ Ibid 134.

¹⁷ Paton, above n 6, 20.

¹⁸ Ibid. 67-68.

¹⁹ O' Neill, above n 15, 139.

²⁰ Christine M Korsgaard (ed), *Creating the Kingdom of Ends*, (Cambridge University Press, Cambridge, 1996) 14.

²¹ Paton, above n 11, 71 *et seq.*

²² Ibid. 90-91.

Humanity as an End in Itself.²³ Kant premises the categorical imperative on humans because they have an absolute worth as persons.²⁴

‘The practical imperative will therefore be as follows: *Act in such a way that you always treat humanity whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end*’.²⁵ There are two separate aspects to fulfilling the requirements of the second formulation of the categorical imperative. Firstly, one must not act on maxims that (negatively) use persons as mere means, because this would be to act on maxims that no other could possibly sanction.²⁶ Secondly, we are required to avoid the pursuit of ends that others cannot share. We do this by treating them (positively) as ends in themselves.²⁷ It is this formulation of the categorical imperative that is the foundation of the principle of respect for persons. Persons are ends in themselves and can be a source of definite laws, because they have an absolute worth. Rational agents differ from ‘inanimate things’ in that they are self-legislating, because they give themselves the laws by which they act. Conversely, inanimate objects (and non agents: animals *etc.*) such as a rocks act according to the laws of nature. A rock or an animal cannot give itself the moral law.

The moral significance of the distinction between things and persons is that the will of the rational moral agent is inherently good (a person who has a good ethical disposition is to be valued because of their goodness), and it is the rationality of this will that is the foundation for this inherent goodness.²⁸ Therefore, it is immoral to frustrate the *autonomy* of the rational will by using the moral person as a mere means. In other words, one can permissibly use things, such as rocks or animals, in any manner they deem fit, but one cannot permissibly use a person in any way he or she deems fit, because the self-legislating autonomy of the rational will has an inherent (worth) goodness. Timmons notes that:²⁹ ‘Our natures as autonomous agents provide the objective basis for right and wrong action. Actions that destroy or degrade humanity are *prima facie* wrong; actions that promote humanity are *prima facie* right. Thus, for example, maintenance of one’s own autonomy requires that we omit actions that destroy or degrade autonomy’.

²³ Hans Reiss and Hugh Barr Nisbet (eds), *Kant’s Political Writing*.(Cambridge University Press, Cambridge, 1970) 18-19.

²⁴ Paton, above n 11, 91.

²⁵ Ibid.

²⁶ O’Neill, above n 15, 113.

²⁷ Ibid.

²⁸ Cf. Richard Dean, ‘What Should We Treat As An End In Itself,’ (1996) 77(4) *Pacific Philosophical Quarterly* 268.

²⁹ Mark Timmons (ed), ‘Motive and Rightness in Kant’s Ethical System,’ in Mark Timmons, *Kant’s Metaphysics of Morals: Interpretative Essays*, (O.U.P., Oxford, 2002) 286.

When x recognises that y is entitled to respect as a person, x refrains from treating y as an inanimate object or as a mere thing.³⁰ Treating other agents (persons) as *mere* means has the effect of overpowering and damaging their agency. It destroys or undercuts their agency and willing.³¹ When we act on maxims or pursue ends in ways that pre-empt the willing of others and ‘deny them the possibility of collaboration or consent—or dissent’,³² we use them as tools or instruments in order to implement our own project. For this reason, we have a perfect duty to refrain from making false promises to others, because they cannot consent to us acting on such a maxim. Kant uses the false promising exemplar to demonstrate that it would be irrational for *others* (promisees) to agree to certain maxims.³³ According to the second formulation of the categorical imperative it would be wrong to make false promises, because it treats the recipients of the promises *merely* as means to an end, rather than as ends in themselves with an absolute worth. The promisor uses the promisee’s *capacity* to set and act on ends as a tool, a capacity she enjoys as a rational human being.³⁴ But would we want to criminalise all false promising? I would think not. Unfortunately, the categorical imperative does not make distinctions between non-criminalisable morally wrongful promising (*i.e.*, we would not criminalise x for falsely promising his wife that he will not sleep with the babysitter again if she lets him move back into the matrimonial home) and criminally wrongful promising (*i.e.*, the lying director who commits corporate fraudulent misrepresentation, or perjury that results in harm and so forth).

The categorical imperative distinguishes between treating someone as a *mere* means to an end and as a means to an end. It is possible to treat others as means to our ends without disrespecting them as persons, so long as we treat them as a *means* and as *ends* at the same time.³⁵ For example, it is not disrespectful to use the services of those who have an *end* in serving us such as restaurant waiters, toilet cleaners, trash collectors, lawyers, professors, doctors and so on. They are not only able to consent to our maxim, but also *share* our end as it fulfils their ends of earning a living and so on. There is nothing wrong, for Kant, with such usage of other people since this use is cooperative, it is not use of a person as a mere means.³⁶ It would not be disrespectful for

³⁰ Thomas E Hill, ‘Humanity as an End in Itself’ (1980-1981) 91 *Ethics* 84, 85-90.

³¹ O’Neill, above n 15, 138.

³² *Ibid.*

³³ Paton, above n 11, 92.

³⁴ Dennis Klimchuk, ‘Three Accounts of Respect for Persons in Kant’s Ethics’ [2003] 7 *Kantian Review*, 53.

³⁵ Allen W Wood (ed), *Kant’s Ethical Thought*, (Cambridge University Press, Cambridge, 1999) 143.

³⁶ *Ibid* 115.

researchers to use consenting human subjects as tools for gaining empirical results for the purposes of his or her postdoctoral or professorial research.³⁷

Dan-Cohen's Criticisms of the Harm Principle-II

A. Feinberg's Concept of Harm

In labelling conduct as criminal the legislature is declaring that it is unacceptable for its citizens to engage in the proscribed conduct—this effectively limits the choices available to citizens. Feinberg argues that a responsible legislature should only apply the crime label to conduct that wrongfully harms (or offends) others.³⁸ He asserts that it would not be unfair to criminalise activities that wrongfully harm or offend others.³⁹ If a person wrongfully harms others, she gets her just deserts when she is held criminally responsible. What is meant by harm? Constructing notions of harm requires one to unpack Feinberg's harm principle. Feinberg⁴⁰ expounds harm in three senses: (i) harm as damage, (ii) harm as a setback to interests, and (iii) harm as wrongdoing. Harm as used in the harm principle is an amalgamation of senses two and three. Harm must be caused by *wrongful* conduct to be a candidate for criminalisation. Harm occurs under the harm principle when *x*'s interests are setback by the wrongful conduct of *y*.⁴¹ The concept of harm as used by Feinberg represents 'the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense'.⁴²

The term interest when used in this way refers to a stake that a person has in his or her well-being. According to Feinberg, one's interests taken as a whole, consist of all those things that one has a stake in. In the singular, one's personal interest 'consists in the harmonious advancement of all one's interests in the plural'.⁴³ These interests, or as Feinberg puts it, 'the *things* these interests are in, are distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish'.⁴⁴ The trichotomy of interests delineated in the harm principle includes welfare interests and those

³⁷ Ruth Macklin and Susan Sherwin, 'Experimenting on Human Subjects: Philosophical Perspectives' [1975] 25 *Case Western Law Reserve Review* 434.

³⁸ Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, Vol I (O.U.P., New York, 1984) 26.

³⁹ *Ibid.*

⁴⁰ *Ibid* 215.

⁴¹ *Ibid* 33-34.

⁴² *Ibid* 36.

⁴³ *Ibid* 34.

⁴⁴ *Ibid.*

security and accumulative interests that cushion our welfare interests.⁴⁵ Welfare interests are at the core of Feinberg's scheme. They are interests of a kind shared by almost everyone 'in the necessary means to [their] more ultimate goals, whatever the latter may be, or latter may come to be.'⁴⁶ Welfare interests include our interest in prolonging the continuance of our life for a foreseeable period of time, preserving our physical health and security, maintaining minimum intellectual acuity and emotional stability, being able to engage in social intercourse and to benefit from friendships, sustaining minimum financial security, sustaining reasonable living conditions, avoiding pain and grotesque disfigurement, preventing unjustified anxieties and resentments (intimidation), and to be free from unwarranted coercion.⁴⁷ They are those interests in goods and conditions that we all need independent of our individual life plans. Everyone has a necessary stake in these kinds of interests, as they are the requisites of our well-being.⁴⁸

Feinberg distinguishes important welfare interests from those interests that merely concern a person's more ulterior aims.⁴⁹ Our ulterior aims might include the goal to own a dream house, to have a prominent career as a movie star or as a politician *etc.*⁵⁰ A person's more ultimate goals and wants (*e.g.*, building a dream house, gaining a political or professional position, solving some vital scientific question, raising a family, achieving spiritual grace *etc.*) are not directly protected by the law.⁵¹ 'If I have an interest in making an important scientific discovery, creating valuable works of arts, or other personal achievements, the law will protect those aspirations by guarding my welfare interests that are essential to it. But given that I have my life, health, economic adequacy, liberty, and security, there is nothing more that the law (or anyone else, for that matter) can do for me; the rest is entirely up to me'.⁵²

⁴⁵ Ibid 37; 207.

⁴⁶ Ibid 37.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ 'But in respect at least to welfare interests, we are inclined to say that what promotes them is good for the person in any case, whatever his beliefs or wants may be. ...[T]here may be correspondence between interest and want, but the existence of the former is not dependent upon, nor derivative from, the existence of the latter': *ibid* 42.

⁵¹ Ibid 62.

⁵² 'If my highest pecuniary accumulation as such, or in such uses of wealth as the purchase of a yacht or a dream house, the law can protect that interest indirectly by protecting me from burglary and fraud, but it cannot protect me from bad investment advice, personal imprudence, the unpredictable dependencies of others, the lack of personal diligence or ingenuity, and so on': *ibid*.

Ulterior interests that extend elements of welfare beyond minimal levels are also protected, however.⁵³ The law against burglary does not only protect the welfare of the indigent person who might face ruin if burgled, but it also protects the billionaire whose welfare might not be directly affected by the theft of one of his Caravaggio paintings that he has forgotten he owns.⁵⁴ It is not only the ulterior interests of billionaires that are protected, ‘but also their interests in liberty (the interest in being the person who decides how the accumulated funds are to be spent) and security (even his welfare interests might be threatened by the act that invades his financial interest, especially if the invasive act employs force or coercion, or seems likely to be frequently repeated)’.⁵⁵ Hence, it is not the gravity or impact of the wrongful harm in the individual case that determines whether the conduct should be criminalised. Instead, we consider the potential accumulative impact of the harm: for instance, protecting the billionaire is also about protecting our security interests more generally. The invasion of people’s financial interests ‘threatens the general security of property, and the orderliness and predictability of financial affairs in which everyone has an interest, however small’.⁵⁶

Those security interests that cushion our welfare interests are protectable.⁵⁷ For instance, common assaults are criminalised to protect our elementary sense of security.⁵⁸ The theft of a billionaire’s yacht or Caravaggio would not necessarily deprive her of her livelihood or of her margin of security above the minimum, but it would invade her accumulative interests.⁵⁹ Hence, a person is harmed when his or her opportunities for enjoying or

⁵³ ‘[U]lterior interests are only indirectly invadable. The usual way of harming one of another person’s ulterior interests is by invading one of the welfare interests whose maintenance at a minimal level is a necessary condition for the advancement of any other interests at all. ... At least one class of ulterior interests are directly vulnerable: those that consist of the extension of welfare interests to transminimal levels. The rich man is wronged by indefensible acts of theft just as much as the poor man is, though he will not be harmed as much’: Ibid 112.

⁵⁴ Ibid 63.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid 207.

⁵⁸ ‘Beyond the bare minimum of health and economic well-being required to pursue his aims, a person requires a certain additional safety margin. Without that margin, that person may be able to function, but only barely so—and with much reason for apprehension’: Andrew von Hirsch, ‘Injury and Exasperation: An Examination of Harm to Others and Offence to Others,’ [1985-1986] 84 *Michigan Law Review* 700, 703.

⁵⁹ Ibid 704.

pursuing the good life are thwarted or diminished.⁶⁰ Simester and von Hirsch convincingly assert harm occurs when a person's personal or proprietary resources are impaired, because our resources are needed to enable us to realise our other opportunities.⁶¹ Such impairments are harmful because of their eventual implications for our well-being.⁶²

'One person harms another in the present sense by invading, and thereby thwarting or setting back, his interest.'⁶³ However, our interests may be setback in the ordinary sense, to a great degree, by a tsunami, earthquake, plague, famine *etc.* For example, if *x* becomes the victim of a crocodile attack whilst wondering around in a national park in the north of Australia, her interests will be setback. Nonetheless, she could not claim that she had been wronged. If *x* goes swimming in a crocodile infested creek at night because a malicious tour guide tells her it is safe to do so, she will be harmed and wronged by the wicked guide. Her interests are setback by the morally wrongful actions of a human agent. A person is harmed in a legal sense when a fellow moral agent invades his or her interests, but obviously the random crocodile attack would cause him or her great harm in the ordinary sense.⁶⁴

More significantly, no plausibly interpreted harm principle could justify the criminalisation of actions that cause setbacks to interests without violating rights, for example, setbacks to interests incurred in legitimate competitions: business practises and sports competitions. Feinberg states that *A* wrongfully invades *B*'s welfare interest when:⁶⁵

- i. A acts...
- ii. In a manner which is defective or faulty in respect to the risks it creates to B, that is, with intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and
- iii. A's acting in that manner is morally indefensible, that is, neither excusable nor justifiable; and
- iv. A's action is the cause of a setback to B's interests, which is also

⁶⁰ A P Simester and Andrew von Hirsch, 'Rethinking the Offence Principle' (2002) 8 *Legal Theory* 269, 281.

⁶¹ *Ibid.*

⁶² 'A broken arm is an impaired arm, one which has (temporarily) lost its capacity to serve a person's needs effectively, and in virtue of that impairment, its possessor's welfare interest is harmed': *Ibid* 281.

⁶³ Feinberg, above n 38, 34.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* 105-106.

v. a violation of B's right.

Take Herbert Hart's example of two people who are walking down the street when they both notice a ten dollar note.⁶⁶ The note is at an equal distance away from each of them when they notice it and there is no clue as to who might have owned it. 'Neither of the two are under a "duty" to allow the other to pick it up. Of course there may be many things which each has a "duty" not to do in the course of the race to the spot—neither may kill or wound the other—and corresponding to these "duties" there are rights to forbearances. The moral property of all economic competition implies this minimum sense of "a right" in which to say that "X has a right to" means merely that X is under no "duty" not to'. While both parties stand to benefit if they acquire the ten dollar note, neither has a right to it, it is not a proprietary resource that either has a normative claim over.

Thus, the loser cannot claim that her interests have been wrongfully setback, because the ten dollar note is not one of her personal or proprietary resources: she does not have a normative stake in it. Similarly, if Tesco puts a small corner store out of business by constructing a superstore in the same street, this would adversely affect the proprietor of the corner store, but it would not wrong her because it does not violate her rights. Planning laws *etc.* may regulate Tesco's ability to construct the superstore, but it would be under no general duty to refrain from engaging in competitive practices. The affected party must lose something that he or she has a normative claim to.⁶⁷ Furthermore, we may be wronged without being harmed. Wrongs that do not setback our interests (unless independent normative reasons can be produced) are not criminalizable.⁶⁸ An example provided by Feinberg is where a wrongly broken promise redounds by fluke to the promisee's advantage. The promisee has been wronged even though she has not been harmed. This conduct is not criminalizable, because it would not be fair to criminalise this type of mere wrongdoing.

B. Harmless Wrongs

Under the harm principle conduct only involves harm when it *wrongfully* sets-back a human interest.⁶⁹ I assert that it is fair to criminalise

⁶⁶ H L A Hart, 'Are There Any Natural Rights,' [1955] 64 *The Philosophical Review* 175, 179.

⁶⁷ Von Hirsch, above n 58, 701.

⁶⁸ For example, I argue below that normative reasons beyond wrongful of offence or harm are required to explain the fairness of criminalising foxhunting. See also Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, Vol. IV (O.U.P., Oxford, 1988) 323-324.

⁶⁹ Feinberg, above n 38.

wrongful harm, as ‘harm’ provides us with a further normative reason for criminalising wrongful conduct.⁷⁰ The fairness constraint is satisfied, because it is fair to punish those who intentionally wrong and harm others. However, it would not be fair or just to criminalise all forms of mere wrongdoing. For instance, an estranged husband wrongs his ex-wife when he falsely promises that he will not cheat on her again, if she lets him move back into the matrimonial home. If the estranged husband moved back into the matrimonial home under these conditions and thereafter slept with the babysitter, then the wife would be able to claim she was wronged by the false promise. But would it be fair to criminalise this type of wrongdoing? The criminal law involves censure, punishment and stigma. Therefore, it should be used as a last resort. In this situation Dan-Cohen could plausibly argue that the husband has wronged his wife by making a false promise. However, Dan-Cohen could not claim that it is *fair* to criminalise this type of wrongdoing. Criminalising this type of false promising would be unfair as it does not result in harm, nor can any other normative reasons be produced to justify invoking the wrath of the criminal law in this situation.⁷¹

At this level Dan-Cohen’s⁷² approach is over-inclusive in that it would allow conduct to be criminalised regardless of the fairness requirement. However, Dan-Cohen argues that the harm principle falls short of the fairness requirement, because it allegedly allows certain gross wrongs (*e.g.*, rape by deception) to escape criminalisation. There is no doubt that rape by deception is wrongful. Gardner and Shute⁷³ convincingly use Kant’s second formulation of the categorical imperative to identify the wrongfulness of rape by deception. Gardner and Shute argue that rape is harmless in certain circumstances even though this sounds oxymoronic. They postulate that in some cases the rape victim will not know that she has been raped nor will she ever find out. This is assuming that she was totally inebriated (to the point of oblivion) during the rape and that the wrongdoer used a prophylactic. According to Gardner and Shute this is not physiologically impossible, because not all rapes involve

⁷⁰ ‘Since ‘causing harm’ entails by its very meaning that the action is *prima facie* wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions’: Joseph Raz (ed), *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 414.

⁷¹ Feinberg also argues that ‘offence’ can supply an additional reason for criminalising certain wrongs: Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others*, Vol. II (O.U.P., New York, 1985).

⁷² Dan-Cohen, above n 3, 153.

⁷³ John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder, *Oxford Essays in Jurisprudence*, 4th Series (O.U.P., Oxford, 2000) 197.

damaging or painful force, ‘which will inevitably bring it to light later’.⁷⁴ They observe that: ‘those who have drawn attention to the phenomena of “date rape” have highlighted, one may be raped while sexually aroused, even while sexually aroused by the attentions of the rapist, and one may be aroused, of course, while drunk or drugged’.⁷⁵ Gardner and Shute postulate that the victim’s life does not change for the worse in such circumstances. They argue that the victim would have no feelings about the rape, since she would not remember the actual physical attack.

Similarly, Dan-Cohen⁷⁶ referring to *State v. Minkowski*,⁷⁷ claims that rape can be harmless when the victim is oblivious of the rape. In that case a number of female patients were oblivious to the fact that they had been used for sex by a medical practitioner who was meant to have been treating them for a medical condition. The rape is brought home to the victim in Dan-Cohen’s example. However, Dan-Cohen⁷⁸ asserts that the harm in this sort of rape by deception is harmless because it would merely cause psychological damage.⁷⁹ He also argues that these types of violations *wrong* the victims despite their lack of physical harm, as they have been used as a mere means to the doctor’s end of seeking sexual gratification *etc.*

Gardner and Shute argue that the rape is harmless when it does not cause any physical damage and when it is not brought home to the victim. Dan-Cohen states that it is harmless when it brought home to the victims so long as they are not physically harmed, as any distress would be psychological. The Gardner and Shute example is a much more convincing example of harmless wrongdoing. Arguably, this kind of rape is harmless if it is never *brought home to the victim*. This does not apply to all undiscovered harms. Its application is limited to special cases such as the rape example provided by Gardner and Shute. More generally, harm does not have to be brought home to *the particular victim involved* for it to amount to harm. The

⁷⁴ Ibid.

⁷⁵ Ibid 196.

⁷⁶ Dan-Cohen, above n 3, 153.

⁷⁷ *State v. Minkowski* 204 Cal. App. 2d. 832 (1962).

⁷⁸ Dan-Cohen., above n 3, 153.

⁷⁹ This type of psychological distress could potentially constitute harm pursuant to the harm principle. As Feinberg points out, ‘an affront or an insult normally causes a momentary sting; we wince, suffer a pang or two, then get on with our work, unharmed and whole. But if the experience is *severe*, prolonged, or constantly repeated, the mental suffering it causes may become obsessive and incapacitating, and therefore harmful’: Feinberg., above n 38, 46. If this type of rape was detected it would result in both physical harm (the physical violation of the woman’s most private sanctum) and harm in the form of the incapacitating effects of the psychological trauma.

harm would have to be discovered in the individual case (even if not discovered by the victim) for it to be labelled as criminal in a court of law from an *ex post* perspective, regardless of whether the harm principle or Dan-Cohen's theory is used to justify its criminalisation from an *ex ante* perspective. In the real world conduct can be criminalised from an *ex ante* perspective so long as it is conduct that poses a real risk of harm to others or normally causes harm to others, but an individual's harm doing can only be brought within the purview of the criminal law from an *ex post* perspective according to the facts of the particular case.

Undiscovered harms would not always constitute harmless wrongs. For example, if an administrator of a deceased estate discovers that a private nurse had embezzled millions of dollars from her elderly employer's bank account leaving just enough so that the elderly employer would have been able to maintain her then comfortable lifestyle for another month if she had lived, without her elderly employer ever knowing because she was suffering from Alzheimer's disease, or having her then lifestyle affected because she had enough to maintain her status at the time, we could hardly say that the elderly victim was not harmed merely because the embezzlement was not brought home to her. Clearly, her interests were setback even though she was not aware of the setback.⁸⁰ Her accumulative economic interests were clearly setback at the time of the theft despite her being in a state of oblivion. The conduct would not be criminalisable from an *ex post* trial perspective at the time of the theft, because we cannot label someone as a criminal by finding them guilty of a crime if the crime has not been discovered.

Criminalisation decisions are decided from an *ex ante* perspective. Because embezzlements result in wrongful harm we are able to say from an *ex ante* perspective that intentional embezzlements ought to be criminalised. In the case above, the nurse could be labelled as a criminal from an *ex post* perspective, if there is sufficient evidence to demonstrate she committed the crime. The individual offender who criminally harms others would not be labelled as a criminal if her harmdoing never came to light, because at an individual level it is not possible to prosecute undetected crimes. Nevertheless, the conduct is generally criminalisable from an *ex ante* perspective even

⁸⁰ This can be contradistinguished from rape by deception, as the rape victim's resources have not been setback in the same tangible way as the victim of embezzlement. The harm has occurred in a tangible way in the embezzlement case and merely awaits discovery by someone. The victim's accumulative financial resources have been diminished and setback from the moment the embezzlement takes place. It is debatable as to whether rape by deception needs to be detected to amount to harm against the individual victim, but once detected it would be caught by the harm principle regardless of whether the individual victim learned of in any individual case.

though some victims will never discover that they were harmed or wronged at the individual level.

Gardner and Shute point out that undetected rapes are harmless when the victim has not suffered physical damage and cannot remember being raped, but:

[i]n no jurisdictions known to us is it true that rape is a crime only when harmful [when it is detected by the victim at an individual level]. Even the pure [so-called harmless; or rape that is not discovered by the particular victim involved] case is classified as rape, and criminally so. One could sideline it by saying that the harm principle is a rule of thumb, and tolerates some departures from its standard. One could also sideline the [so-called harmless] case by observing that the harm principle's standard is met if the class of criminalised acts is a class of which tend to cause harm, and that is true of rape in spite of the possibility of the case [that is harmless because it was not discovered by the particular victim involved]. ... The test is passed by the [harmless] case of rape with flying colours. If the act in this case were not criminalised then, assuming at least partial efficiency on the part of the law, people's rights to sexual autonomy would more often be violated.⁸¹

Hence, the nucleus of Gardner and Shute's argument is that conduct can be criminalised under the harm principle even if the individual victim was not harmed due to a lack of awareness (*i.e.*, the deceased employer who was oblivious to an embezzlement or the rape victim who was unaware of the fact she was raped), because these types of wrongs normally result in harm.

Gardner and Shute's argument is markedly different to that put forward by Dan-Cohen. To start with, Gardner and Shute support the harm principle. Furthermore, they merely invoke the second formulation of the categorical imperative to explain the wrongfulness of rape. They do not suggest that the *wrongfulness* of rape by deception *per se* is the basis for criminalising it. Instead, it can be extrapolated from their treatise that applying the criminal law at the individual level from an *ex post* perspective is only possible when the harm is discovered. Whereas, criminalising conduct from an *ex ante* perspective is possible so long as the conduct poses a real risk of harm or normally results in harm, regardless of whether the particular victim discovered the harm in her individual case. *Per contra*, Dan-Cohen argues that the wrongfulness of the hidden rape is criminalisable merely because it is

⁸¹ Gardner, and Shute, above n 73, 215-216.

wrongful. From a general *ex ante* perspective Dan-Cohen could say all rapes should be criminalised, but the rape would have to be detected for the rapist to be labelled as a criminal from an *ex post* perspective in a given case. Take the example of *x*, who is *raped by deception* by *y* in a public place with the entire incident being caught on CCTV with *x* being killed in car accident the next morning before the rape is discovered on the CCTV footage. The fact that *x* never learns of the rape would not alter its criminalisableness from an *ex ante* perspective. Even though the individual victim in this case may not have been harmed physically or psychologically because the rape was never brought home to her, it is conduct that normally results in harm and it would be fair to hold the perpetrator criminally responsible. The decision as to whether the rapist should be held responsible at the individual level is decided from an *ex post* perspective in a court of law according to the rules of evidence. Rape by deception is *prime facie* criminalisable from an *ex ante* perspective because it is conduct that normally involves wrongful harm. *Ex ante* criminalisation decisions are not guided by those cases that go undetected.

Dan-Cohen is unable to defeat the harm principle with his harmless wrongdoing argument. Dan-Cohen not only fails to show that the harm principle is unable to explain the fairness of criminalising rapes that are harmless in that they have not been brought home to the particular victim involved, but also fails to provide a feasible alternative principle for ensuring that criminalisation decisions meet the requirement of fairness. The second formulation of the categorical imperative would allow all forms of wrongdoing to be criminalised regardless of the fairness requirements. The husband who falsely promises his wife that he will clean her car would be caught by Kant's categorical imperatives. The categorical imperative is not able to effectively constrain unfair and unprincipled criminalisation. It gives the legislature too much scope, as many trivial wrongs could be criminalised in accordance with the categorical imperative. The core issue is how do you measure the wrongfulness of rape as compared to that of false promising. What makes one criminalisable and the other not criminalisable?

We would not want to necessarily give the legislature a free hand to criminalise any act that merely involves moral wrongdoing. This would lead to unfair and unprincipled criminalisation. It is essential that the conduct involve something other than mere moral wrongdoing for the purposes of demonstrating that it is fair to invoke the criminal law to deter it. The harm principle provides a cogent further normative check. The offence principle also provides a further check on criminalising mere wrongdoing.⁸² There are cases that cannot be dealt with under the harm or offence principles, but in those cases alternative normative reasons can be produced to justify resorting to criminalisation. It is beyond the scope of this paper to outline what those

⁸² Simester and von Hirsch above n 60, 275-276.

other principles might be, as my focus is on defending the harm principle as a core principle for ensuring that criminalisation decisions meet the requirements of fairness. Feinberg's harm principle is a plausible normative principle for ensuring fair criminalisation in the vast majority of cases.

At best, Kant's categorical imperative provides a moral basis for showing when conduct involves moral wrongdoing. Kant's theory is deontological,⁸³ according to this theory morally rightful actions are those that treat human beings as ends in themselves, whereas morally wrongful actions are those that treat them as a *mere* means to an end. It is a general deontological theory that is useful for identifying rightful and wrongful conduct. It does not tell us which of those wrongs *deserve* a criminal law response. The harmful consequences of wronging others by raping them or making false promises are not factors that can be used for making distinctions between the various wrongful actions as determined by Kant's deontological theory. The categorical imperative can be invoked to explain moral wrongdoing in certain cases, but as a scheme it does not work in tandem with other moral theories (for example, it cannot be supplemented with consequentialist theories). It is about acting out of duty or moral obligation. A significant implication of deontology is that a person's behaviour can be wrong even if it results in the best possible outcome. *Per contra*, consequentialist theories look for a negative outcome (*e.g.*, harm or offence *etc.*). The negative outcomes give the legislature further guidance as to why it might be fair to criminalise the particular wrong. This is where the categorical imperative fails as a guide about what can be fairly criminalised. According to the categorical imperative, rape and false promising are equally wrong. Consequently, Dan-Cohen's theory suggests that rape and false promising are equally criminalisable. The harmful consequences of false promising and rape have no role to play in determining their criminalisability in Dan-Cohen's scheme. Certainly, the consequences flowing from a lying company director misrepresenting the financial status of a company to potential investors differs from those that flow from a husband falsely promising his wife not to use her car without her permission.

⁸³ '[A] normative moral theory—a theory that purports to reveal what features of an action at bottom make the action right or wrong—is just a theory of moral relevance... The Humanity formulation of the Categorical Imperative serves this role in Kant's ethics. [I]t is facts about the bearings of one's actions on the maintenance and flourishing of humanity (as Kant understands this notion) that are the morally relevant facts determining the (objective) deontic status of an action': Timmons., above n 29, 285-286.

B. Harm and Wrongdoing to Nonhumans

The further problem with using Kant's categorical imperative is that it is a part of a strict deontological scheme that decides the rightness and wrongness of all conduct within Kant's morality. And actions are morally wrong when they are inconsistent with the status of a person as a free rational being. Kant's categorical duties are based on *a priori* reasoning about the general nature of things, and thus apply no matter what the circumstances are. Legal academics like to pull the second formulation of the categorical imperative from the context in which it works, and try to make it do things it cannot do.⁸⁴ It works as a part of a system, so it is not feasible to say that we could use it to determine when it is fair to criminalise some conduct (*i.e.*, wrongdoing to rational agents) and use other theories to determine when it is fair to criminalise other acts that cannot be brought within the purview of the categorical imperative (*i.e.*, harm to animals). Nor can we say that the act of false promising *etc.* is wrong because it violates the categorical imperative, but that we won't criminalise it because it does not result in harm. The categorical imperative does not consider consequences. The second formulation of the categorical imperative it cannot tell the legislature why it might be fair to invoke the criminal law to protect foxes from foxhunters. Nor can the harm principle, but it is a consequential principle that can work in tandem with other normative principles. The harm principle is not an exclusive theory of fair criminalisation. Wrongful offence is also criminalisable. Nor does the harm principle prevent other independent normative theories being produced to justify criminalising harm to animals. The harm principle only claims to be a predominant reason for invoking the criminal law.

Arguably, Dan-Cohen would like to see wanton cruelty to animals and the destruction of endangered species prevented by invoking the criminal law where necessary. Criminalisation decisions that are guided by applying the second formulation of the categorical imperative cannot also be guided by other normative principles, especially those that consider the consequences of the wrongdoing. Kant's theory only provides 'person centred reasons'⁸⁵ for identifying moral wrongdoing generally. It is over-inclusive in that it would unfairly criminalise certain harmless wrongs (*eg*, false promising: husbands

⁸⁴ Dan-Cohen and Ripstein are Kantian theorists, but it is not clear that they are too concerned about what Kant (himself) might have said. Nor do they develop independent Kantian theories that would stand on their own to explain the fairness or unfairness of criminalising conduct. Instead, they seem to rely on Kant's concepts, which are pretty empty and are arguably deployed merely to justify conclusions reached on other (very irreducible) grounds.

⁸⁵ Stanley I Benn (ed), *A Theory of Freedom* (Cambridge University Press, Cambridge, 1988) chapter 1.

who make false promises that do not result in harm to their wives) and it is under-inclusive in that it cannot explain why it is fair to criminalise those who hunt foxes. Those who hunt foxes are entitled to know why they deserve to be criminalised for engaging in what they regard to be a sport. The harm principle is also under-inclusive in that it cannot explain why it is fair to criminalise foxhunting and bullfighting, but this is ameliorated by the fact that the harm principle does not prevent other normative reasons being produced to show why it is fair and just to criminalise these activities.

Why does Kant's second categorical imperative fail to provide a standard for demonstrating that it is fair to criminalise harm to animals? On its face, Kant's logocentric morality seems to support the idea that non-persons can be used in an abominable fashion to serve the ends of persons. Kant's theory is notoriously anthropocentric (or rather it is logocentric), that is, it is based on the idea that 'rational nature, and it alone, has an absolute value'.⁸⁶ For instance, Kant states: 'The first time [the human being] said to the sheep, Nature gave the skin you wear not for you but for me, and then took it off the sheep ... he became aware of the prerogative he had by nature over all animals, which he no longer saw as fellow creatures, but as a means and tools at the disposal of his will for the attainment of the aims at his discretion'.⁸⁷

Two leading Kantian scholars have argued that Kant's moral law does offer limited (indirect) protection to nonhuman animals. Wood and O'Neill⁸⁸ argue that the categorical imperative imposes indirect duties on human agents, which direct them to use animals prudently. They argue that Kant's *Formula of Humanity as an End in Itself* is able to deal with ethical questions about how we should treat irrational nonhumans.⁸⁹ The logocentric feature of Kantian ethics is simply that it recognises no value that is independent of the dignity of rational nature. This aspect of Kant's theory seems to provide a barrier⁹⁰ to protecting irrational nature. Notwithstanding this, Wood and O'Neill postulate that protecting irrational nature is reconcilable with Kant's logocentrism. According to Wood and O'Neill, Kant goes wrong by using a personification principle. 'This principle says that rational nature is respected only by respecting humanity in someone's person, hence that every duty must be understood as a duty to a person or persons'.⁹¹ The gist of their argument is simply that logocentric ethics, which grounds all duties on humanity or rational nature, should not be guided by a personification principle. They

⁸⁶ Allen Wood and Onora O'Neill, 'Kant on Duties Regarding Non-rational Nature,' (1998) *Proceedings of the Aristotelian Society* 189.

⁸⁷ Ibid.

⁸⁸ Ibid 190.

⁸⁹ Ibid.

⁹⁰ Ibid 195.

⁹¹ Ibid 196.

assert that rational nature should be respected not only by respecting human dignity but also by respecting things that bear certain *relations* to it, by being fragments of it or necessary conditions of it.⁹²

O'Neill⁹³ argues that the most persuasive rationale for enlarging the extent of moral concern for rational natures is that some are considered to be irrational or incipiently rational (almost rational), that is, they exhibit 'fragments of rationality, but are not presently persons according to Kant's narrow use of the term'. Such a rationale has been used persuasively to cover human beings whose 'rational agency is either potential (infants) or temporarily reduced (in illness) or fading (the senile), or borderline (the severely retarded)'.⁹⁴ O'Neill asserts that the same line of reasoning can be applied to non-human animals who exhibit 'fragments of rationality'. But this does not bring nonhuman animals fully within the scope of the second formulation of the categorical imperative. Wood and O'Neill assert that Kant did not intend nonhuman animals to be available for unrestricted human use, but also acknowledged that he did not regard them as *ends in themselves*. Kant did hold some moral views on the value of treating non-human animals virtuously, so it is arguable that despite his refutation of the idea that animals could be ends in themselves, he sought to moderate the implications of the personification principle. O'Neill states:⁹⁵ 'It is true that he denies that non-humans animals have rights, or that they can bind us to any duties, and that he never regards them as ends in themselves. Nevertheless, in allowing that harming non-human animals is an indirect violation of duties to humanity Kant endorses more or less the range of ethical concern for non-human animals that more traditional utilitarians allowed: welfare but not rights'.

The protection accorded to animals is less than that accorded to persons. Non-human animals ought not be used wantonly, that is, 'destroyed or cruelly misused, although they may be sold, used for labour (but not excessive labour) and killed (painlessly) for food'.⁹⁶ This kind of concession would not apply to humans, because humans ought never be killed or sold *etc.* O'Neill's and Wood's analysis makes it clear that the categorical imperative cannot simply be applied to animals. Simply applying second formulation of the categorical imperative to the problem of determining the fairness of criminalising harm to animals would have absurd results. The bullock that is slaughtered to provide meat and leather is used as a mere means, because it is only the slaughterman and his customers who benefit from the bullock's death. Yet we would not want to criminalise those who run meatworks. How do we distinguish this

⁹² Ibid 197-198.

⁹³ Ibid 221.

⁹⁴ Ibid.

⁹⁵ Ibid 223.

⁹⁶ Ibid 221.

from elephant poaching? Likewise, the monkey that is used as a part of animal testing in a Cambridge University laboratory is used as a mere means. It is the experimenter who benefits from the monkey's suffering. The monkey could not share the experimenter's end. Yet, we would not want to criminalise these kinds of legitimate uses. Therefore, independent moral arguments need to be produced to deal with those situations where animals are used wantonly (*e.g.*, foxhunting, dogfighting, bullfighting, poaching *etc.*). Human agents do not have a direct duty to respect non-human animals, because irrational creatures are not rational choosers.⁹⁷

If animals and fetuses were full persons then abortion would be treated as murder. Arguably, a fetus would have 'fragments of rationality', which would require it to be treated with the same amount of respect as is accorded to a rational adult person. The 'fragments of rationality' test does not draw any clear line to distinguish those full and quasi persons, (non-human animals and fetuses) who are and are not owed duties. What kind of indirect duties do we have to a fetus? At what stage of its development does it become a fully-fledged person? A fox is not a person so why is it fair to invoke the criminal law to protect it from hunters? These questions are beyond the scope of this paper, but they do highlight the conceptual difficulties with using the categorical imperative as a criterion for ensuring that criminalisation decisions meet the requirements of fairness. It cannot be used to explain the fairness of criminalising foxhunting.

C. The Harm Principle and Non-Human Animals

It has to be acknowledged that the harm principle also fails to cover a range of non-human subjects. Non-human animals do not have rights or interests as defined in the harm principle.⁹⁸ The harm principle could be applied to those situations where humans do have a collective interest⁹⁹ in preserving endangered species and the environment for the benefit of humanity. However, we have no collective interest in protecting animals that are commonly regarded as pests such as foxes. It is difficult to see how foxhunting sets-back the collective or individual interests of human agents.¹⁰⁰ How does the foxhunter setback our interests? We do not have an interest in prohibiting foxhunting, dog fighting or bullfighting. Foxes are often culled for the benefit of other species and bulls are killed in large numbers to provide pet

⁹⁷ Ibid 225.

⁹⁸ Cf. Wellman, C. H., 'Feinberg's Two Concepts of Rights,' (2005) 11 *Legal Theory* 213.

⁹⁹ Feinberg, Vol. I, above n 38, 227-232.

¹⁰⁰ 'In the primary sense of harm, only beings with interests can be harmed, and that account excludes mere things, artefacts and lower animals...': Feinberg, Vol. IV, above n 68, 22-23.

meat. Foxhunting and bullfighting do not amount to a wrongful setback to our collective or individual interests, as we do not have a stake or interest in protecting them. Nor would the offence principle be applicable, as we cannot produce normative reasons to demonstrate that this kind of offence wrongs those who are offended.¹⁰¹

Under Feinberg's scheme nonhuman animals would not be protected, as the harm element would not be satisfied. Our interests cannot be wrongfully setback unless we have an interest. We are neither wronged nor harmed by bullfighting or foxhunting. We might argue that these sports cause profound offence, but how does this offence wrong us? Feinberg calls this type of harm a free-floating evil because it is an evil that does not impact on our interests.¹⁰² Feinberg asserts that free-floating evils are inherently evil 'despite the fact that they have no adverse effects on anyone's well-being'.¹⁰³ He describes the extinction of a species as a free-floating evil.¹⁰⁴ Feinberg acknowledged that the harm principle could not be used to explain the fairness or unfairness of all criminalisation decisions. He asserted that it would be necessary to criminalise harmless wrongs in certain cases.¹⁰⁵

The cases where this would be necessary are exceptional. Free-floating evils are hardly ever worthy of criminalisation. 'The qualifying words "hardly ever" and "perhaps never" reflect the conscientious liberal's inevitable wavering in the face of the legal moralist's strongest counterexamples ... however, we can define liberalism cautiously as the view that as a class, harm and offence prevention are far and away the best reasons that can be produced in support of criminal prohibitions, and the *only ones that frequently outweigh* the case for liberty'.¹⁰⁶ Feinberg's departure from the harm and offence principles is morally sustainable, because evils other than harm and offence will hardly ever tip the balance in favour of restricting liberty, and the harm and offence principles do not prevent independent normative reasons being

¹⁰¹ Andrew von Hirsch and A P Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, Oxford, 2006) 125-129.

¹⁰² Feinberg, above n 68, 20.

¹⁰³ Ibid.

¹⁰⁴ For example, our interests would not be setback by the extinction of the Colorado cave fish, which has existed almost unchanged for millions of years in the dark isolation of their shallow cavern pools: *ibid.* 24.

¹⁰⁵ *Ibid.* 324.

¹⁰⁶ 'The other principles state considerations that are at most sometimes (but rarely) good reasons, depending for example on exactly what the non-grievance is...'. Indeed there are some extraordinary, and up to now only hypothetical examples of non-grievance evils (neither harms nor offences, nor right-violations of any kind) that are so serious that even the liberal ...will concede that the prevention would be a good reason for criminalisation...': *Ibid.* 323.

produced to show why conduct that does not harm or offend human agents can be fairly criminalised.¹⁰⁷ Thus, if the legislature cannot demonstrate that the conduct involves moral wrongdoing and harm or offence, then it will have to produce other independent normative reasons to criminalise the conduct in accordance with the requirements of fairness. Notwithstanding this, the reach of the offence and harm principles should not be understated. By and large, most forms of criminalisation will be justified by referring to wrongful harm and wrongful offence. While the harm principle cannot be used to show why it is fair to criminalise foxhunting, it does not rule out the criminalisation of foxhunting when other normative reasons can be produced to show that it is fair to criminalise it.¹⁰⁸ This is where Dan-Cohen's Kantian approach fails. The categorical imperative is an "all or nothing" deontological principle for determining the rightfulness or wrongfulness (or in Dan-Cohen's scheme criminalisableness) of all actions including those that involve animals. The rightness or wrongfulness of actions in this scheme cannot be determined by also referring to other theories, especially consequentialist theories.

Ripstein's Sovereignty Principle—III

A. Ripstein's Interferences with Equal Freedom as a Criterion for Fair Criminalisation

Ripstein proposes a 'sovereignty principle', which holds that violations of 'equal freedom' provide the legitimate basis for criminalisation.¹⁰⁹ Ripstein uses Kant's concept of external freedom that is specific to the *Doctrine of Right* in an attempt to resolve the problem of unfair and unprincipled criminalisation. He does not concern himself with the categorical imperative, but rather concentrates on the notion of external freedom.¹¹⁰ 'The foundational assumption in Kantian morality is that human freedom has unconditional value, and both the *Categorical Imperative* and the *Universal Principle of Right* flow directly from this fundamental normative claim: the categorical imperative tells us what form our actions must take if they are to be compatible with the universal value of freedom, and the universal principle of right tells us what form our actions must take if they are to be compatible with the universal value of freedom, regardless of our maxims and motivations'. The *Universal Principle of Right* holds: 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right

¹⁰⁷ Ibid 38.

¹⁰⁸ See for example, Paul W Taylor (ed), *Respect for Nature: A Theory of Environmental Ethics* (Princeton University Press, Princeton N.J., 1986).

¹⁰⁹ Ripstein, above n 4, 216.

¹¹⁰ See Ripstein's opening footnote: *ibid*.

belonging to every other man by virtue of his humanity'.¹¹¹ Our innate right to freedom is derived from the concept of human dignity: 'Do not make thyself a mere Means for the use of others, but be to them likewise an End'.¹¹² From this, Kant derives the universal principle of justice which requires that we: 'Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law'.¹¹³

Kant asserts that coercion is legitimate if it is used to prevent a hindrance to freedom, because a hindrance to a hindrance to freedom is itself a means to freedom.¹¹⁴ Using the juridical law is not itself a hindrance to freedom, because the threat of sanction does not deprive a would-be criminal of freedom in the way that her crime would deprive its victim of freedom.¹¹⁵ The criminal exercises the choice to risk criminal punishment, but deprives his victim of a similar freedom of choice. Kant's Principle of Right aims to give each person the right to pursue his or her freely chosen ends as he or she sees fit. Basically, Ripstein refers to external freedom, which is external action that proceeds unimpaired by others. The sovereignty principle (drawing on Kant) requires a person to act externally (use her free choices) so that they can coexist with the freedom of all others in accordance with a universal law. Those actions that are able to coexist are not criminalisable. Those that cannot coexist are criminalisable. A person can only determine the rightfulness of her actions by locating them in a system of external actions to assess their harmony with that system as a whole.¹¹⁶

The moral basis for juridical laws of freedom lies in our capacity to set and pursue our own ends.¹¹⁷ Ripstein argues that a person's external actions will impinge on the external freedom of others when they prevent those others from being free to pursue their ends as rational beings or subject those others to her choices. Hence, if x requires y 's permission to use the means that x has to pursue her ends then she will not be free.¹¹⁸ Ripstein also asserts that, if y

¹¹¹ Mary J Gregor (ed), *Practical Philosophy* (Cambridge University Press, Cambridge, 1999) 393.

¹¹² 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 (ed), *The Philosophy of Law* (T. & T. Clark, Edinburgh, 1887) 54.

¹¹³ Gregor, above n 111, 386.

¹¹⁴ *Ibid* 287-288.

¹¹⁵ Hastie, above n 112, 46.

¹¹⁶ Philip M Kretschmann, 'An Exposition of Kant's Philosophy of Law,' in George T Whitney and David F Bowers (eds), *The Heritage of Kant*, (Princeton University Press, Princeton, 1939) 252-253.

¹¹⁷ Katrin Flikschuh, 'Kantian Desires,' in Timmons, above n 29, 194.

¹¹⁸ Arthur Ripstein, 'Authority and Coercion,' 2004 32(1) *Philosophy & Public Affairs* 1, 7-8.

uses x or uses x 's means without her consent, then y will hinder x 's freedom. According to Ripstein it would be fair to criminalise actions when they interfere with the capacity of others to set ends for themselves. Our freedom is impinged when our decisions as to which ends we will pursue depend on the choices of others.¹¹⁹ Ripstein asserts that people can wrongfully interfere with your freedom in three core ways: 'by depriving you of the means you use in pursuit of those ends, or making you pursue ends you do not share, or using your means to pursue those ends'.¹²⁰ External freedom is about being independent from being compelled by the choices of others. In summation, Ripstein's sovereignty principle clearly mirrors Kant's fundamental principle of right. He asserts that freedom in the sovereignty principle is 'understood as each person's ability to set and pursue his own purposes, consistent with the freedom of others to do the same. You are independent if you are the one who decides what ends you will use your powers to pursue, as opposed to having someone else decide for you ... This interest in independence is not a special case of a more general interest in being able to set and pursue your purposes. Instead, it is a distinctive aspect of your status as a person, that entitles you to set your own purposes, and means that you are not required to act as an instrument for the pursuit of anyone else's purposes'.¹²¹

B. Interferences with Freedom

Ripstein asserts that the harm principle should be discarded and replaced with his sovereignty principle. He puts forward similar arguments as Dan-Cohen for jettisoning the harm principle. Ripstein refers to a number of highly abstract harmless wrongs, which he claims cannot be fairly criminalised in accordance with the harm principle. He postulates that certain wrongs do not result in harm, so the harm principle does not explain why the conduct ought to be criminalised. He starts with his example of so-called harmless trespass.¹²² In Ripstein's example the trespasser uses burglars' tools to enter into someone's home to take a nap on her bed. The trespasser does not cause any damage to the locks and uses hygienic covers so she does not leave any germs on the homeowner's bed. The hypothetical trespasser does not weigh much so she does not cause any wear and tear to the mattress. The trespasser naps for some hours whilst the homeowner is at work and then leaves without the homeowner ever finding out about the trespass. Ripstein asserts that this type of undiscovered trespass ought to be criminalised, but that its criminalisation could not be justified as a harmful wrong.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ripstein, above n 4, 231.

¹²² Ibid.

It is true the harm principle does exclude certain harmless trespasses from the scope of the criminal law. But Ripstein's trespass is not harmless. If detected, this kind of trespass does involve harm. It sets-back one's interest in security. It sets-back the interest we have in maintaining those proprietary resources that provide us with a secure habitat. These kinds of invasions against our property interests threaten the general security of property and those security interests that cushion our welfare interests that are protectable under the harm principle.¹²³ Trespasses into private homes could be criminalised to protect our elementary sense of security. If people were allowed to freely trespass into the private homes of others, then people would generally feel less secure and our entire property law system would be jeopardized.¹²⁴ Coupled with this, entering another's home without permission results in a gross violation of their privacy rights.¹²⁵

Even if the privacy invasion does not constitute harm, it would certainly cause wrongful offence and therefore would be criminalisable under the offence principle. The wronging involved in offending others in this situation is a phenomenological component of the obnoxious experience itself, an element that actually contributes to the offence.¹²⁶ This type of offensive privacy invasion would wrong the homeowner as it interferes with her property right.¹²⁷ These types of trespasses can be distinguished from those that are dealt with as a tort, because they involve the private home. It is true the harm principle does exclude certain harmless trespasses from the scope of the criminal law (*e.g.*, mere trespasses to goods). It is possible to commit a

¹²³ Feinberg, , above n 38, 63; 207. Duff notes that: 'There are substantive offences related to secondary harms: thus although one reason for criminalising 'assault' might be that it is likely to lead to the primary harm of actual violence and injury (by the assaulter of the victim), the law defines it as a substantive offence, of bringing about the secondary harm of fear and violence: R A Duff (ed), *Criminal Attempts* (Clarendon Press, Oxford, 1996) 130.

¹²⁴ A number of empirical studies suggest that the victims of burglary find the trespass and invasion of privacy leaving them feeling less secure. Mike Maguire and Trevor Bennett (eds), *Burglary in a Dwelling* (Heinemann, London, 1982); Roger Tarling and Tonia Davison, *Victims of Domestic Burglary: A Review of the Literature* (2000) Victim Support, London; Mike Maguire and Jocelyn Kynch, *Public Perceptions and Victims' Experiences of Victim Support* (2000) H.M.S.O., London.

¹²⁵ Trespassing into a private home could leave the owner feeling violated and insecure. It would amount to a significant interference with his or her proprietary resource and would also constitute a wrongful privacy intrusion: Andrew von Hirsch and Nils Jareborg, 'Gauging Crime Seriousness: A "Living Standard" Conception of Criminal Harm,' in von Hirsch and Ashworth, above n 2, 212. See also Gardner and Shute, above n 73, 202-203.

¹²⁶ Feinberg, above n 71, 2.

¹²⁷ Feinberg, above n 38, 35.

trespass to goods without setting back the owner's long-term interests. While a person has a proprietary interest in maintaining exclusivity over her goods, a mere trespass does not setback her long-term interest in such a resource. The case is different in the case of larceny as her right to exclusive possession (exclusivity) has been violated and her interest in that resource has been setback by the permanent appropriation. *Per contra*, if *x* takes possession of *y*'s hat (without any intention of permanently appropriating it) and hides it for a few hours for a joke, she violates *x*'s exclusivity right in that good, but she does setback *x*'s long-term interests. No harm results from this type of wrongdoing. Feinberg notes that certain 'mere' trespasses could violate a person's property rights and thereby *wrongs* her, but might not necessarily result in harm. In some cases the trespass may incidentally improve the resource that has been trespassed upon.¹²⁸ These types of trespasses are rightly dealt with through the use of tort law. However, Ripstein's approach would criminalise both trespasses into the private home and trespasses to goods. Both are violations of another's freedom. The problem is that we cannot measure freedom, so a mere violation does not offer any guidance on when it is fair to invoke the criminal law to deter a violation to freedom.¹²⁹

Ripstein postulates that even if trespasses into the private home are harmful in the standard case, they cannot cause harm when they go undetected. But as I noted above, the criminalisation question from an *ex ante* perspective concerns the standard case, not those individual cases that go undetected. The homeowner may never discover the trespass, but if she does the criminal law needs to be able to protect her interests. As I noted above, the harm principle merely requires the wrongdoing to be of a kind that normally results in wrongful harm. The harm principle also demonstrates that it is not only fair to criminalise those who cause harm, but also those whose activities pose a real risk of harm. For instance, if a would-be burglar enters someone's house through an open window and reaches for a silver teapot that is sitting on the homeowner's sideboard, with the intention of appropriating it, but quickly withdraws upon noticing a large Doberman approaching, and thereafter makes an escape without taking or damaging anything and leaves no trace of his entry, the owners might not be harmed. Even if we suppose that this kind of attempt is harmless in that it is not sufficient to interfere with the owner's

¹²⁸ Ibid.

¹²⁹ As Simmonds notes: 'The notion freedom involved is empty, and its role (if it has one) in the *Doctrine of Right* probably requires a notion of equal freedom. But freedom in any relevant sense is not measurable and so cannot be equal or unequal': personal communication with Nigel Simmonds, University of Cambridge, 3rd May 2006. For an irrelevant sense in which freedom is measurable see Ian Carter (ed), *A Measure of Freedom* (O.U.P., Oxford, 1999).

privacy and elementary security interests and nothing has been taken, it would be criminalisable from *ex ante* perspective, since the completed crime would normally setback the homeowner's property interests. The standard burglary exposes its potential victims to a real risk of harm.

In the example above, the burglar's acts are more than preparatory. He came close to removing the silver teapot. This kind of harmless attempt is criminalisable under the harm principle, because the harm principle does not merely provide a moral justification for criminalising conduct that has caused harm, but also conduct that poses a real risk of harm to others. Harms that fall within a class of acts that pose a real risk of harm to others are criminalisable. Such acts come within the purview of the harm principle. Even if we accept that burglary can be totally harmless in certain circumstances, it is still criminalizable as it is conduct that normally causes actual harm to others.¹³⁰ Harmless wrongs can be dealt with pursuant to the harm principle 'if their criminalisation diminishes the occurrence of them, and the wider occurrence of them would detract from people's prospects—for example, by diminishing some public good, such as people's sense of ease with their living environment'.¹³¹

Inchoate offences are premised on this notion. Some offences are inchoate versions of offences that are inchoate themselves.¹³² Attempted burglary being a prime example. A person commits burglary by 'entering a building as a trespasser with an intent to commit one of the following: (a) theft or attempted theft; (b) criminal damage or attempted criminal damage; or (c) infliction of grievous bodily harm or attempted grievous bodily harm'. Trespassing *per se* is not normally regarded as a criminal offence, but it is when a person trespasses with the intent to commit a substantive offence.¹³³ Inchoate offences are designed to criminalise conduct 'in so far as it has an appropriate causal relationship to a primary harm, as making the occurrence of harm more likely; and the culpability of someone committing an inchoate offence, in so far as it involves more than the wilful performance of conduct defined by law as criminal, will consist essentially in her awareness of that relationship—in the fact that she knowingly, and avoidably, does what makes the occurrence of a primary harm more likely'.¹³⁴ The great majority of

¹³⁰ Gardner and Shute above n 73, 216.

¹³¹ Ibid.

¹³² Duff above n 123, 130.

¹³³ Section 9 *Theft Act 1968* (U.K.). See also sections 68-70 of the *Criminal Justice and Public Order Act 1994* (U.K.); section 63 of the *Sexual Offences Act 2003* (U.K.). Section 4 of the *Vagrancy Act 1824* (U.K.) makes it an offence to be found on private premises for an unlawful purpose.

¹³⁴ 'However, whilst not denying that this may be the appropriate way to understand many inchoate offences, the latter view will give a different account of others, particularly those involving an intention directed towards

burglaries result in harm and moral wrongdoing. Such acts belong to a class of acts that either cause harm or pose a risk of harm to others.¹³⁵ Since the harm principle only ‘requires that criminalisation of an action will prevent harm, not that the action itself be harmful’, the risk of harm can be considered.¹³⁶ Ripstein understates the reach of the harm principle. We criminalise the standard case, and if the hidden wrong is detected, then it can be dealt with from an *ex post* perspective.

In the alternative, Ripstein argues that trespasses into a person’s home (even when undetected¹³⁷) are criminalisable because they interfere with the homeowner’s freedom. The trespasser wrongs the homeowner ‘by using the powers that are external to [her] person—[her] property—without [her] permission’.¹³⁸ In a separate paper he asserts that, for Kant, rummaging through someone’s home or goods for purposes that she does not share violates her ability to be ‘the one who determines the purposes to which they will be put’.¹³⁹ The trespasser wrongs the homeowner by depriving her of the ability to be the one who determines how her property will be used. This is an intuitively plausible, alternative, explanation of the moral wrongdoing involved in trespasses into homes. But if mere wrongdoing were the sole criterion for limiting criminalisation, then this could lead to further unfair and unprincipled criminalisation decisions.

Ripstein relies heavily on Kant’s narrow concept of freedom. He states: ‘You remain free to use your other powers to pursue other purposes. But apart of being free to use your powers to set and pursue your own purpose is having a veto on the purposes you will pursue. You need more than the ability to

a primary harm. For in such cases, on the latter view, the wrongfulness of the conduct consists in its intentional, not merely causal, relationship to some primary harm; and the culpability depends also on the way in which she directs her action towards that harm’: Duff, above n 123, 132-133.

¹³⁵ Simester and von Hirsch above n 60, 287. Furthermore, Ashworth notes that: ‘The “subjective principle” would also be accepted by the consequentialist as a justification for criminalising complete attempts: the defendant was trying to break the law, and therefore constitutes a source of social danger no less (or little less) than that presented by “successful” harmdoers’: Andrew Ashworth, *Principles of Criminal Law*, 4th ed. (O.U.P., Oxford, 2003) 447.

¹³⁶ Ibid.

¹³⁷ According to Ripstein, ‘I can nap in your bed while you are away, but any wrongs against your person will be committed in your presence, although not necessarily with your awareness of them’: Ripstein, above n 4, 241.

¹³⁸ Ibid. See also Gregor, M. J., above n 111, 402-405.

¹³⁹ Ripstein above n 118, 10. ‘For Kant, property in an external thing—something other than my own powers—is simply the right to have that thing at my disposal with which to set and pursue my own ends’: *ibid* 11-12.

pursue purposes you have set; you also need to be able to decline to pursue purposes unless you have set them. When I usurp your powers, I violate your sovereignty precisely because I deprive you of that veto'.¹⁴⁰ The harm principle protects autonomy in a much wider sense than Kant envisaged.¹⁴¹ Autonomy is reduced to vanishing point in Kant's formulation as it only allows 'one set of principles which people can rationally legislate and they are the same for all. Nobody can escape [his or her] rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives'.¹⁴² The broader concept of personal autonomy as expounded by Raz, also explains the harmfulness of interfering with the property rights of others:¹⁴³

Respect for the autonomy of others largely consists in securing for them adequate options, *i.e.*, opportunities or the ability to use them. Depriving a person of opportunities or of the ability to use them is a way of causing him harm. Both the use-value and the exchange-value of property represent opportunities for their owner. Any harm to a person by denying him the use or the value of his property is a harm to him precisely because it diminishes his opportunities. Similarly, injury to the person reduces his ability to act in ways which he may desire. Needless to say a harm to a person may consist not in depriving him of options but in frustrating his pursuit of the projects and relationships he has set upon.

The broader concept of personal autonomy links wrongful violations of autonomy back to their harmful consequences and thus gives guidance as to why it might be fair to criminalise certain violations. Hence, there is no question that the violations of others' autonomy as defined by Raz can amount

¹⁴⁰ 'The other way I can subject you to my choice is by injuring you or in the limiting case, killing you, putting your powers to an end': Ripstein, above n 4, 234-235.

¹⁴¹ 'Such a rationale explains why a minimum of political liberty is a welfare interest. It is not that one cannot subsist without liberty. It is instead, that one cannot formulate, select, and pursue one's own purposes where there is excessive outside interference with one's choices, associations, and expressions': von Hirsch, above n 58, 705; Stephen Perry, 'Corrective v. Distributive Justice,' in Horder, above n 73, 256.

¹⁴² Joseph Raz (ed), *The Morality of Freedom*, (Clarendon Press, Oxford, 1986) 370-371. Jeremy Waldron, 'Moral Autonomy and Personal Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, Cambridge, 2005) 309-310. O'Neill, above n 15, 53-54; 66. Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, Vol. III (O.U.P., Oxford, 1986), 94 *et seq.*

¹⁴³ Raz, above n 70, 413.

to harm, when detected. As for those violations that go undetected by the particular victims, the Gardner and Shute treatise explains why the harm principle would reach these types of harmless wrongs from an *ex ante* perspective. As for the *ex post* implications, that is a matter for the courts to deal with when the wrongdoing is detected.

C. Concluding remarks

Ripstein's sovereignty principle does not provide the legislature with sufficient guidance about what it may fairly criminalise. It could allow conduct to be criminalised in situations where it would not be fair to invoke the criminal law. For example, it could be used to criminalise harmless trespasses to goods and many other minor violations of freedom in the Kantian sense. We are not even able to distinguish a harmless trespass from a harmful murder: both violations of freedom are equally wrong and equally criminalisable according to the sovereignty principle. Coupled with this, the sovereignty principle does not factor in those other mediating or countervailing considerations that can be used to override a *prima facie* case of criminalisation.¹⁴⁴ The sovereignty principle is not sophisticated enough to provide the sole criterion for ensuring that all criminalisation decisions meet the requirements of fairness and justice. It is not possible to measure freedom as defined by Kant. Ripstein's theory for ensuring that criminalisation decisions meet the requirements of fairness is equivocal and theoretically weak. Surely the starting point for developing a Kantian theory for ensuring fair criminalisation would have to be to identify and set out the connections between practical reason/categorical imperative/universal principle of justice and legal order.¹⁴⁵ Ripstein's sovereignty principle does not even attempt to identify the relevant connections. The sovereignty principle is too vague and underdeveloped to explain the fairness or unfairness of criminalisation decisions inclusively.

A fuller critique of the possibility of Kant's Philosophy of Law being used to develop a Kantian basis of criminalisation is beyond the scope of this paper. I have merely aimed to highlight some of its obvious weaknesses in those theories that have been put forward by Ripstein and Dan-Cohen. I have also defended the harm principle against the challenges raised by them. Neither Ripstein nor Dan-Cohen has offered a feasible alternative to the harm

¹⁴⁴ Von Hirsch and Simester, above n 101, 124-131; Feinberg, above n 38, 215-216.

¹⁴⁵ Professor Baroness O'Neill attempts to do so in Onora O'Neill, 'Kant and the Social Contract Tradition,' in François Duchesneau and Guy Lafrance et Claude Piché (ed), *Kant Actuel: Hommage à Pierre Laberge* (Bellarmin, Montréal, 2000) 185-200.

principle. Nor have they provided a convincing argument for jettisoning the harm principle. The core problem the second formulation of the categorical imperative is that it does not limit criminalisation to situations where it is fair to invoke the criminal law. The categorical imperative cannot make a distinction between the wrongfulness of rape and that of falsely promising to wash your husband's car.