



University of Dundee

'Smoke gets in your eyes . . .': the criminalisation of smoking in enclosed public places, the harm principle and the limits of the criminal sanction

Ferguson, Pamela

Published in:

Legal Studies: the Journal of the Society of Legal Scholars

DOI:

[10.1111/j.1748-121X.2010.00181.x](https://doi.org/10.1111/j.1748-121X.2010.00181.x)

Publication date:

2011

Document Version

Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):

Ferguson, P. (2011). 'Smoke gets in your eyes . . .': the criminalisation of smoking in enclosed public places, the harm principle and the limits of the criminal sanction. *Legal Studies: the Journal of the Society of Legal Scholars*, 31(2), 259-278. [10.1111/j.1748-121X.2010.00181.x](https://doi.org/10.1111/j.1748-121X.2010.00181.x)

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from Discovery Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain.
- You may freely distribute the URL identifying the publication in the public portal.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

‘Smoke gets in your eyes...’ :

The criminalisation of smoking in enclosed public places, the harm principle, and the limits of the criminal sanction

Pamela R Ferguson*

Professor of Law, University of Dundee

This is the accepted version of the following article: ‘Smoke gets in your eyes . . .’: the criminalisation of smoking in enclosed public places, the harm principle and the limits of the criminal sanction, published in *Legal Studies: The Journal of the Society of Legal Scholars*, Vol 31 Issue 2, June 2011, by Wiley -which has been published in final form at <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-121X.2010.00181.x/abstract;jsessionid=F81FE878BF41BB72533857667960B8C1.f02t01>.

*A version of this paper was presented to Stirling Law School in February 2010 and at a conference in Edinburgh Law School in June 2010. I am grateful to participants for helpful suggestions. Subject to the usual caveats, particular thanks are due to Professor Antony Duff, and the anonymous reviewers of *Legal Studies*, for comments on earlier drafts.

‘Smoke gets in your eyes...’ :

The criminalisation of smoking in enclosed public places, the harm principle, and the limits of the criminal sanction

Legislation has been enacted in both England/Wales and Scotland which criminalises smoking in certain places. This paper uses these prohibitions as a way of exploring two prominent theories of criminalisation which were employed in the parliamentary debates on the legislation, namely legal paternalism and the liberal ‘harm principle’. The paper argues that the creation of these offences cannot be justified by paternalism, and that the risk of harm to non-smokers from ‘passive smoking’ is a preferable justification. This latter rationale could be used in support of more extensive smoking prohibitions, in future. The paper recognises the desire of many to limit the use of the criminal sanction, and concludes by suggesting that unwarranted criminalisation can only be avoided if legislatures which are proposing new offences first articulate their reasons for believing that the criminal law is the best mechanism for reducing or deterring the conduct at issue, and demonstrate that the behaviour cannot adequately be deterred by non-criminal measures.

INTRODUCTION

...Criminal law allows for the most severe intrusions into individual rights.

Therefore, the notion of criminal law embodies, above all, questions of legitimacy and of individual rights and guarantees.¹

Criminal law theorists have attempted to devise principles to delimit the types of behaviour which ought, or more importantly ought not, to be subject to the criminal sanction. The enactment of legislation both in England/Wales and Scotland which makes it an offence to smoke in certain places raises issues as to the appropriate scope of the criminal law. In this paper the anti-smoking legislation is used to critique two leading criminalisation theories,

¹ H Jung ‘ ‘L’etat et moi’: some reflections on the relationship between the criminal law and the state’ (1998) 6 European Journal of Crimes, Criminal Law and Criminal Justice 208, at 210.

namely legal paternalism and the liberal ‘harm principle’.² The paper argues that ‘*parentalism*’, rather than ‘paternalism’, might be a preferable way of viewing the law’s approach, but concludes that neither offers a sufficient basis for criminalisation. It also considers whether a better rationale lies in the ‘harm principle’ – the belief that only conduct which causes, or threatens, serious harm to *other people* is deserving of criminalisation. The paper suggests that the harm principle can be used to justify the smoking prohibitions, and that the risks to others posed by ‘second-hand’ smoke may warrant even wider prohibitions, in future. Finally, it is proposed that before criminalising any form of unwanted behaviour, legislators ought to articulate their reasons for believing that the best mechanism for reducing or deterring it is by means of the criminal sanction, and should be required to demonstrate that the behaviour cannot be adequately deterred by non-criminal measures.

LEGAL PATERNALISM VERSUS THE HARM PRINCIPLE

The two theories of criminalisation can be briefly sketched. Legal paternalism has been defined as state intervention by means of laws ‘designed to protect persons from the negative consequences of their own behaviour.’³ Andrew von Hirsch has suggested that this has ‘two salient characteristics. First, the aim of the intervention is the affected person’s own good, or the prevention of harm to him. Second, the intervention involves compulsion: the person may not refuse the proffered assistance.’⁴ The paternalist holds that

² Other criminalisation theories such as legal moralism are not discussed in the paper, but see generally: P Devlin *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) and the response by HLA Hart *Law, Liberty, and Morality* (Stanford CA: Stanford University Press, 1963); R Dworkin ‘Lord Devlin and the enforcement of morals’ (1966) 75 *Yale LJ* 986; RP George *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993). For a more recent discussion, see K Raes ‘Legal moralism or paternalism? Tolerance or indifference? Egalitarian justice and the ethics of equal concern’ in P Alldridge and C Brants (eds) *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Oxford: Hart, 2001).

³ D Husak *Overcriminalization* (Oxford: Oxford University Press, 2008) p 138.

⁴ A von Hirsch ‘Direct paternalism: criminalizing self-injurious conduct’ (2008) 27 *Criminal Justice Ethics* 25. See also TM Pope, ‘Counting the dragon’s teeth and claws: the definition of hard paternalism’ (2004) 20 *Georgia State University Law Review* 659 at 660:

it is legitimate for the law to attempt to prevent people from self-harming. This may involve a range of legal measures, including criminal prohibitions. Such an approach is, however, abhorrent to many people: legal paternalism has been described as ‘a distasteful and insulting practice, without any redeeming features.’⁵ Some anti-paternalists reject interference by the state in any form, hence criticise all types of legislation which is motivated by a desire to save people from their own (informed) choices. Others, however, are concerned to limit paternalistic *criminal* laws, but are not necessarily opposed to other legal measures, such as the state’s attempt to deter or reduce certain self-harming behaviours by increased taxation, licensing laws, or other forms of regulation. This is an important distinction, which should be borne in mind in discussions concerning criminalisation. The 19th century liberal philosopher John Stuart Mill was opposed to state interference, in general.⁶ He cautioned that the individual ought not to

... be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right... his independence is ... absolute. Over himself, over his own body and mind, the individual is sovereign. ⁷

It followed from this that

neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being...⁸.

Focussing on the criminal law, in particular, a similar idea has been more colourfully expressed by Norval Morris and Gordon Hawkins, for whom ‘man has an inalienable right to go to hell in his own fashion, provided he does not directly injure the person or property

‘Paternalism is the restriction of a subject’s self-regarding conduct primarily for the good of that same subject.’

⁵ J Kleinig *Paternalism* (Manchester: Manchester University Press, 1983) p 4.

⁶ J Gray (ed.) *John Stuart Mill on Liberty and Other Essays* (1859) (Oxford: Oxford University Press, 1991).

⁷ *Ibid*, p 14.

⁸ *Ibid*, pp 84 – 85.

of another on the way.⁹ Some paternalistic criminal prohibitions are designed to prevent children from purchasing items (such as tobacco, alcohol or fireworks) whose use would be detrimental to their health. There is felt to be little justification, however, for similar prohibitions which are intended to restrict the choices of mentally competent adults, since they are generally regarded as best able to determine their own interests.¹⁰ Thus liberal criminalisation theories, such as those offered by Joel Feinberg¹¹ and Douglas Husak,¹² would reject any attempt to enact criminal laws based on paternalism.¹³ For the liberal, the only behaviours which may be criminalised are those which harm or risk harm to persons *other than the actor* (hence the proviso from Morris and Hawkins, above).

Feinberg defined harm as a serious setback to interests,¹⁴ by which he meant primarily ‘welfare interests’, and he explicitly recognised health as such an interest. It followed from this that where one person has behaved in a way which put another’s, or others’, health at risk this was exactly the sort of set-back to interests/harm which the criminal law may be justified in attempting to deter.¹⁵ The behaviour in question had also

⁹ N Morris and G Hawkins *The Honest Politician’s Guide to Crime Control* (London: Pheonix Books, 1970) p 2.

¹⁰ Mill himself had little difficulty with paternalism towards children, hence his reference to the person of ‘ripe years’- see text at n 8, above. Adults who lack full mental capacity may also be protected by the law, according to liberalism, since they are not necessarily capable of determining their own interests.

¹¹ J Feinberg *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (Oxford: Oxford University Press 1984); *Vol 2: Offense to Others* (Oxford: Oxford University Press, 1985); *Vol 3: Harm to Self* (Oxford: Oxford University Press, 1986) and *Vol 4: Harmless Wrongdoing* (Oxford: Oxford University Press, 1988).

¹² Husak, above n 3.

¹³ See also N Persak *Criminalising Harmful Conduct* (Springer, 2007). For a critique, see DA Dripps ‘The liberal critique of the harm principle’ (1998) 17 *Criminal Justice Ethics* 3; BE Harcourt ‘The collapse of the harm principle’ (1999) 90 *Journal of Criminal Law and Criminology* 109; N Holtug ‘The harm principle’ (2002) 5 *Ethical Theory and Moral Practice* 357.

¹⁴ Feinberg, *Harm to Others*, above n 11, p 36.

¹⁵ *Ibid*, p 37. ‘Other kinds of properly prohibited behaviour, like reckless driving and the reckless discharge of lethal weapons, are banned not because they necessarily cause harm

to be a violation of another person's rights.¹⁶ This was to ensure that those set-backs to interest which were generally regarded as legitimate were not regarded as 'harms' from the perspective of the criminal law. For example, an aggressor who is killed or injured by someone who acted to defend herself has undoubtedly sustained a set-back to his interests, but has not been 'wronged' or 'harmed' according to Feinberg's analysis. Interfering with a person's autonomy, with her right to self-govern, can also be regarded as a harm. This justifies many offences which are committed 'against the (physical) person' (including many sexual offences, and assault), but also property offences such as theft, robbery, fraud, and vandalism, in which there is unjustifiable interference with the rights of the property owner or custodian.¹⁷

Harm/risk of harm is generally regarded as a necessary condition, but for some authors, including Mill and Feinberg, it is a positive reason for criminalising ('if conduct risks harm- criminalise it'), while for others it is rather that its absence precludes criminalisation ('if there is no risk of harm, criminalisation cannot be justified'). In either case, harm in itself is insufficient to justify criminalisation; it may be too trivial or the chances of it occurring too remote, or the cost of criminalisation (to the state and/or the perpetrator of the harm) may outweigh the deterrent benefits of criminalisation. Furthermore, many types of harm are regarded as being unsuitable for criminalisation because they are not created intentionally, or even recklessly.¹⁸ Such cases of negligent or

in every case, but because they create unreasonable risks of harm to other persons': *ibid*, p 11.

¹⁶ *Ibid*, p 36. See also *ibid*, p 109. For an argument that Feinberg ought not to have separated 'setbacks to interest' from 'wrongdoing', see RA Duff 'Harms and wrongs' (2001) 5 *Buffalo Criminal Law Review* 13. See also H Stewart 'Harms, wrongs, and setbacks in Feinberg's *Moral Limits of the Criminal Law*' (2001) 5 *Buffalo Criminal Law Review* 47, in which the author argues the contrary; that Feinberg erred in not sufficiently separating 'setbacks to interest' from 'wrongdoing'.

¹⁷ Robbery could be considered as an offence 'against the person', rather than a property offence, but is generally treated as involving dishonesty, hence as being within the latter category.

¹⁸ Of course, the focus on 'harms' begs the question why it is that the criminal law should focus on harms, as opposed to 'offence', 'disorder' or even 'inconvenience'. For a

careless harm-causing does not generally warrant the severe condemnation which is characteristic of the criminal law. Compensation may be required, but not punishment, and the matter is better dealt with by the law of tort/delict.¹⁹ At other times, the interest being harmed is not one which is regarded as being a matter of public concern, hence is not within the purview of the criminal law (e.g. a breach of contract, which is regarded as a private matter). As we shall see, the fact that criminalisation involves condemnation is generally regarded as one of its key features: the criminal law does not aim merely to deter unwanted or undesirable conduct, but to label the behaviour, and thus the person responsible for it, as blameworthy.²⁰

ANTI-SMOKING LEGISLATION

The prohibition on smoking in England and Wales is to be found in the Health Act 2006, s 7(2) which provides that: ‘A person who smokes in a smoke-free place commits an offence.’²¹ The equivalent Scottish provision is the Smoking, Health and Social Care (Scotland) Act 2005, s 2(1). This refers to ‘no-smoking premises’ rather than ‘a smoke-free place’ but is otherwise identical to the English legislation.²² Both Acts also make it an offence for the manager of such premises to fail to prevent smoking (England), or

discussion on this, see MD Dubber ‘Theories of crime and punishment in German criminal law’ (2005) 53 *American Journal of Comparative Law* 679, at 683.

¹⁹ There are exceptions to this, eg s 3 of the Road Traffic Act 1988 which makes it an offence to drive a motor vehicle without due care and attention or without reasonable consideration for other persons.

²⁰ See CS Steiker ‘Punishment and procedure: punishment theory and the criminal-civil procedural divide’ (1997) 85 *Georgetown Law Journal* 775.

²¹ C.28, in force in Wales from 2 April 2007, and in England from 1 July 2007. The terms ‘smoking’ and ‘smoke’ are defined in s 1(2), and ‘smoke-free place’ in s 2, of the Health Act 2006. ‘Smoking’ refers to ‘smoking tobacco or anything which contains tobacco, or smoking any other substance’.

²² 2005 asp 13. This came into force on 26 March 2006. See also the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 (SSI 2006/90). ‘Smoke’ and ‘smoking premises’ are defined in s 4(1) and s 4(2) of the Smoking, Health and Social Care (Scotland) Act 2005.

knowingly to permit someone to smoke (Scotland), in their premises.²³ This paper focuses on the liability of the smoker, rather than the manager/controller of premises. In England and Wales the prohibition applies to certain ‘enclosed’ and ‘substantially enclosed’²⁴ places, defined as those which are open to the public²⁵ or are used as a place of work.²⁶ In Scotland the Scottish Ministers were given power to prescribe ‘no-smoking premises’ by regulations,²⁷ and this applies to ‘premises which are wholly or substantially enclosed’, ‘to which the public... has access’; or which are being used ‘as a place of work’, ‘by and for the purposes of a club or other unincorporated association’; ‘for the provision of education or of health or care services’.²⁸

Many other countries have similar legislation. For example, smoking bans operate in Argentina, Australia, Belgium, Canada, Denmark, France, Iceland, India, Ireland, Italy, New Zealand, South Africa, Spain and the United States of America.²⁹ Some countries have gone further than the UK and have criminalised smoking in selected outdoor areas. These include some Australian beaches, bus and tram stops, and certain Japanese streets. It seems that Bhutan has the most restrictive legislation, having prohibited smoking in all circumstances, as well as the sale of tobacco. Bhutan is an absolute monarchy, but in a

²³ Health Act 2006, s 8(4), and Smoking, Health and Social Care (Scotland) Act 2005, s 1, respectively.

²⁴ As defined in the Smokefree (Premises and Enforcement) Regulations 2006.

²⁵ Health Act 2006, s 2(1). Public places are regarded as ‘smoke-free premises’ only when open to the public, unless they are also used as a place of work (see below n 26).

²⁶ Ibid, s 2(2). The prohibition applies only to places of work which are used ‘by more than one person (even if the persons who work there do so at different times, or only intermittently)’, or ‘where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present).’ (Health Act 2006, ss 2(2)(a) and (b)). Exemptions are provided for in s 3 of the Act.

²⁷ Smoking, Health and Social Care (Scotland) Act 2005, s 4(2).

²⁸ Ibid, s 4(4). See also The Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 (SSI 2006/90).

²⁹ For details of European countries which have imposed a smoking ban, see the website of the European Public Health Alliance, available at <http://www.eph.org/a/1941>.

democracy like Britain it is generally accepted that there must be some limits on the criminal law sanction.

PARLIAMENTARY DEBATES

How did the legislatures attempt to justify these prohibitions? Both in the Westminster and Scottish parliaments the debates focussed on the harmful effects which smoking can have on third parties, particularly non-smokers, but at times the rhetoric stressed the need to protect the health of smokers themselves. Rarely was there much discussion of the implications of criminalisation. In respect of the Scottish legislation the Scottish Deputy Minister for Health emphasised that: ‘The bill is not about banning tobacco; it is about protecting people's health.’³⁰ She employed the liberal rhetoric of rights and freedoms – arguing that the legislation would ‘*increase the choice* that is available to the vast majority of the people of Scotland, who do not smoke’³¹ and that it ‘aims to *offer freedom* to enjoy the pleasures of life... in a smoke-free atmosphere. In short, the bill offers a healthier way of living...’.³² Similarly, the Minister for Health commented that: ‘The smoking provisions are pro-clean air and pro-choice.’³³ There was only one explicit mention of the criminal law – MSP Brian Monteith pointed out that ‘people will be turned into criminals because they choose to smoke in enclosed spaces’,³⁴ and only one reference to the need to balance the conflicting freedoms of smokers and non-smokers.³⁵

The debate on the English legislation was rather more sophisticated, with one MP referring explicitly to the views of JS Mill.³⁶ According to another speaker: ‘Many people think that an addiction is an encumbrance on their freedom and would welcome the opportunity to go to work or to a social setting where smoking is not rammed down their throat and temptation is removed.’³⁷ Hence the anti-smoking legislation promoted liberty

³⁰ Scottish Parliament, Official Report, 28 April 2005, col. 16520, per Rhona Brankin MSP.

³¹ Ibid, col. 16521 (emphasis added).

³² Ibid (emphasis added).

³³ Ibid, col 16474.

³⁴ Ibid, col 16499.

³⁵ Ibid, col 16507.

³⁶ *Hansard* HC Deb, col 217, 29 November 2005, per Richard Taylor, MP.

³⁷ *Hansard* HC Deb, col 180, 25 November 2005, per Tim Farron.

by offering smokers the chance to be free from their nicotine addiction!³⁸ Eric Forth MP did address the issue of whether the criminal law was the best mechanism for encouraging people to stop smoking. He had scrutinised the Bill for ‘prohibition’, which he described as one of his least favourite words, and found that: ‘“regulations” occurs 18 times, “offence” occurs 20 times, and “enforcement” occurs 10 times. In schedule 1, “penalty” occurs 19 times, “offence” six times and “enforcement” three times.’³⁹ He concluded: ‘Instead of instinctively saying, as so many politicians do, “We’re going to try to use the force of the law to make you good people out there do what we think is *right for you*”, why cannot we challenge people to take a sensible approach to the vexed subject of smoking?’⁴⁰ This again suggests that the Bill was designed to save smokers from themselves. A key issue, therefore, is whether the legislatures were right to use arguments based on paternalism and on ‘harm to others’.

SAVING SMOKERS FROM THEMSELVES

The harmfulness of tobacco smoke is not in doubt; it contains carbon monoxide, mercury, ammonia, formaldehyde and arsenic.⁴¹ According to the Tobacco Advisory Group of the Royal College of Physicians, cigarette smoking ‘kills more people in the UK than any other avoidable cause.’⁴² Action on Smoking and Health (ASH), a major player in the campaign to enact the 2006 legislation, suggests that smoking is linked to more than 50 diseases and disorders and kills 114,000 people per year in Britain.⁴³ A survey by the Office of National Statistics found that 71% of British smokers want to give up smoking⁴⁴ and it seems to be accepted that banning smoking in certain locations, such as places of work, is effective in

³⁸ The relationship between addiction and autonomy is discussed further, below.

³⁹ *Hansard* HC Deb, col 188, 25 November 2005.

⁴⁰ *Ibid*, col. 189 (emphasis added).

⁴¹ Royal College of Physicians *Going Smoke Free: The Medical Case for Clean Air in the Home, at Work and in Public Places* (London: RCP, 2005) at p xiii.

⁴² *Ibid*, preface.

⁴³ See the website available at <http://www.ash.org.uk>.

⁴⁴ Office of National Statistics *Smoking Related Behaviour and Attitudes 2002* (London: ONS, 2003).

helping people to quit.⁴⁵ It may be suggested, therefore, that the smoking prohibitions can be justified since they aim to improve smokers' health and prolong their lives. Do these paternalistic concerns legitimate the state's use of the criminal law to deter smoking?

Douglas Husak has suggested that one argument against paternalistic prohibitions is based on the punishment that criminal sanctions entails which, he argues, 'is almost always more detrimental to an offender than is the harm that he causes or risks to himself by engaging in the proscribed behaviour.'⁴⁶ He contended that small fines were unlikely to discourage unwanted behaviour,⁴⁷ hence legislatures were required to punish offenders with imprisonment. Since paternalistic laws are, by definition, intended to be for the benefit of the offenders themselves, it cannot seriously be maintained that a person is better off in jail than engaging in the forbidden behaviour out of jail.⁴⁸ Few would contend that it is better for an individual to be in jail than to smoke one cigarette in a no-smoking area, and indeed the punishment for breaching the smoking prohibitions in the UK is restricted to a monetary penalty.⁴⁹ However, Husak's conclusion that imprisonment was required as a

⁴⁵ CM Fitchenberg and SA Glantz 'Effect of smoke-free workplaces on smoking behaviour: systematic review' (2002) 325 *British Medical Journal* 188. This view was echoed in Royal College of Physicians *Tobacco Smoke Pollution: The Hard Facts* (London: RCP, 2003). Prior to the ban, the RCP estimated 'that if all UK workplaces and public places that currently permit smoking were to become completely smokefree, at least 320,000 current smokers would quit' (p 11).

⁴⁶ Husak, above n 3, p 151.

⁴⁷ *Ibid*, p 152.

⁴⁸ *Ibid*. Even if their jail terms included educational programmes, designed to help offenders to stop smoking, the potential benefits of such a regime would not outweigh the harm to autonomy caused by the state in depriving smokers of their liberty by incarceration.

⁴⁹ Under the Scottish legislation the maximum penalty for smoking in no-smoking premises is a fine at level 3 on the standard scale (currently £1,000): Smoking, Health and Social Care (Scotland) Act 2005, s 2(3). The English legislation allows the Secretary of State to set the appropriate fine level by way of regulation (Health Act 2006, s 7(6) and sch 1.) The Smoke-free (Penalties and Discounted Amounts) Regulations 2007 has set this at level 1 (£200). Other countries have adopted a different approach- in Jordan, for example, the

deterrent seems to be flawed in relation to the UK smoking prohibitions; the legislation has met with wide-spread compliance, suggesting that the mere threat of a small fine seems to have sufficed as a deterrent.⁵⁰ If the justification for the smoking bans was indeed to encourage people to give up smoking, the legislatures should have considered employing alternative sentencing disposals, such as compulsory attendance at anti-smoking classes, nicotine patches, and the like. These would, however, generally be regarded as imposing greater intrusions on people's freedom than a low level fine.

Many criminal law prohibitions are motivated by paternalism. The classic examples are the requirement for drivers to use seat-belts, and for motorbike riders to wear helmets.⁵¹ Although there is a high level of compliance with these laws, they are controversial. As we have seen, the liberal approach is to insist that persons have the right to act on their own preferences, even if these would be regarded by the objective observer as unreasonable, or involve danger to the self.⁵² Liberals commonly portray paternalists as embarked on a mission to curb the individual's freedom. Jonathan Schonscheck described their fear that

‘once some paternalistic laws are acknowledged as justified, why not some others: why not _____, and _____, and also _____? Once the dam against paternalism has been breached it becomes ever more difficult to staunch the flow of yet more paternalism.’⁵³

There is of course an argument that seat-belt and helmet requirements can be justified by the harm principle, based on the harm the offender risks to others. Should A's failure to

penalty is a fine of 20 dinars (£19) or imprisonment ('You can't ban smoking: it's a family pastime', *The Week*, 29 May 2010, at 16).

⁵⁰ Eg, on the first anniversary of the Scottish prohibition, it was reported that 70% of people supported the smoking ban: see the website available at <http://www.scotland.gov.uk/News/Releases/2007/03/23130308>.

⁵¹ I have specifically referred to 'drivers', rather than 'passengers', because one argument for the compulsory use of seat-belts for passengers seated in the rear of vehicles is that failure to wear a seat-belt endangers the lives of those sitting at the front of the vehicle.

⁵² See, eg, Feinberg, above n 11, pp 137-8.

⁵³ J Schonscheck *On Criminalization: An Essay in the Philosophy of the Criminal Law* (London: Kluwer, 1994) p 107 (original emphasis). See also Feinberg Harm to Self, above n 11, p 136.

wear a seat-belt or helmet result in more serious injury than would have occurred had the law been complied with, harm is caused in the form of distress to those who witness the accident, and to those with an interest in A's well-being, such as family and friends. Society may be said to be harmed if the injuries require public health care resources. If the injuries prove fatal, the state may have to bear the burden of looking after A's dependents. As Mary Ann Glendon has put it

those who contest the legitimacy of mandatory automobile seat-belt or motorcycle-helmet laws frequently say: 'It's my body and I have the right to do as I please with it.' ... The implication is that no one else is affected by my exercise of the individual right in question. This way of thinking and speaking ignores the fact that it is a rare driver, passenger, or biker who does not have a child, or a spouse, or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, or rehabilitation, or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward.⁵⁴

Liberals accept that there may be distress, perhaps even considerable distress, to others as well as financial consequences to society from those who take risks with their own health (such as helmet-less bikers, drivers who fail to wear seat-belts and, presumably, smokers) but argue that these adverse effects should not count as 'harms' worthy of protection by the harm principle. This is a contentious issue – is it reasonable to insist that only those harms which liberals want to protect ought to be regarded as the 'right' sort of harm? Some have questioned this approach and accused the harm principle of being *il*liberal.⁵⁵

For the liberal, the solution is for bikers who wish to ride without protective headgear to be required to purchase additional insurance. This would provide financial compensation to the injured, paid for by those who want the freedom to ride without a

⁵⁴ MA Glendon *Rights Talk: The Impoverishment of Political Discourse* (Maxwell Macmillan, 1991) pp 45-46. See also Schonscheck, *ibid*, p 111.

⁵⁵ Perhaps the distress is felt to be too remote? But the criminal law does offer protection from quite remote harms, at times. For instance, I may not carry a 5-inch penknife in my rucksack, to safeguard against the remote possibility that I may use the knife to injure someone (see the Criminal Justice Act 1988, s 139 (for England, Wales & Northern Ireland), and the Criminal Law (Consolidation) (Scotland) Act 1995, s 49).

helmet, rather than by the tax payer, thus enhancing liberty ‘while financially protecting others from the harmful consequences of the exercise of that liberty.’⁵⁶ In similar vein, rather than criminalise smoking, society could enact legislation which requires smokers to take out private insurance policies to pay for their medical care should they suffer from a smoking-related illness, in future. Of course, some bikers or smokers may fail to take out insurance, and society may need to criminalise their failure to do so. Referring to the uninsured biker, Feinberg assured us of the compassionate nature of liberalism, noting that it would be ‘*unthinkable* that we leave the reckless, bareheaded, young motorcyclist to die in his own pool of blood because he has not contributed to the costs of his own care’.⁵⁷ Since society provides medical care to injured bikers (or smokers) regardless of their insurance position, criminalisation of a failure to take out the requisite insurance could be justified on the view that this type of omission constitutes a breach of civic responsibility, and can be condemned and punished as such.⁵⁸

One can see the attractions of insurance schemes; applying it to smokers would reduce the financial harm caused to society by smoking-related illnesses and deaths. It may, however, be suggested that it is *not* the financial costs to society which is the dominant harm here. Our main concern when hundreds of thousands of people suffer and/or die from smoking-induced illnesses is surely not that the rest of us have to pay for their medical care or their dependents, but the very fact that they are suffering, and may die from, these horrific illnesses. Here, paternalism is based on compassion. Furthermore, it may be suggested that the liberal vision of society does not reflect the way things really are. As John Kleinig has highlighted:

Our lives do not always display the cohesion and maturity of purpose that exemplifies the liberal idea of individuality, but instead manifest a carelessness, unreflectiveness, short-sightedness, or foolishness that not only does us no credit

⁵⁶ Schonscheck, above n 53, p 115.

⁵⁷ Feinberg, above n 11, p 140 (original emphasis). See also Schonscheck, above n 53, p 141: ‘The liberal is not compelled by consistency to abandon victims in the street. The liberal can wholeheartedly support the care of victims; insurance programs can be implemented to indemnify other motorists, and the state’.

⁵⁸ See R A Duff *Answering for Crime* (Oxford: Hart, 2007) at pp 173-174, where it is argued that breaches of regulations which ‘serve the common good’ are breaches ‘of our civic responsibilities ... which merit condemnation as wrongs’.

but also represents a departure from some of our own more permanent and central commitments and dispositions. That is characteristic of the self-regarding vices, and most of us are prey to some. On many occasions, the consequences of such lapses and deviations will not be serious, and we must wear them as best we can. But sometimes because of our actions, consequences of a more catastrophic kind may become inevitable or considerably more probable, consequences that would be quite disproportionate to the conduct's value for us. This we may fail to appreciate, not because we are incapable of it, but because of our lack of discipline, our impulsiveness, or our tendency to rationalize the risks involved. It would not take much to act more prudently, yet we are inclined to negligence.⁵⁹

Thus while the liberal approach is predicated on a citizenry of rational beings, each of whom is (in theory) capable of determining where his or her best interests lie and acting accordingly, the paternalist would argue that in reality people sometimes do need to be saved from *akrasia*, from their own ill-considered choices. This is particularly so when the choice is not a fully autonomous one, due to addiction. Anthony Ogus has suggested that paternalism may be justified by what he calls 'ex ante rationalisation'. He used gambling rather than smoking as an example, but the two addictions are analogous:

Suppose ... I am a compulsive gambler. I also know, from past experience, that I lose much more frequently than I win with, as a consequence, significant financial losses. Rationally, if I know that I find it difficult to resist temptation, then it is quite reasonable for me to take the view that it is in my own longer-term interest for my wife or someone else to stop me going to a casino, or at least to make it hard for me to do so. It is a short step from this to the notion that, as an exercise of personal autonomy, I might *ex ante* consent to the state creating legal barriers to my gambling opportunities.⁶⁰

The desire to be saved from one's self has been referred to by James Buchanan as '*parentalism*.'⁶¹ Although it is generally assumed that people want freedom to decide for themselves, without state coercion, this view fails to appreciate that many 'do not want to

⁵⁹ Above n 5, pp 67–68. See also A Ogus 'The paradoxes of legal paternalism' (2010) 30 *Legal Studies* 61, at p 68: '...people often attribute an excessively high value to short-term benefits and too low a value to longer-term costs'.

⁶⁰ *Ibid*, p 67.

⁶¹ J Buchanan 'Afraid to be free: dependency as desideratum' (2005) 124 *Public Choice* 19.

shoulder the final responsibility for their own actions. Many persons are, indeed, afraid to be free.’⁶² According to Buchanan, the state then ‘steps in and relieves the individual of his responsibility as an independently choosing and acting adult. In exchange, of course, the state reduces the liberty of the individual to act as he might choose.’⁶³ Although he employed the term in an essay on political philosophy, not criminalisation, it may be that Buchanan’s ‘parentalism’ is a preferable way of classifying legislation such as the smoking prohibitions. As Feinberg noted, paternalism is a term that might have been invented by its enemies⁶⁴ with its strong connotations of one person or body insisting that they know what it best or right *for other people*. Parentalism, by contrast, may be viewed as members of a society, including a great many smokers, agreeing to the creation of laws which will fetter some of their freedom in order to further their own greater good. It must, however, be recognised that not all smokers favoured the prohibition, and for this small minority the prohibitions *are* paternalistic, rather than parentalistic. Nevertheless, since liberalism presupposes informed choices being made by rational individuals, the fact that smoking is an addiction may tend to support some form of state action, depending on what we believe it means to be addicted to something, and the extent to which addicts remain capable of governing their own lives.

Even if all of this suggests that state intervention may sometimes be based on paternalism, it does not make the case for saying that this ought to take the form of *criminalisation*. It is indeed an odd sort of justification which tells a smoker: ‘we are classifying your behaviour as a criminal offence for your own good.’ As previously noted, a central purpose of the criminal law is not merely to deter potentially harmful or undesirable behaviour, but to express society’s condemnation of that behaviour.⁶⁵ Where

⁶² Ibid, at 23.

⁶³ Ibid, at 24.

⁶⁴ Feinberg, above n 11, p 4.

⁶⁵ See S Kadish ‘The use of the criminal sanction in enforcing economic regulations’ in *Blame and Punishment: Essays in the Criminal Law* (New York: Macmillan,1987) p 51. See also von Hirsch, above n 4, pp 27-28. Furthermore, the creation of too many mala prohibita offences may result in a great many people breaching the law, such that this becomes commonplace, and this may cause a loss of respect for the criminal law in general: Husak, above n 3, p 12. See also H Packer *The Limits of the Criminal Sanction*, (Stanford: Stanford University Press, 1968) p 359.

the behaviour is self-harming and due to addiction, condemnation seems out of place. As noted previously, Feinberg required harms to be ‘wrongful’, that is, to involve a setback to (others’) interests. While harming oneself by smoking is a setback to one’s own interests, it seems odd to condemn this as ‘wrongful’ in the sense in which liberals generally use the term, meaning unjust, in breach of duty, or in violation of rights. If the motivation for deterring smoking in public places and workspaces is the prevention of self-harm, it is preferable for the state to employ non-criminal measures such as education, civil law remedies, or increased taxation. These alternatives will be considered further, below. But first the second justification, that of preventing harm to others, requires to be explored.

HARM TO OTHERS

As we have already noted, liberalism accepts that the criminal sanction may be employed against those who cause or risk certain types of harm to other people.⁶⁶ Applying this approach to the smoking prohibitions, we must consider ‘environmental tobacco smoke’, also known as ‘passive smoke’ and ‘second-hand smoke’. There is now clear evidence of the harmful effects of this.⁶⁷ According to the Minister for Health and Community Care in Scotland, each year environmental tobacco smoke ‘is associated with the deaths of more

⁶⁶ Mill, above n 6, p 14: ‘...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. ...the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’; Feinberg *Harm to Others*, above n 11, p 26. Feinberg’s second principle was that the criminal law could be used to prevent serious offence to persons other than the actor (ibid). See also *Offense to Others*, above n 11. This paper is not concerned with the offence principle. For an argument that the punishment of imprisonment should only be imposed on those who have breached the harm principle, see DJ Baker ‘Constitutionalizing the harm principle’ (2008) 27 *Crim Just Ethics* 3.

⁶⁷ See, for example, PH Whincup et al ‘Passive smoking and risk of coronary heart disease and stroke: prospective study with cotinine measurement’ (2004) 329 *British Medical Journal* 200; Editorial ‘More evidence on the risks of passive smoking’ (2005) 330 *British Medical Journal* 265; K Jamrozik ‘Estimate of deaths attributable to passive smoking among UK adults: database analysis’ (2005) 330 *British Medical Journal* 812.

than 800 people who have never smoked.’⁶⁸ In 2005, the Royal College of Physicians published its views on banning smoking and concluded: ‘The ethical justification for smoke-free public places and workplaces rests primarily on the harm caused by second-hand smoke to third parties.’⁶⁹ Claims that the legislation is normatively legitimate would therefore seem to be on a more secure footing if based on the harm, or more accurately, on the *risk* of harm, tobacco smoke causes to those who inhale second-hand smoke. Thus criminalisation is based on endangerment.⁷⁰ But before we rush towards this conclusion, we need to pause and ask: what exactly *is* the risk here?

Looking at both probability (the likelihood that the harm materialises) and impact (the magnitude of any harm which would be caused thereby), the risk posed by repeated exposure to smoke is undoubtedly a substantial one. If A, one of my colleagues, smokes 20 cigarettes per day for 20 years while sharing a workspace with me, we can readily conclude that A’s behaviour puts me at substantial risk of harm, in terms of both probability and impact. By contrast, although the impact of the risk remains the same, it is impossible to quantify its probability when a smoker lights up a cigarette on any given occasion. If B, one of my students, smokes while in conversation with me in the corridor, but only does so on one occasion, the risk to my health from this encounter must be very small. Of course, the problem with this approach is that without some sort of prohibition it would not merely be one student who might smoke in the corridor, several alphabets worth of students would be likely to behave in the same way, and soon my situation is similar to that in the first example. But from the point of view of the smoker – the person whose smoking may be in breach of the criminal law – there is a clear difference in the health risk A offers me from prolonged exposure, on the one hand, and the surely tiny risk B offers me from one instance of smoking in my presence.

The smoking prohibitions are not unique in criminalising small probabilities of harm where the potential impact is high. For example, often a driver who exceeds the speed limit or drives through a red light will be putting others or another at a high risk of injury; if

⁶⁸ Debate in the Scottish Parliament on the principles of the Smoking, Health and Social Care (Scotland) Bill (col 16471, 28 April 2005).

⁶⁹ Royal College of Physicians, above n 41, p xvii.

⁷⁰ For an argument that a risk which does not actually cause harm is nonetheless a harm in itself, see C Finkelstein ‘Is risk a harm?’ (2003) 151 University of Pennsylvania Law Review 963.

the road is busy with cars or pedestrians then the impact of the risk (death or serious injury) is high and so too is the probability of the risk occurring. However, the situation is different where a driver behaves in the same fashion at 3 a.m. The impact remains static, but the probability of its occurrence may be very low indeed. Nonetheless, the prohibition still applies. These types of offences involve what Antony Duff has called ‘implicit endangerment’, since there is no reference to harm in the wording of the offence provisions themselves, and no requirement that the prosecution show that anyone was actually endangered by the defendant’s behaviour.⁷¹ There is, of course, a difference between the speeding driver and the smoker, in that the harm caused by the driver can be directly attributed to the speeding, whereas the errant smoker makes a small contribution to a cumulative risk or harm. The law’s concern is with the aggregate risk, whether this is posed by smoker A to certain (identifiable) others, or by smoker B plus many other smokers to many (identifiable and unidentifiable) others. But the actual behaviour which the legislation is proscribing is not the cumulative effect, but each instance of smoking.

Of course, not all risky behaviour is the subject of a criminal prohibition. Each time I walk along a street, every person who is driving a car down that street at that time exposes me to a risk of substantial harm. It is a low probability risk, a risk which is extremely unlikely to materialise, but so is the risk offered by one instance of smoking in my presence. Driving is regarded as a socially valuable activity. Speeding and driving through red lights are not. We see then that the social utility of the risky behaviour is an important factor in criminalisation. A can even expose B to great risk, in terms of both impact and probability – a surgeon performing a high risk operation on a patient who is certain to die without the procedure is one example of this – but the law does not regard this as wrongful (quite the reverse), hence there is no question of it being criminalised. The smoking prohibitions make clear that smoking in public is no longer viewed by society as a socially acceptable activity, far less a valuable one.⁷²

⁷¹ See RA Duff ‘Criminalising endangerment’ (2005) 65 Louisiana Law Review 941, at p 959. Markus Dubber refers to these types of offences as involving ‘abstract endangerment’ since ‘they cover conduct that “typically creates a concrete danger”, whether or not that danger was in fact created by the particular conduct in question.’ See Dubber, above n 18, at 692.

⁷² Paternalism has a role here: the fact that smoking is harmful to the smoker is an important basis for our judgment that it is not a valuable activity.

That the criminal law aggregates risk can be seen in other aspects of road traffic legislation, such as those which require lorries to comply with weight restrictions. By itself, an over-weight lorry may be unlikely to cause a bridge to crack, but repeated flouting of the law by many lorries will eventually cause the bridge to fail, and it is this risk which the law is concerned to avoid. The prohibitions against dropping litter⁷³ or polluting the air with chimney smoke⁷⁴ provide further examples of criminalisation based on cumulative effect; one piece of litter or one smoky chimney does little harm, but without a prohibition there is a danger that a great many people would act similarly, and this becomes problematic.

It must be borne in mind that, for the liberal, the fact that conduct causes or risks harm to others is a necessary but not a sufficient ground for criminalising it. Husak has specified that violations of criminal laws must result in punishments that are ‘deserved’. On the face of it, this overlaps with the idea that the conduct must be ‘wrongful’, but if it is to have value as a separate criterion then it may mean that an accused person who unwittingly breaches a prohibition ought not to be punished. In the context of the smoking prohibition this would seem to be satisfied by the provision of a defence for the accused who did not know, and could not reasonably be expected to know, that the place in question was a no-smoking/smoke free premise. Such a defence is indeed provided in both the English and Scottish legislation.⁷⁵ He also stipulated that the state had to have a ‘substantial interest’ in reducing or preventing the unwanted behaviour in question.⁷⁶ It is clear that the state does have such an interest in reducing the effects of passive smoking, and the legislation is

⁷³ Section 87(1) of the Environmental Protection Act 1990 provides: ‘If any person throws down, drops or otherwise deposits in, into or from any place to which this section applies, and leaves, any thing whatsoever in such circumstances as to cause, or contribute to, or tend to lead to, the defacement by litter of any place to which this section applies, he shall ...be guilty of an offence.’

⁷⁴ See s 1(1) of the Clean Air Act 1993: ‘Dark smoke shall not be emitted from a chimney of any building, and if, on any day, dark smoke is so emitted, the occupier of the building shall be guilty of an offence.’ The 2005 and 2006 anti-smoking prohibitions may be viewed as a further measure to tackle air pollution, thus enhancing people’s right to clean air in public spaces.

⁷⁵ Smoking, Health and Social Care (Scotland) Act 2005, s 2(2), and Health Act 2006, s 7(4).

⁷⁶ Husak, above n 3, p 137.

designed to advance that interest directly.⁷⁷ Husak's final criterion for criminalisation is that prohibitions should be no more extensive than necessary to achieve their purpose.⁷⁸ Many of the ill effects of passive smoking could be eliminated by proscribing smoking in enclosed public places *only when a non-smoking third party is present*, and the legislation could have been worded accordingly. Since smoke tends to linger long after a cigarette is finished, it may be argued that the difficulties the alternative wording would pose in practice make a broader prohibition more appropriate.

Smoking endangers other people in several ways; its harmful effects are not limited to those caused by passive smoking. Each year about 200 people are killed, and ten times that number seriously injured in smoking related fires in the UK, the vast majority of which occur in the home.⁷⁹ Sudden infant death is more common in children whose parents smoke and, according to the Royal College of Physicians, about a quarter of such deaths can be attributed to parental smoking.⁸⁰ Even without recourse to arguments about fires and cot deaths, it seems to be accepted that the home is the major source of exposure to smoke for most adults – and this was so even before the ban on public smoking.⁸¹ It is now being suggested that there is a health risk from 'third-hand' smoke – 'residue from tobacco smoke which clings to upholstery, clothing and the skin' which 'releases cancer-causing agents'.⁸² The risk of harm to others from second-hand, or even third-hand, smoke could

⁷⁷ The fact that in the UK the NHS meets the bill for smoking-related illnesses provides an additional reason for suggesting that there is a substantial state interest in such legislation, but the state's primary interest lies in the fact that the criminal law serves to protect citizens against harm - Husak himself notes that 'the prevention of physical harm will qualify as compelling and, a fortiori, as substantial': *ibid*, p 138.

⁷⁸ *Ibid*, p 153.

⁷⁹ Royal College of Physicians, above n 45, p 10.

⁸⁰ Royal College of Physicians, above n 41, p 23.

⁸¹ *Ibid*, p xiv.

⁸² See "Third-hand smoke" could damage health', *BBC News*, 9 February 2010, available at <http://news.bbc.co.uk/1/hi/health/8503870.stm>. The news report was based on M Sleiman et al 'Formation of carcinogens indoors by surface-mediated reactions of nicotine with nitrous acid, leading to potential thirdhand smoke hazards' *Proceedings of the National Academy of Sciences* (2010), available at: <http://www.pnas.org/content/107/15/6576.full.pdf+html>.

provide a reason for banning smoking in the home in the presence of minors,⁸³ but this has not (yet) been used as a justification for prohibiting smoking in private places such as houses or vehicles. This may be based on the belief that some types of ‘private behaviour’ (however defined) ought to be beyond the reach of the criminal law. As Alison Jaggar has put it:

‘In the context of liberalism, those aspects of life that may legitimately be regulated by the state constitute the public realm; the private realm is those aspects of life where the state has no legitimate authority to intervene. Just where the line between the two realms should be drawn has always been controversial for liberals; but they have never questioned that the line exists, and that there is some private area of human life which should be beyond the scope of legal government regulation.’⁸⁴

The public/private dichotomy has been criticised by feminist scholars, in particular, who point out that the law’s historic failure to regulate certain aspects of the private realm allowed men to abuse their wives, physically and sexually, with impunity.⁸⁵ Whether or not a behaviour such as smoking in the home ought to be proscribed cannot be decided solely on the basis that it is a private matter: the home is the individual’s private sphere, hence ought always to be free from the reach of the criminal law. Several forms of behaviour, such as assaulting other people and cruelty to animals, are regarded as properly

⁸³ It might be suggested that the prohibition should be extended to criminalise smoking at home in the presence of any non-smoking third party, but the non-smoker could generally choose to leave the smoke-filled environment, an option which the smoker’s children do not have.

⁸⁴ AM Jaggar, *Feminist Politics & Human Nature* (Lanham: Rowman & Littlefield, 1983) p 34.

⁸⁵ See, eg, L Finley ‘Breaking women’s silence in law: the dilemma of the gendered nature of legal reasoning’ (1989) 64 *Notre Dame Law Review* 886, at 899; CA MacKinnon *Women’s Lives, Men’s Laws* (Harvard: Harvard University Press, 2007) p 262; VE Munro ‘Dev’l-in disguise? Harm, privacy and the Sexual Offences Act 2003’ in VE Munro and CF Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge-Cavendish, 2007) p 11; E Frazer and N Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (London: Harvester Wheatsheaf, 1993) p 72.

criminalised, even if the locus is the home. The descriptors ‘public’ and ‘private’ should be applied following deliberation as to the respective values which are at stake if the behaviour in question is criminalised.⁸⁶ If the law is justified in proscribing certain potential harms, irrespective of whether this is perpetrated in public or in private, then it may also be justified in proscribing smoking in the presence of others, even in the home. There seems little to distinguish a prohibition on being drunk while in charge of one’s children, and a prohibition on smoking in their presence. This suggests that a wider prohibition – one which extended to vehicles and indeed the home – may in principle be justified, though of course there may be difficulties in enforcing such a proscription.

These arguments offer at least a *prima facie* case for the state intervening in order to limit smoking to protect third parties. However, as in our discussion of legal paternalism, many of the arguments made thus far show only that the state is justified in intervening, but *not* that the state is entitled to employ the criminal law for this purpose. The evils associated with the criminal sanction (the financial and social costs of both prosecution and punishment) mean that it is generally preferable for the state to discourage unwanted behaviours by non-criminal means. As previously noted, this may include increased taxation, educational programmes, and the like. Criminal prohibitions are legitimate only when they are the best mechanism, which means that the onus is on legislators to show that *all* other avenues to deter the unwanted behaviour would be less successful.⁸⁷ How else might the harmful effects of second-hand smoke be reduced?

ALTERNATIVES TO CRIMINALISATION

Other mechanisms for reducing smoking have been attempted in the UK; according to the RCP’s Tobacco Advisory Group, a voluntary system of self-regulation was tried in the

⁸⁶ ‘[A]rguments about public and private spheres are all too often hived off from their underlying liberal rationales and used as if we were simply *describing* spheres of activity, obscuring the normative premises of the argument’: N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998) p 57 (original emphasis) .

⁸⁷ For an evaluation of the idea that the criminal law ought to be employed only when all else has failed, see D Husak ‘The criminal law as last resort’ (2004) 24 Oxford J Legal Stud 207 and Husak, above n 3. He ultimately concludes that while this is a useful criterion, it is insufficient in itself to stem the tide of over-criminalisation.

hospitality industry but it ‘failed to protect the majority of staff or customers’.⁸⁸ Cigarettes have also been the target of many tax increases and there is evidence that increasing their price does reduce the number being smoked.⁸⁹ An alternative solution to the problem of passive smoking may be to impose swingeing taxes on cigarettes. As against this, however, it may be suggested that non-criminal measures are not always more appropriate than criminal ones. Increased taxes may be less fair than the creation of a criminal prohibition, since taxing cigarettes disproportionately targets those who can least afford to pay while permitting more affluent members of society to continue smoking; if taxation levels are to act as an effective deterrent, they must be set at a sufficiently high level such that smoking becomes unaffordable for the vast majority of people. This is tantamount to banning smoking for the majority, while leaving the wealthy unaffected. By contrast, the criminal law does not discriminate against people in its initial application; poorer people may struggle to pay monetary penalties for smoking, more so than those who are financially better off, but the initial decision to prosecute a violation takes no account of ability to pay: all who flout the law receive a criminal conviction, rich and poor alike.

A chief concern for many liberals is that excessive punishment results from there being too many criminal prohibitions on the statute books.⁹⁰ As previously noted, the punishment for breaching the UK smoking prohibitions is confined to a fine, with no option for imprisonment, and in practice a fixed penalty of £50 is offered at first instance.⁹¹ This is a low penalty which can hardly be described as the ‘harsh treatment and censure’ which was the object of critique by liberals such as Husak. Nonetheless, given that imprisonment is not an option, there is an argument that some form of administrative action could have been employed in preference to the criminal law. The creation of no-smoking places could

⁸⁸ Royal College of Physicians, above n 45, p 8.

⁸⁹ Taxation of cigarettes has led to an increase in the price from £1.85 per packet in 1971 to £2.65 in 1995. This caused a per capita decrease in smoking from 15,000 to 10,000 cigarettes per annum: ‘Global pleas to raise smoking taxes’: *BBC News* 9 August 2000, available at <http://news.bbc.co.uk/1/hi/health/871951.stm>. The current cost of a packet of 20 cigarettes is about £4.80.

⁹⁰ See for example Husak, above n 3, p vi.

⁹¹ For England: Smoke-free (Penalties and Discounted Amounts) Regulations 2007, SI 2007/764, reg 2(5). For Scotland: Prohibition of Smoking in Certain Premises (Scotland) Regulations, SSI 2006/90, reg 4(2)(b).

have been facilitated by the use of civil penalties. Both the American Model Penal Code and the German Criminal Code draw a distinction between ‘criminal offences’ and ‘violations’, with the latter being dealt with by means of civil fines.⁹² In the UK, the fixed penalty is the closest analogy to a violation; where a fixed penalty is paid, this is not treated as a criminal conviction. A key difference, however, between the UK systems and that employed in the USA and Germany is that the UK fixed penalty systems are part of the criminal law: the unwanted behaviour is defined as a criminal offence, and the criminal law is used as a back-stop, such that refusal to pay the fine can result in prosecution.

Ought the UK to move closer to the American/German models by removing breach of no-smoking prohibitions from the criminal law realm? Criminal procedure embodies a number of safeguards, designed to ensure that punishment or unfavourable treatment is only meted out once the state has over-come a series of hurdles. These include the presumption of innocence and the requirement that the prosecution establish beyond reasonable doubt that the accused has indeed infringed the law.⁹³ Such safeguards are lacking in civil proceedings. The UK legislatures have increasingly resorted to non-criminal mechanisms for controlling behaviour of which they disapprove. One example of this is in the use of antisocial behaviour orders (ASBOs)⁹⁴ which can be granted by a civil

⁹² Section 1.04 of the American Model Penal Code. German law distinguishes between ‘*Straftaten*’ (crimes) and ‘*Ordnungswidrigkeiten*’ (violations). See Kadish, above n 65, pp 59-61. For an argument, in the American context, that there should be an increased use of civil sanctions, see K Mann ‘Punitive civil sanctions: The middleground between criminal and civil law’ (1991-2) 101 Harvard LR 1795. For a critique of this approach, see JC Coffe ‘Paradigms lost: the blurring of the criminal and civil law models- and what can be done about it’ (1991-2) 101 Harvard LJ 1875.

⁹³ See, however, A Ashworth ‘Four threats to the presumption of innocence’ (2006) 10 International Journal of Evidence & Proof 241 for the argument that there are now many exceptions to this. See also A Ashworth ‘Social control and ‘anti-social behaviour’: the subversion of human rights?’ (2004) 120 Law Quarterly Review 263.

⁹⁴ The Anti-social Behaviour Act 2003 (England and Wales), the Anti-social Behaviour (Northern Ireland) Order 2004 and the Antisocial Behaviour etc (Scotland) Act 2004. See A Cleland and K Tisdal ‘The challenge of antisocial behaviour: new relationships between the state, children and parents’ (2005) 19 International Journal of Law Policy and the Family 395.

court. ‘Antisocial behaviour’ is defined as conduct which causes or is likely to cause harassment, alarm or distress to one or more persons who are not of the same household as the actor.⁹⁵ Since the procedure is governed by the civil law, hearsay evidence can be used to substantiate the allegations.⁹⁶ Similarly, ‘parenting orders’ (POs) can be issued by the civil courts to ‘bind over’ parents to take ‘proper care and exercise proper control over’ their child.⁹⁷ Contravening an ASBO or PO is a criminal offence, even though the behaviour which breached the Order may not otherwise be criminal. The use of the civil law in initiating such orders has been much criticised.⁹⁸ Paradoxically, employing the criminal sanction to regulate behaviour may be a way of respecting the rights of citizens by ensuring that they are not subject to state-imposed adverse consequences without the requirements of due process. The European Court of Human Rights (ECtHR) is concerned to ensure that member states do not impose penalties while circumventing safeguards, such as the right to a fair trial, provided by Article 6 of the European Convention on Human Rights. States have attempted to evade Convention requirements by declaring that particular conduct is not a criminal matter, as such, but merely a ‘violation’ or ‘breach of regulation’. According to the jurisprudence of the Court, measures which are designed to deter and impose blame are to be treated as criminal provisions, irrespective of the label

⁹⁵ Crime and Disorder Act 1998, s 1(1).

⁹⁶ In *Clingham v Royal Borough of Kensington and Chelsea; R (on behalf of McCann) v Crown Court of Manchester* [2002] UKHL 39, [2003] 1 AC 787, the House of Lords determine that the making of an anti-social behaviour order was indeed a civil procedure but that proof of the conduct leading to the ASBO should be beyond reasonable doubt.

⁹⁷ Crime and Disorder Act 1998, ss 8 and 9, as amended by the Anti-social Behaviour Act 2003 and Criminal Justice Act 2003.

⁹⁸ See, eg, S Cracknell ‘Antisocial behaviour orders’ (2000) 22 *Journal of Social Welfare and Family Law* 108; RH Burke and R Morrill ‘Anti-social behaviour orders: an infringement of the Human Rights Act 1998?’ (2002) 11 *Nottingham LJ* 1; A Cleland and K Tisdall, above n 94; A Cleland ‘The Antisocial Behaviour etc (Scotland) Act 2004: exposing the punitive fault line below the children's hearing system’ (2005) 9 *Edinburgh Law Review* 439; A Samuels ‘Anti-social behaviour orders: their legal and jurisprudential significance’ (2005) 69 *J Crim L* 223; A Ashworth *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 5th edn, 2010) ch 6.

employed by the member state. This is illustrated by *Schmautzer v Austria*.⁹⁹ The Austrian system treated failure to wear a seat-belt as an administrative matter, dealt with by means of a fine, rather than a criminal offence. This was held by the ECtHR to be, in essence, a criminal charge. Thus criminal law procedural safeguards applied; those who wished to contest an allegation that they had breached the relevant provisions had a right to have this determined by means of a criminal trial.

It seems, then, that so long as it allowed ‘offenders’ to challenge the imposition of civil penalties before the courts, a legislature could attempt to resolve the problem of smoking in certain public places by means of administrative fines, rather than criminal ones. This would remove the condemnation and stigma that attach to a criminal conviction, while nonetheless making it clear that smoking was prohibited in certain locations. A major problem with this approach, however, is that arguably condemnation and stigma *are* appropriate here; without this, the fines for breaching the prohibitions become more of a taxation system, albeit imposed on a less systematic basis. Focusing on the economic costs of criminalisation, in general, has led to the suggestion that: ‘If private or administrative law solutions can provide the requisite degree of control, and can do so at a lower cost, then there is likely to be a presumption that they represent a better approach than criminalization.’¹⁰⁰ This fails, however, to recognise that there is more at stake than the costs involved in deterring conduct. The criminal law is an appropriate, perhaps *the* appropriate, response when the behaviour in question is one which is deemed to have been ‘wrongful’.¹⁰¹ ‘Wrongfulness’ is a concept whose meaning varies from generation to generation, and the law may lead the way in changing people’s attitudes towards particular conduct. Just as the decriminalisation of gambling and homosexual behaviours has led to greater tolerance, society may come to recognise that something is harmful, and therefore a

⁹⁹ (1995) 21 EHRR 511. See also *Ozturk v Germany* (1984) 6 EHRR 409. Both cases are discussed in A Ashworth ‘Conceptions of overcriminalization’ (2007-8) 5 Ohio St J Crim L 407, at 422.

¹⁰⁰ R Bowles, M Faure and N Garoupa ‘The scope of criminal law and criminal sanctions: an economic view and policy implications’ (2008) 35 Journal of Law and Society 389, at 415.

¹⁰¹ See, for example, Husak, above n 3, p 73.

fit subject for the criminal law, *because* the law has proscribed it.¹⁰² Increased penalties for drunk-driving were instrumental in changing the way society viewed this form of behaviour. Given what we know about the detrimental effects environmental smoke has on health, it seems likely that it is already regarded by many people as ‘wrongful’ to smoke in the presence of another person (or, at least, another non-consenting person)¹⁰³ since it violates their right to bodily integrity, the right not to be harmed or put at an unacceptable risk of harm. This does, however, presuppose that being exposed to another person’s smoke is an unacceptable risk of harm – its unacceptability lying in the fact that people seem to be unwilling to accept the risk, rather than in the actual probability and magnitude of the harm, itself.

CONCLUSIONS

The paper set out to assess whether the recently enacted smoking bans in the UK were a legitimate exercise of state authority, and to use these prohibitions as an example with which to critique two leading criminalisation theories. There is little doubt that the health benefits resulting from these prohibitions have been considerable; on its first anniversary in England, a worldwide study reported that such bans have resulted in a 19% decrease in heart attack admissions to hospital.¹⁰⁴ In Scotland, the heart attack rate fell by 17% in the year following the legislation.¹⁰⁵ These types of proscription have a particularly beneficial

¹⁰² See JM Junker ‘Criminalization and crimogenesis’ (1972) 19 UCLA Law Review 687 at 701.

¹⁰³ The extent to which a ‘victim’ ought to be able to consent to an activity which would otherwise be criminal is a vexed question in criminal law theory. For most liberal theorists, the harm principle does not preclude mentally competent adults from being able freely to consent to what would otherwise be harmful activities by others, since such persons have not been ‘wronged’. For a critique of this, see I Hunt ‘Risking one’s life: “soft paternalism” and Feinberg’s account of legal liberalism’ (1995) 2 Canadian Journal of Law and Jurisprudence 311.

¹⁰⁴ R Dobson ‘Smoking bans reduce heart attack admissions’ (2008) 337 British Medical Journal 597.

¹⁰⁵ The average reduction during the decade prior to the ban had been 3%: S Hall ‘Smoking ban brings big cut in heart attacks in Scotland, study finds’ *The Guardian*, 11 September

effect in reducing the harm caused by passive smoke for those who work in what have hitherto been very smoky atmospheres, such as bar workers.¹⁰⁶ We have seen that both paternalism and the harm principle were employed by politicians to justify the legislation, but the conclusion reached in this paper is that the argument based on paternalism is a weak one. We have also seen that non-criminal mechanisms have been tried, but with limited success, and that criminalisation may sometimes be the preferable mechanism for attempting to deter behaviour which is harmful to others, and regarded by society as wrongful. It is therefore concluded that the legislation was warranted. Nevertheless, it is disappointing that the debates in the legislatures fell short of a properly articulated case in favour of criminalisation.

So what, if any, light do the smoking prohibitions shed on the criminalisation debate? As we have noted, many regard the principle that conduct ought to be criminalised only where it harms or risks harm to others as a fundamental tenet of liberal democracy, yet there is no consensus as to what ought to count as a ‘harm’, and the principle tells us little about whether any particular harm which is identified as such ought to be proscribed, or tolerated. In itself, it does not specify how serious in terms of either impact or probability the risk requires to be before it should be the subject of a criminal sanction. As we noted at the outset, while some theorists regard the harm principle as a limitation on criminalisation, such that conduct should not be proscribed if it offers little risk of harm to other peoples, other theorists treat the principle as part of the argument in favour of proscription; conduct which is potentially harmful is ipso facto regarded as meriting criminalisation.¹⁰⁷ In 2006, it

2007, available at <http://www.guardian.co.uk/uk/2007/sep/11/health.smoking>. It has more recently been reported that in England ‘there was a small but significant reduction in the number of emergency admissions for myocardial infarction after the implementation of smoke-free legislation’: M Sims et al ‘Short-term impact of smoke-free legislation in England: a retrospective analysis of hospital admissions for myocardial infarction’ (2010) 340 *British Medical Journal* 2161.

¹⁰⁶ See, eg, D Menzies et al ‘Respiratory symptoms, pulmonary function, and markers of inflammation among bar workers before and after a legislative ban on smoking in public places’ (2006) 296 *Journal of the American Medical Association* 1742.

¹⁰⁷ It has been suggested that the harm principle has been used in the United States of America to justify laws against prostitution, pornography, public drinking, drugs, loitering, and various homosexual and heterosexual behaviours; see Harcourt, above n 13, at 139.

was estimated that there were more than 10,000 statutory offences in England and Wales, with 3,000 of them having been introduced within the first 11 years of the last Labour Government.¹⁰⁸ Enactment of a criminal prohibition has thus become the preferred response to potentially harmful (and sometimes merely anti-social) behaviour.¹⁰⁹ Thus we have an abundance of criminal prohibitions on the statute books, but little by way of a principled means for determining when it is appropriate to have resort to the criminal law sanction.

It is beyond the scope of this paper to attempt to develop a theory of criminalisation, but as a minimum, the starting premise for legislatures should be that any proposals involving criminal penalties require vigorous justification, based on the harm principle *and* the inherent wrongfulness of the behaviour which is to be proscribed. Further, those advocating the imposition of a penal sanction must articulate their reasons for believing that this is the most appropriate method for regulating the unwanted or undesirable behaviour, in terms not only of its ability to act as a deterrence, but also with regard to the fairness of its application. Donald Dripps has suggested that one way of limiting the creation of criminal offences is to focus on institutional arrangements.¹¹⁰ He proposed that criminal legislation ought to require a two-thirds majority before it can be enacted. This would prevent crimes being created ‘by a bare majority in the heat of popular passion.’¹¹¹ Dripps also suggested that criminal provisions include a ‘sunset clause’, requiring re-enactment every ten years. As he put it: ‘The core criminal ... provisions on murder, rape, [burglary] and theft would easily be readopted, perhaps with some beneficial fine-tuning. But borderline criminal legislation of any description would face an up-hill fight.’¹¹² These proposals merit serious consideration. Without a more robust approach than the current one, the only restraint on criminalisation is likely to be a pragmatic one;

¹⁰⁸ N Morris ‘Blair’s “frenzied law-making” has created a new offence for every day spent in office’, *The Independent* 16 August 2006, p 2, cited in J Chalmers and F Leverick ‘Fair labelling in criminal law’ (2008) 71 MLR 217 at 217.

¹⁰⁹ As Persak has pointed out: ‘To propose a new incrimination is... the cheapest, quickest, most memorable, and media-inviting act the Member of Parliament can do – the most efficient for a legislator (securing re-election) and the least truly efficient i.e problem-solving’ : above n 13, p 27.

¹¹⁰ Dripps, above n 13, at 11.

¹¹¹ *Ibid*, at 12.

¹¹² *Ibid*.

politicians rely on the votes of their constituents and are unlikely to criminalise behaviour without the backing of a significant proportion of the population. This is in danger of leaving the development of the criminal law to the mercy of popular sentiment– the ‘tyranny of the prevailing opinion and feelings’ against which Mill cautioned 150 years ago.¹¹³

¹¹³ Mill, above n 6, p 9.