THE MORAL LIMITS OF CRIMINALIZING REMOTE HARMS

Dennis J. Baker*

I draw on accessorial liability jurisprudence in an attempt to outline the moral limits of criminalizing people for merely influencing the criminal choices of others. A person’s conduct is a “remote harm” when it is harmless “but for” the fact that it encourages another independent party to commit a harmful criminal act (a primary harm). For example, the “broken windows” thesis holds that minor incivilities (such as passive begging) are a precursor to more serious crime. Passive begging allegedly sends a signal to criminals that the broken windows area is unpolicied and is an easy target for crime. The beggars are criminalized to deter independent parties from committing crimes in the broken windows area. In this paper, I object to this kind of criminalization because it contravenes the requirements of fairness and individual responsibility, because it aims to punish people for the inadvertent consequences of their actions. I argue that a person should only be held responsible for another’s criminal harm when she is normatively involved in it. What is needed are normative reasons for stating from an ex ante perspective that it will be fair to hold X morally responsible for S when it causes Y to do harm N. If this requirement is satisfied then there will be a prima facie case for criminalization. I argue that a person is normatively involved in another’s crime when she knowingly assists or intentionally encourages that crime. In addition, a person can become normatively involved in another’s criminal harm by underwriting it. I also assert that the fairness constraint should only be overridden as a

*Jesus College, University of Cambridge. I would like to thank Professors Andrew von Hirsch and Peter Glazebrook for their comments on this draft, and for their valuable discussions.
matter of necessity to prevent harm of an extraordinarily grave kind and that the broken windows harm does not satisfy this requirement.

I. REMOTE HARM CRIMINALIZATION

A. Criminalization for the Acts of Another

The focus of this paper is on the moral limits of the criminal law with respect to the criminalization of passive begging as a remote harm. Conduct should only be criminalized when there are “critical” moral reasons for doing so. Frederick Pollock writes that

Moral law is the sum of the rules binding on human beings, generally or with regard to circumstances of a particular society, so far forth as they are capable of discerning between right and wrong; but it may also mean the rules to which the members of a particular society are actually expected, by the feelings and opinions prevalent in that society, to conform. Sometimes the distinction between actual and ideal rules of conduct is marked by speaking of moral rules, or of “positive morality,” when we mean the rules accepted in fact at given times and places but of “natural law,” “law of nature,” or “natural justice [critical morality],” when we mean universally accepted, or in our opinion ought so be.1

I adopt Feinberg’s “critical” moral principles for limiting the scope of the criminal law. Hence, conduct should only be criminalized when it causes morally wrongful harm or offense to others.2 With this in mind, I consider harmless conduct (except for wrongful offense) to generally be un-criminalizable, and morally wrongful harmful conduct to be prima facie criminalizable.

I argue that passive begging does not cause direct harm, and therefore is not criminalizable as a direct harm under the harm principle. Nevertheless, some commentators allege that passive begging is indirectly (remotely) harmful, because it influences others to commit direct harms.

3. In this paper, at least for the sake of argument, I take it as a given that passive begging is not directly harmful for the purposes of criminalization. I have argued elsewhere
For the sake of convenience, I refer to this type of criminalization as remote harm criminalization. A remote harm is harm that occurs when X’s innocuous conduct contributes to Y’s decision to commit a harmful crime. X is only indirectly (remotely) connected to the direct (primary) harm, because the harm is contingent on Y making an independent criminal choice. For instance, when X gives Y a flyer and Y harms the environment by making an independent choice to throw the flyer into the street, the harm is remote because it is contingent on Y making an independent choice to litter. Handing out flyers per se is not harmful.

The question for present purposes is whether remote harm constitutes criminalizable harm for the purposes of the harm principle. If the harm principle is to maintain its function as a liberty-protecting principle, then criminalization has to be limited to those situations where a person inflicts actual harm or is normatively involved in harm inflicted by another. One who harms remotely should only be held criminally responsible when it is possible to “fairly impute” blame to her for the primary harmer’s subsequent criminal choice. The fair imputation requirement has to be met if the harm principle is to operate as an effective check on criminalization. In this paper, I question whether passive begging can be criminalized as a remote harm. According to the broken windows thesis, conduct such as passive begging is harmful because it causes others to engage in harm doing. Begging is allegedly harmful because it is a “but for cause” to the broken windows phenomena: the harm transpires when an independent party makes the intervening choice to criminally target the broken windows area.

Criminalization for another’s conduct is morally objectionable, because it ignores the separateness of each person as a responsible autonomous

that passive begging is not generally criminalizable, because it only causes offense, not harm, to others in very narrow circumstances (i.e., when the passive beggar targets a captive auditor in a train, etc.). I have argued that anti-begging laws should be narrowly tailored to deal with begging in those circumstances. Dennis J. Baker, Reshaping Offence and Harm: The Moral Limits of Criminalization (March 10, 2006) (unpublished manuscript, on file with author).

4. Von Hirsch defines conduct that is only remotely connected to the actual harm as “a remote harm.” Andrew von Hirsch, Extending the Harm Principle: “Remote” Harms and Fair Imputation, in Harm and Culpability 259 (Andrew P. Simester & Tony A.H. Smith eds., 1996).

Generally, it is unjust to criminalize people for the remote consequences of their actions, as criminal liability usually requires some proof of harmful conduct that is imputable to some culpable action of those who are to be criminalized. The harm principle is designed to uphold this ethical principle. Being able to fairly impute blame for the actual harmful conduct is a fundamental requirement of justice and fairness both in attributing fault and blame from an *ex post* (trial) perspective and from an *ex ante* (criminalization) perspective. Glanville Williams sums this ethical principle up in the following terms:

An extreme view of criminal responsibility might be that a man is under a duty to act in such a way that others are not led to cause harm, so that in some circumstances he would be responsible for harm that is directly caused by others, even though without his authorization or encouragement. This does not represent the criminal law. The legal attitude is that a man is primarily responsible only for what he himself does or incites.

H.L.A. Hart asserts that “a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not be applied to him.” Notably, the passive beggar is not able to control those who target the broken windows area. Factual harm or a mere chain of causation with nothing more has the potential to treat legal blame as a self-evident consequence of causation, regardless of moral responsibility.

Unfair criminalization occurs when a person is blamed for a crime that she has not incited, committed, attempted, planned, or actively encouraged. A retributive justification for criminalization and punishment would not allow a remote harm doer to be criminalized for the inadvertent consequences of her innocuous conduct. A utilitarian justification for criminalization would be prepared to criminalize and punish innocent people, if it would reduce the overall frequency of crimes. In our case, the broken windows thesis alleges that begging is indirectly harmful, because there is

---

6. This is tolerable if normative reasons can be given to allow utility to prevail. See H.L.A. Hart, Between Utility and Rights, 79 Colum. L. Rev. 828 (1979).
allegedly a *causal* relationship between begging and criminality. The broken windows justification for criminalizing passive begging means that the wrong (blameless) person is blamed for primary harm that emanates from the conduct of other independent parties. The utilitarian would argue that the innocuous act of begging should be criminalized and punished, because removing beggars from the streets might help to prevent other independent parties from committing serious crimes in the broken windows area. The beggar is not blamed for the direct harm that flows from a house burglary (i.e., the beggar is not charged, convicted, and punished for burglary). Instead, the beggar is blamed at a lower (preventative/expediency) level for inadvertently signaling that the broken windows area is attractive for criminals.

Remote harm criminalization differs from accessory criminalization in that the legislature creates two individual offenses in order to prevent the primary (direct) harm. For instance, it might assert that it is necessary to criminalize both the passive beggar (the alleged remote harm doer) and the burglar (the primary harm doer) who target the broken windows area. Both are criminalized to deter the broken windows harm, but this is achieved by creating two separate offenses: one offense criminalizing the remote harm and the other criminalizing the primary harm. The remote harm doer is blamed so long as she has the mens rea for the remote harm (i.e., so long as she intends to beg). In the case of accessorial liability, both parties are blamed and punished for the principal’s act and are criminalized at this level.

In this paper, I draw on accessorial liability theory to demarcate the moral limits of remote harm criminalization. Accessory liability is somewhat different from remote harm liability, but there is a common theme: blame for the harmful act of another. The philosophical rationale for criminalizing accessories hinges on the normative link between the accessory’s and principal’s conduct.10 The idea of normative involvement can be developed to explain when it will be fair to impute blame to a remote harm doer. In those cases where normative involvement cannot be established there will be no case for criminalizing the remote conduct, unless

10. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 327 (1985) (“Where the principal’s actions are fully voluntary, the accomplice cannot be said to have caused the principal’s actions, and thus cannot be held liable for crime on the basis that he caused those actions.”).
an argument can be produced to justify overriding the fairness constraint. It is also worth mentioning that causation in this paper differs from legal causation. It is only used in an empirical sense to demonstrate that certain innocuous acts are “but for” causes of certain criminal harms. This is not a question of legal causation, as clearly the intervening choice of the person who causes the direct harm would sever any chain of causation. It is about empirically demonstrating that certain remote acts contribute to the occurrence of certain primary harms. An empirical connection is necessary, if we are to label conduct as causing remote harm.

II. A STANDARD FOR FAIRLY IMPUTING BLAME FOR REMOTE HARMS

A. Fair Imputation of Harm: A Three-step Imputation Standard

Fair imputation cannot be determined merely by considering mens rea and the causal connections between the remote harm (begging) and primary harm (broken windows).\(^{11}\) Passive begging may very well be a “but for” cause of the broken windows phenomena. Furthermore, we know that the beggar is responsible for her act of begging, as she begs with mens rea. We also know that the beggar does not intentionally or knowingly\(^{12}\) aim to induce independent parties to enter the area to commit the wrongful harms that allegedly result from the alleged broken windows phenomena. It is not a case of incitement. Furthermore, it is not a case of aiding and abetting. The beggar does not intentionally (or knowingly) aid or abet those who target the broken windows area.

The fair imputation of harm problem can be resolved by following a three-step process. The first step is to ask: Was the remote act a “but-for” cause of the primary harm? After all, criminalizable conduct is conduct that harms others. If there is no empirical link, then there will be no grounds for criminalizing the alleged remote harm, as it will not constitute a remote harm.

\(^{11}\) Von Hirsch, supra note 4, at 267.

\(^{12}\) Merely knowing that someone might be induced into criminality because of your lawful activities is not sufficient to normatively involve you in that person’s criminality. But it would be for the purposes of accessory liability, because there is a close and direct relation between an accessory and principal. The accessory has firsthand knowledge of the principal’s bad intentions and is able to choose whether to assist or not. See the discussion infra.
harm unless it is a “but for” cause of the primary harm. If the remote harm is a “but for” cause, then the second step is to ask: Was the remote harmer somehow normatively involved in the primary harm? If there is a strong empirical connection, then the third step might allow for an override argument to be invoked. The legislature might argue that the fairness requirement ought to be overridden as a matter of urgency to prevent harm of an extraordinarily grave kind.

B. Step One: Factual Harm

The available empirical evidence suggests that the broken windows thesis is empirically false. Any empirical evidence should be thoroughly scrutinized before being used as a basis for criminalizing conduct. The broken windows hypothesis, which has been used to justify the criminalization of begging in England and America, has little empirical support. The British government has used the broken windows thesis to defend its crackdown on begging. It advocates zero tolerance for minor incivilities. The broken windows thesis is central to its harm argument. A white paper presented to the United Kingdom Parliament by the secretary of state for the Home Department investigating anti-social behavior quotes the broken windows thesis, which postulates that neighborhoods that neglect minor signs of decay and incivilities open the door for more serious crime to take place. According to the broken windows thesis, “disorder and crime are usually inextricably linked in a kind of developmental


16. Id.
sequence.”17 The broken windows thesis claims that neighborhoods with abandoned overgrown properties, with broken windows, people drinking in the streets, accumulated litter, inebriates, beggars, and prostitutes on the sidewalks, etc., attract more serious crime.18 Wilson and Kelling claim that many residents in the broken windows neighborhood will think that “crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. . . . Such an area is vulnerable to criminal invasion.”19 Essentially, the broken windows theory postulates that neighborhood disorder, physical decay, graffiti, litter, and minor incivilities such as begging will, if left unchecked, send a message to potential malefactors that the area is a defenseless target for criminal activities because no one cares.20 Kelling still holds the view that the broken windows thesis has substance.21

Hitherto, little empirical evidence has emerged to support the idea that disorder left unchecked causes crime.22 The proponents of the broken-widows thesis usually start by citing Wesley Skogan’s research from the 1980s.23 Skogan analyzed previous surveys of residents in forty neighborhoods throughout a number of sizeable cities.24 Skogan found that measures of social and physical decay correlated with some types of serious crime, but prefaced his work with a notable warning:

Ironically, the data from the 40 neighborhoods cannot shed a great deal of light on the details of the relationship between disorder and crime, for the measures all go together very strongly. With only 40 cases to untangle this web, the high correlation between measures of victimization, ratings of crime problems, and disorder make it difficult to tell whether they have either separate causes or separate effects at the street level.25

17. Wilson & Kelling, supra note 5, at 31.
18. Id. at 31–32.
19. Id.
20. Id.
23. Wesley G. Skogan, Disorder and Decline (1990); Wesley G. Skogan, Disorder, Crime and Community Decline, in Communities and Crime Reduction 48 (Tim Hope & Margaret Shaw eds., 1988).
24. Skogan, Disorder and Decline, supra note 23.
25. Harcourt, supra note 13, at 311–12.
Notwithstanding this, Kelling and Coles have claimed that Skogan established a causal link between disorder and serious crime. After reanalyzing Skogan’s study, Harcourt found that there were “no statistically significant relationships between disorder and purse-snatching, physical assault, burglary, or rape when other explanatory variables are held constant, and that the relationship between robbery and disorder also disappears when the five Newark neighborhoods are set aside.” Harcourt found that out of the forty included neighborhoods in Skogan’s sample, the strongest link occurred in five contiguous neighborhoods in Newark. But when those neighborhoods were excluded the link disappeared totally. Furthermore, he notes that only a few of the calculations included data from all the neighborhoods, because the various surveys failed to ask exactly the same questions. Harcourt found that overall the data did not support the broken windows hypothesis.

New York Mayor Rudolph Guiliani’s 1994 quality-of-life initiative has also been cited repeatedly in support of the broken windows thesis. After the introduction of this initiative there was a remarkable reduction in the overall crime rate, especially for serious crime. Harcourt asserts that a number of factors contributed to the declining crime rates in New York including increased police numbers, shifting drug use, new computerized tracking facilities, and demographics. He argues that the current understanding of what caused the remarkable decline in New York’s crime rates is too uncertain and too contested to conclusively support the broken windows hypothesis. While he acknowledges that the quality-of-life initiative perhaps did have an indirect effect on the decline in crime, he nevertheless asserts that it had very little to do with fixing windows. Instead he believes that the decline may have been attributable to the policing approach.

29. Id.
30. Id.
31. Id. at 331.
32. Id. at 331–39.
33. Id. at 339.
34. Id. at 342.
adopted in New York, which may have enhanced the power of surveillance offered by the aggressive policing of misdemeanors.35

There is empirical evidence to suggest that the quality-of-life initiative allows police to collect “more identifying information; that the policing strategy increases opportunity for checking records, fingerprints, DNA, and other identifying characteristics; and that it facilitates information gathering from informants.”36 This measure does not hinge on the restoration of public order sending a “message to criminals that they cannot commit crime, [but rather on] the old-fashioned idea that more police contact, more background checks, and more fingerprinting will produce better crime detection.”37 Furthermore, a number of other cities achieved equal or greater reductions in crime during this period.38 At the same time, San Francisco adopted a less strident law enforcement approach, which also reduced arrests, prosecutions, and imprisonment rates.39 Although San Francisco is frequently derided by conservatives for its alternative crime policies, it registered reductions in crime during this same period that were in excess or equal to comparable cities and jurisdictions—including New York.40

A landmark study in Chicago carried out over the last decade by Sampson, Raudenbush and Earls suggests that most major crimes are linked not to broken windows, but to two other neighborhood variables: “concentrated poverty” and “collective efficacy.”41 The study, which puts forth the idea of collective efficacy (i.e., collective efficacy is defined as social cohesion among neighbors and their willingness to intervene on behalf of the common good),42 suggests that the greatest predictor of

35. Id.
36. He notes that “[t]o be sure, this alternative hypothesis is also based, in large part, on anecdotal evidence, and it is essential that it too be operationalized and empirically verified. Like the broken windows theory, it is at present an untested hypothesis.” Id.
38. Id.
40. Id.
41. Sampson et al., supra note 13.
neighborhood crime is not broken windows or disorder. Instead it suggests that crime is deterred by community presence.\textsuperscript{43} The preliminary results from this study imply that the broken windows thesis lacks credibility.\textsuperscript{44}

Sampson and Rudenbush\textsuperscript{45} noted in their earlier study that “[c]ontrary to the ‘broken windows’ theory, however, the relationship between public disorder and crime is spurious except perhaps for robbery.”\textsuperscript{46} Once the researchers factored other neighborhood characteristics thought to be associated with crime into their study, such as poverty and instability, the correlation with disorder disappeared for every type of crime tested apart from robbery. In the end they suggested that serious crime and disorder was more likely to be related to deeper social and economic disadvantages.\textsuperscript{47} Sampson et al.\textsuperscript{48} found that neighborhoods high in disorder did not have higher crime rates in general than those that had low levels of disorder once collective efficacy and structural antecedents were held constant.

They found that there was no high correlation between crime and disorder to start with:

Even for robbery, the aggregate-level correlation does not exceed 0.5. In this sense, and bearing in mind the example of some European and American cities (e.g., Amsterdam, San Francisco) where visible street level activity linked to prostitution, drug use, and panhandling does not necessarily translate into high rates of violence, public disorder may not be so “criminogenic” after all in certain neighborhood and social contexts.\textsuperscript{49}

In other words, they found that the active stimulus for criminality was structural disadvantage and attenuated collective efficacy more so than disorder. They held that attacking public disorder through strong-handed policing may be a politically popular approach to reducing criminality, but is an analytically weak strategy as “it leaves the common origins of both, but especially the last, untouched.”\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Sir Anthony E. Bottoms, Incivilities, Offence, and Social Order in Residential Communities, in Incivilities: Regulating Offensive Behavior 239, 268–69 (Andrew von Hirsch A. & Andrew P. Simester eds., 2006).
\item \textsuperscript{45} Sampson & Raudenbush, supra note 13.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id. at 638.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\end{itemize}
The coauthor of the broken windows thesis, James Wilson, recently stated: “I still to this day do not know if improving order will or will not reduce crime . . . People have not understood that this was a speculation.” If the government is going to criminalize incivilities such as begging, on the basis of broken windows, it should start by demonstrating that there is a credible empirical connection between disorder and crime. My analysis of the available literature suggests that there is clearly no empirical evidence to support the broken windows thesis. Therefore, it does not provide a sound factual basis for criminalizing begging.

C. Step Two: Normative Links

Let us assume for the sake of argument that the government is able to demonstrate that passive begging is a significant cause of the broken windows harm. In those cases where there is a sound normative connection, a strong empirical link could give the legislature reason for holding X partly responsible for harm caused by Y’s independent criminal choices. This brings us to the second step, namely whether the remote harmer is normatively involved in the primary harm in the broken windows situation. If it can be shown that the beggar is normatively involved in the primary harm (increased burglaries, robberies, etc.), then it may be possible to fairly impute blame to the beggar proportionate to her contribution to the primary harm. A normative link is required to reconcile remote harm liability with critical morality. Imputing blame from an ex ante perspective is a normative inquiry: should the law impute blame to X and Y at different levels if X does N and this causes Y to do S to both X and Y? I draw on the idea of normative involvement to establish whether it may be fair to impute a share of the blame for the broken windows harm to those who allegedly cause the phenomenon. The question is: Was the remote harmer...

52. Some commentators have alleged, without offering any proof, that zero tolerance policing has led to massive reductions in crime in New York, where between 1994 and 1996 the crime fell overall by 37 percent with a 50 percent reduction in homicides alone. See Roger Burke-Hopkins, The Regulation of Begging and Vagrancy: A Critical Discussion, 2 Crime Prevention & Community Safety 43, 45 (2000).
somehow normatively involved\(^{53}\) in the primary harm? If she was, then there will be a prima facie case for criminalization, as it will be fair to impute a share of the blame to her for the primary harm.

What is meant by normative involvement? Von Hirsch asserts that “We are speaking of situations where the original actor, through his conduct, in some sense affirms or underwrites the subsequent [criminal] choice” of the primary harmer.\(^{54}\) This suggests that the remote harmer’s conduct would have to underwrite the final harm that is likely to transpire. The concept of normative involvement explains the moral underpinnings of accessory liability, which, in some respects, is analogous to the remote harm liability. Just as remote harm liability derives from the crimes of another, so too does secondary (accessory) liability. Simester and Sullivan note that in the accessory situation, “[t]he defendant is indirectly held responsible for a crime committed by another and, as such, her liability is dependent upon the criminal actions of that other person.”\(^{55}\) The mens rea is satisfied if the accessory intended to do the acts of assistance or encouragement and foresaw that the principal would go on to commit the offense with the acts of assistance or encouragement.\(^{56}\) It is the accessory’s intention (or knowledge), assistance, and foreseeability that normatively link her to the primary harm.

Accessory liability provides us with a methodological starting point, as its moral basis is best explained by the normative links between the principal and accessory. In the accessory liability context, the accessory becomes criminally liable for the criminal act of another in two core ways. Firstly, an accessory can be held criminally liable for assisting a principal. Secondly, an accessory can be held criminally liable for influencing (encouraging) the principal to commit a crime. Accessory liability is reconcilable with fairness in the above-mentioned situations, because the accessory is normatively involved in the principal’s wrongdoing. In the first situation, the accessory is normatively involved in the principal’s crime, because she assists with full knowledge of the principal’s criminal intentions. Hence, if

\(^{53}\) Normative involvement involves underwriting the primary harmer’s criminal choice. Andrew von Hirsch, Varieties of Remote Harms and Rationales for Their Criminalization (March 2006) (unpublished manuscript, on file with author).

\(^{54}\) Id.


X gives Y a gun intending (or knowing) that Y will use it to murder another, then X clearly underwrites Y’s act of murder. It is fair to hold her responsible for Y’s more serious wrong (murder) as she has participated in a normative way by supplying the murder weapon. She involves herself normatively by intentionally or knowingly assisting and can be held responsible for the primary harm, that is, the murder, as she, indirectly, helps the principal to achieve this harm.

Intention and the looser concept of knowledge are important tools for demonstrating a normative link in the accessory situation. Mere knowledge is normally sufficient in those cases where the accessory helps (assists) the principal, because of the close links. In *Cook v. Stockwell* it was held that a proprietor who chooses to sell liquor knowing that the buyer intends to resell it in violation of law is guilty of aiding and abetting the criminal resale. Likewise, in *Cafferata v. Wilson* the defendant wholesaler sold a firearm to an unlicensed dealer. The unlicensed dealer resold the revolver and was charged with an offense, as he was not registered as a firearms dealer. The court held that the wholesaler was also guilty because he knew that the unlicensed dealer was not licensed to resell the firearm. David Ormerod sums up the rationale for these decisions in the following terms: “In both these cases the suppliers were indifferent whether the crime was committed or not. Both had voluntarily performed acts of assistance and had sufficient knowledge from which a jury could find that they intended by the act to assist.” This is acceptable because of the propinquity between the accessory and the identifiable principal’s intended crime. It is fair to impute blame to those who knowingly aid a crime. These cases are reconcilable with critical morality, as the accessories were able to say no. They knew of the principal’s intentions but chose to assist, even though their purpose or desire was merely to sell their products.

57. See, e.g., Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (opinion of Parker, J.) (obiter dicta).
58. Glanville Williams argues that “[h]elping another to commit a crime does not require a purpose on the part of the accessory that the crime should be committed. A person may be guilty as accessory simply by knowingly helping.” Glanville L. Williams, Complicity, Purpose and the Draft Code—2, 1990 Crim. L.R. 98, 100.
59. (1915) 113 L.T. 246.
60. (1936) 3 All E.R. 149.
A person can also become normatively involved as an accessory by encouraging or influencing another to commit a crime.\(^\text{62}\) But mere knowledge is not enough to establish a normative link when a person merely influences or encourages the commission of a crime, because the association is too remote. When a person knowingly encourages rather than assists another to commit a crime, something more than mere knowledge is needed to demonstrate normative involvement. This is due to the fact that the accessory has no direct link with the principal in these cases, except for where it is her purpose to influence the principal to commit a crime. To satisfy the normative involvement requirement in this context, the accessory would not only have to know that she was encouraging or influencing another to commit a crime, but would also have to intend (have it as her purpose) to encourage or influence the commission of that crime.

Glanville Williams discusses those situations where a primary harmer is merely influenced or encouraged by the actions of another.\(^\text{63}\) For instance, media coverage of violent street protests could influence some quasi-political groups to organize such protests so as to attract publicity for their grievances. Likewise, media coverage of prison riots could encourage further rioting. When a television station broadcasts prisoners on the rampage on a prison roof, destroying property and displaying banners conveying their message to the public and so forth, it could encourage the prisoners to continue rioting so as to attract publicity for their grievances. To take another example, hundreds of protestors rode bicycles through London in the nude last year to draw attention to their crusade against oil consumption and its affects on the environment. While there is little doubt that the inevitable media coverage influenced the decision not to wear clothing, the television stations that reported on this event should not be held criminally responsible for merely knowing that their actions might encourage nude protests. Williams asserts that in the influencing situation it would be necessary to also show that it was the accessory’s purpose to influence

\(^{62}\) This type of liability is based on the normative concept of “purpose.” As Williams notes, “the normal doctrine of causation does not apply to accessories, so that it need not be proved that the act or encouragement or influence was a but-for cause of the crime. However, the act intended to influence the perpetrator must reach his mind, and must be of a kind that may be expected to influence him.” Glanville L. Williams, Complicity, Purpose and the Draft Code—1, 1990 Crim. L.R. 4, 9 (1990).

\(^{63}\) Williams, supra note 62, at 10.
or encourage the primary harm. Hence, merely anticipating that you might encourage a riot or nude protest by giving it media coverage would not be sufficient. Clearly, it is not the television station’s purpose to encourage the criminal activities of the rioters and protestors. The idea of purpose is important for establishing a normative link in the influencing context. It would be morally objectionable to hold the remote harmer blameworthy for merely foreseeing a primary harm as a definite side effect of her lawful (remote) conduct.

*Beatty v. Gillbanks* complies with this line of normative reasoning. In that case it was held that the Salvation Army had acted lawfully in congregating in Weston-super-Mare even though its officers knew from past experience that this would cause an opposing organization, the Skeleton Army, to attack them. The Salvation Army anticipated and knew that it was likely that the Skeleton Army would behave unlawfully, but it was not its purpose to encourage this unlawful behavior. Its purpose was merely to congregate.

The aforementioned scenarios concerning the media coverage of the prison riot and the Skeleton Army attack are good examples of remote harms, rather than examples of secondary criminal participation. The limits that apply in the accessory liability situation also apply to remote harms. When the accessory’s purpose is to encourage another to commit a crime, it can be fairly stated that she becomes normatively involved in that crime. Reckless or negligent contributions to others’ criminal acts are not sufficient to establish a normative connection in either the accessorial or remote liability context.

64. Id.

65. Glanville Williams asserts that the “extension of the meaning of intention to foreseen certainties should not apply to illegal conduct.” Williams, supra note 8, at 86. For instance, in *Beatty v. Gillbanks* “the Salvation Army foresaw that when they assembled they would be set upon, because they knew that this was the policy of their opponents; but that did not make them responsible for being set upon. The reason for the limitation is partly the result of our notion of responsibility, which we attribute to the immediate wrongdoer, not to the innocent party who merely foresees the wrongdoing. It would be an intolerable extension of criminal responsibility if people who were exercising their lawful rights and liberties were to be responsible for the acts of deliberate mischief-makers.” Id.

66. (1892) 9 Q.B.D. 308.

67. Williams, supra note 8, at 12.

In the broken windows context, the remote harmers do not have a close connection with the primary harm doers. Nor is it the beggar's aim to encourage those who commit crimes in the broken windows area. Remote harm liability for influencing others to commit crimes ought to, by and large, be limited to those situations where purpose is present. However, it might be fair to impute blame to remote harmers in limited situations regardless of purpose. I note that those situations will hardly ever arise. When they do it is important to provide additional normative reasons to demonstrate normative involvement.

For instance, a person might become normatively involved in another's crime when she sells goods that have a harmful telos to that person. Normative involvement here comes about because the seller of the harmful goods through her conduct in some sense affirms or underwrites the subsequent harmful use of that good by another. Those who sell bazookas to the general public (knowing that the government has limited their use for military combat) would be normatively involved in any harm caused by someone using a bazooka, whether they knew about that person's harmful intentions or not. When the retailer sells a weapon that has a military use to the general public, she has "the requisite normative involvement in its possible use—since the very design and purpose of the bazooka is as an anti-personnel weapon."

Michelle Dempsey proposes an alternative argument for fairly imputing a primary harm to a remote harmer. She argues that in certain contexts, harms are fairly imputable to the remote harmer on the simple idea that the remote harmer creates "the demand" for the conduct that causes the primary harm. Dempsey's argument is flawed and has the potential to increase the scope of the criminal law. She argues that all those who use prostitutes ought to be criminalized, because at some stage a prostitute somewhere could be harmed by the practice of prostitution, as some prostitutes are not giving genuine consent. She asserts that the harm suffered by those who are forced into prostitution "can be fairly imputed to all prostitute users, due to their role in creating the prostitution market."

70. Id.
71. Id.
73. Id. at 454.
She makes a similar claim with respect to child pornography. It is worth noting that possessing child pornography is a remote harm, because those who merely purchase child pornography do not come into contact with the children. Nor do they necessarily have any close association with the child pornographer. The purchaser of these ghastly materials might not care who produced them or where they came from. Dempsey argues that “[u]sers of child pornography not only create the market for such material, but they also create the incentive for pedophiles and profiteers to satisfy that market through the abuse of children.”\(^74\) But a normative link cannot be established merely by referring to the user’s role in creating demand for the child pornography market.

Dempsey would also argue that the purchasers of ivory collectively form the lucrative ivory market that is poaching’s raison d’être. This market might be the sole incentive for the poachers’ activities. Furthermore, the market, even though indirectly, does increase the risk of harm to the endangered elephant population.\(^75\) Even though X does not kill the elephants or even come into contact with them, her ivory purchases create demand for ivory. But this is not sufficient to establish a normative link. As I noted above, merely influencing another’s criminal choice is not sufficient for establishing a normative link. Should the television crew be held criminally liable for creating the demand for nude and violent street protests? Would it not be an intolerable extension of criminal responsibility if television crews were held criminally liable for exercising their lawful rights and liberties, simply because it might encourage others to engage in criminality?

The better argument for prohibiting people from purchasing child pornography and ivory relates to the normative implications of receiving the proceeds of a wrongful (criminal) harm. The purchaser of child pornography can be normatively linked to the wrongful harm that is caused to real children who are used in child pornography, because the normative implication is simply that you are receiving the fruits of a wrongful harm.

\(^{74}\) Id. at 453–54.

criminal harm. This would not prevent pedophiles from purchasing cartoons or animated material, as real children are not harmed to produce these types of materials. This type of compromise is necessary, as we need to link the remote harm back to some tangible primary harm if we are to limit the scope of the criminal law in other less emotive areas. Likewise, the purchaser of ivory can be normatively linked to the ultimate harm that is caused to the wild elephant population. 76 The normative link is based on the notion that it is wrong to receive benefits which you know can only be obtained when another person harms others; and if you do, you become normatively involved in the underlying primary harm. By receiving a good that can only be produced through wrongful harm, you underwrite the wrongful harm. Similarly, the gravamen of the offense of receiving stolen goods is the receiving of the goods with knowledge that they were stolen. It is wrong for a person to possess or receive goods that she knows are stolen, since she knows the goods have only come about because someone has committed a wrongful harm. These cases are distinguishable from the television crew cases, as the normative implications are different. The normative aim of possessing child pornography or stolen goods is to intentionally benefit from a known criminal harm. Whereas the telos of giving media attention to a nude protest is not to intentionally benefit from the protestors’ criminal activities. Any benefit in the latter situation is inadvertently acquired.

D. Step Three: Override Arguments

In some cases there will be strong empirical evidence showing that a remote harm is a “but for” cause of a primary harm with which it is not normatively connected. The evidence might also demonstrate that it is necessary to criminalize the remote harm to prevent the primary harm. How do we reconcile criminalization of remote conduct that poses a real risk of harm to others with critical morality where there is no normative involvement? Overriding the fair imputation requirement is difficult to reconcile with moral judgments about moral responsibility and blame. Dworkin argues that the fairness constraint can be overridden in exceptional circumstances. 77 Dworkin’s override argument, inter alia, asserts that

76. This is assuming that harming and destroying elephants is something that sets back the collective interests of humanity.
it might be fair to override fundamental rights when “the cost to society would not be simply incremental, but would be of a degree beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.” This ground for overriding fairness “applies most readily to situations where there is a derogation from rights done in order to avert catastrophic consequences.”

Dworkin argues that “if the nation is at war, a policy of censorship may be justified even though it invades the right to say what one thinks on matters of political controversy. But the emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude.” Public emergencies often require urgent action to prevent harm of serious magnitude. The urgency of the situation could mean that it is necessary to override the fairness constraint for some greater public good. The threat posed by someone carrying the “bird flu” virus would allow the fairness constraint to be overridden, so as to allow the carrier to be quarantined for as long as reasonably necessary. Such a situation would require urgent action to prevent a grave harm that poses present danger of magnitude.

Dworkin makes clear is that rights cannot be trumped merely on a utilitarian calculus. Utilitarians might disagree. People can only be asked to keep the law themselves. It is not fair to expect them to ensure that others with whom they have no normative relationship also obey the law. Liability without blame might be justified in those cases where a convincing Dworkin-style override argument can be produced, but that is a very high standard to satisfy. The broken windows argument is unable to meet the requirements of this standard, because it does not have a factual basis

78. Id.
80. Id.
81. “Such an approach, based on Dworkin’s [override argument] for derogation, seems plausible in the case of quarantine, because of several features. The potential harm is of extraordinary magnitude, not only in the seriousness of the possible consequences in the individual case, but also in the pervasiveness of the harm. . . .” Id. at 54.
82. Utilitarian justifications for criminal law have been used to circumvent the fairness constraint by way of eliminating the culpability requirements in the form of strict liability offenses. Jeffrie G. Murphy & Jules L. Coleman, Philosophy of Law: An Introduction to Jurisprudence 128 (rev. ed. 1990); Cf. Hart, supra note 9.
and the normative implications of passive begging do not suggest that it causes grave harm of a direct nature. Begging does not present a clear and present danger, because (even assuming for the sake of argument that the broken windows argument were credible) it is only remotely connected to other potential harms. It would not be necessary to criminalize both begging and the primary harm. It would only be necessary to criminalize the activities of those who actually engage in harm doing in the broken windows area.

The lawmaker cannot demonstrate that criminalizing begging is necessary to prevent extraordinarily grave harm that is virtually certain to transpire and that its prevention is a matter of urgency. The above analysis demonstrates that the broken windows justification for criminalizing people for the remote consequences of their actions does not fulfill the prerequisites for overriding the fairness constraint. According to the above analysis, passive begging is not a but for cause of the broken windows phenomena, so an override argument is not relevant. Even if begging were a precursor to the broken windows harm, we would need further empirical evidence to demonstrate that this causes harm of an extraordinarily grave kind before we could consider invoking an override argument.

III. CONCLUSION

By requiring a normative connection between the remote harmer’s isolated conduct and the primary harm we are able to limit criminalization to those cases involving fairly imputable harm and wrongdoing. Inadvertently influencing others to commit a criminal activity is insufficient for demonstrating normative involvement. In the present case it is clear that the beggar does not underwrite the burglar’s, robber’s, or murderer’s independent choice to commit crimes in the broken windows area. Notably, under the broken windows approach begging would be punishable regardless of whether someone robs the broken windows area. The aforementioned argument has shown that begging is not criminalizable as

---

83. The beggar also has normative rights with respect to existing and using public spaces. See generally Jeremy Waldron, Homelessness and Community, 50 U. Toronto L.J. 371 (2000).
a remote harm. This paper dealt with the question of the moral limits of
criminalization from an intriguing starting point: that of the government’s
suggestion that begging might be criminalized on the basis of the broken
windows hypothesis. I have juxtaposed this case with a number of other
examples drawn from the accessory liability jurisprudence. The conclusion
is that there needs to be a normative link between the defendant and the
remote harm, and that no such link has been established in the case of bro-
ken windows. Furthermore, the normative implications of begging suggest
that it is not necessary to override the fairness constraint.