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COMMENT
A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging

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In evaluating the historical and contemporary justifications for the offences of vagrancy and begging, the first part of this Comment focuses on the historical roots of the older English legislation. Thereafter, the contemporary justifications for criminalising homeless beggars are considered and it is argued that there is no normative justification for criminalising beggars in the 21st century. The article traces the history of the offences to demonstrate that the rationale for the enactment of the earlier laws is no longer relevant. Furthermore, it demonstrates the justifications for maintaining that such offences are invalid and contrary to constitutional justice. The 750-year-old offence of begging was enacted in a bygone age. It is no longer an appropriate response for dealing with indigence. It is therefore constructive to trace the legislative history of the older vagrancy offences in order to define the purpose of such prohibitions and the harms that they were originally designed to counter and to contrast that with the contemporary homelessness problem. In conclusion, it is suggested that there is no historical or normative justification for maintaining this offence in the 21st century. The continued criminalisation of begging violates the beggar's fundamental right not to be criminalised.

In its crackdown on begging and homelessness in England and Wales, the UK government has emphasised the harmfulness and offensiveness of anti-social behaviour and the need for ‘zero-tolerance policing’. The espousal of such policies with an emphasis on the harmfulness and intolerableness of so-called anti-social behaviour has resulted in the criminal law being used excessively and unjustly. The Crime and Disorder Act 1998 and the Anti-Social Behaviour Act 2003 have been used along with other much older provisions, such as s. 3 of the Vagrancy Act 1824, to target beggars. Section 3 of the Vagrancy Act 1824 makes it a crime to beg.

The government continues to invoke the criminal law in this context so often that it is time for human rights barristers to think more about what the substantive criminal law ought to be in light of fundamental

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principles of justice such as the proportionality principle. The proportionality principle requires that sentences and *prima facie* criminalisation be a proportionate response for dealing with the social problem being tackled. The Vagrancy Act 1824 contravenes the beggar's fundamental right not to be criminalised, which is not only a moral right, but also a cardinal constitutional right. This right is found in, among other provisions, Articles 3, 5 and 8 of the European Convention on Human Rights.\(^1\) The proportionate punishment provision ensures that justifiable criminalisation is punished proportionately, whereas the general personal autonomy right, which derives from the privacy and deprivation of liberty rights, requires that any criminalisation be *prima facie* justifiable as a proportionate legislative response for dealing with a genuine societal problem. As considered more fully below, this leads to a conclusion that begging should be tolerated as it does not result in bad consequences of an objective kind for others. Its continued criminalisation is a human rights abuse.

**Historical justifications**

A historical analysis allows an examination of the larger principles and rationales that underlie the older statutes to see how they have evolved over time and to examine the relevance of such laws in contemporary society. The 185-year-old Vagrancy Act 1824 (hereinafter ‘the Vagrancy Act’) is still in force in England and is regularly used against homeless beggars. It is the most recent of a long line of enactments *in pari materia*.\(^2\) There is little doubt that countering harm is the vagrancy offence’s *raison d’être*. In order to demonstrate the shortcomings of criminalising homelessness in modern society, it is worthwhile understanding the historical rationale of vagrancy crimes and the harms that the laws were designed to tackle.

Whether the criminal law was ever an appropriate response to begging is a much wider question than can be dealt with here. Nonetheless, it is worth noting that the historical literature suggests that at times begging was considered to be seriously harmful to the collective interests of society.\(^3\) The social and economic conditions that led to beggars being regarded as a major threat to the community in the Middle Ages are entirely different to those that exist today. There is no evidence to suggest that modern begging is likely to lead to the sorts of social


problems that the early legislation was designed to tackle. Passive begging in contemporary society is a symptom of a number of social problems including homelessness, poverty, drug addiction, alcoholism, mental illness, a lack of education and vocational training, and so on. Governments continue to conflate the need for health care, education, and employment opportunities with crime. An enlightened answer to the current homelessness problem cannot be found in the criminal law. The empirical evidence suggests that the public would prefer begging to be dealt with through other kinds of state intervention such as increased educational and employment opportunities and other initiatives.

What were the social harms that the older legislation was designed to deter? Can any rational connection be drawn between those harms and the social, legal, economic and political realities in contemporary society? The earlier legislation was designed to prevent worker migration, as well as to prevent crimes and to reinforce the laws regulating the poor by compelling the able-bodied to work for fixed wages. The older vagrancy offences, to a large degree, formed the criminal part of the poor laws. Generally, the historical development of the law of vagrancy can be divided into three main periods: vagrancy as a criminal aspect of the economic condition of England from 1349–1547, as a crime of status during the period 1547–1824, and thereafter as a crime of conduct.

The economic rationale (1349–1547)

All through Christendom, in the Middle Ages, the Church took responsibility for providing relief to the impoverished. In early Saxon times providing succour to the needy was thought to be self-sacrificing, saintly and noble. During this period the giving of alms by the lady of the house was seen as a dutiful honour. Throughout early Christendom providing assistance to the needy was thought to be on a par with prayer and fasting as overt signs of inner spiritual grace.


6 See generally, Webb and Webb, above n. 3.


9 Stephen, above n. 8.

10 Webb and Webb, above n. 3 at ch. 1; R. Burns, The History of the Poor Laws with Observations, 1764 (Augustus Kelly: Clifton, New Jersey, 1973) 1–7.

11 Lady is derived from the words ‘lef day’ which means ‘bread giver’. See R. Spector, ‘Vouchers for Panhandlers: Creative Solutions to an Old Problem’ (1996) 3 Hybrid 50 at 51.

12 Webb and Webb, above n. 3 at 1.
of sovereigns and men of wealth often provided occasion for liberal almsgiving in Europe and Britain. The motivation for such acts of charity was the god-fearing Christian's commitment to alleviating the suffering of 'God's poor'. Begging was an accepted and vital practice for many in the early Middle Ages, but it was eventually regulated and then generally forbidden. Quixotic notions about begging being creditable were ultimately superseded by more practical intrusions. There was an increasing focus on the character of the beggar and his or her deservedness. Those who worked were considered to be good Christians because they contributed to society through their work. Meanwhile, those who were not working were thought to be anti-social, immoral and fraudulent.

From Athelstan and Canute down to Henry VIII a plethora of laws were enacted for the purpose of 'maintaining order—that is (as governments always understand it) the maintenance of the then-existing order, based on social hierarchy of rulers and the ruled, landowners and those who belonged to the land'. Prior to the accession of Edward III, the existence of serfdom precluded modern vagrancy as the feudal system tied the labourer to working on his Lord's estate. In feudal England, begging was seen as a symptom of vagrancy, that is, those who were outside the feudal order. Therefore, only the disabled had any chance of begging. The Statute of Labourers was the first Act to criminalise vagrancy. It was closely connected with the poor-law system and was designed to provide the feudal lords with a sufficient supply of agricultural labour after the Black Death, which along with a number of other social and economic factors produced a grave labour shortage. The Black Death altered the employer/employee power relationship in favour of the employee. Labourers found themselves in a powerful

14 Webb and Webb, above n. 3 at 23.
15 Humphreys, above n. 13.
16 Webb and Webb, above n. 3 at 5.
17 Humphreys, above n. 13.
18 Webb and Webb, above n. 3. Chambliss argued that the vagrancy enactments spanning from the 11th century through to the 18th century were introduced by the powerful to safeguard their economic position: W. J. Chambliss, 'A Sociological Analysis of the Laws of Vagrancy' in W. G. Carson and P. Wiles (eds), The Sociology of Crime and Delinquency in Britain, vol. I (Martin Robinson: Oxford, 1981) 237. Cf. S. J. Alder, 'A Historical Analysis of the Law of Vagrancy' (1989) 27(2) Criminology 209, 213. Others have opined that, 'Marxian analyses of bourgeois society provide some theoretical elements necessary for an understanding of criminalisation'. However, they contend that while 'indispensable to an explanation of criminality which does not view crime as a natural or moral phenomena, these elements do not suffice for a "global" construction of the kind of theory of deviancy upheld by certain Marxist criminologists according to the classical theses of E. B. Pašukanis' (L. Ferrajoli and D. Zolo, 'Marxism and the Criminal Question' (1985) 4 Law and Philosophy 71).
19 23 Edw 3, c. 1 (1349); 25 Edw 3, c. 1 (1350).
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bargaining position, which they endeavoured to capitalise on by demanding better wages and conditions. If their master refused their terms, they were able to travel to other plague-ravaged parishes where an employer with a labour shortage might have been more willing to negotiate.\textsuperscript{21} As a result, travelling and vagrancy became a crime.\textsuperscript{22} The Statute of Labourers\textsuperscript{23} was enacted to restrain the labouring population from moving outside their designated areas, to fix wages at pre-plague rates and to check the vice of idleness.\textsuperscript{24}

The runaway worker was subjected to increasingly harsh punishments including public whippings, brandings and imprisonment.\textsuperscript{25} Rigorous punishments and officially ‘imposed geographical and occupational immobility were the devices used to drive these men to work at wages pegged to earlier times and conditions’.\textsuperscript{26} Webb and Webb note:

Such severe and persistent oppression, enforced by cruel punishments and the exercise of tyranny by landowners and employers, led naturally to every kind of evasion of the laws, to sullen resistance, to continual tumult and disorder, accompanied by no small amount of crimes of violence and breaking out repeatedly into organised insurrections on a large scale.\textsuperscript{27}

Along with the stated economic justification for this legislation was the accompanying reference to public order and crime prevention. Giving alms to able-bodied beggars was outlawed:

Because that many valiant beggars, as long as they may live from begging, do refuse to labour, giving themselves to idleness and vice, and sometimes to theft and other abomination; none upon pain of imprisonment, shall under the colour of pity or alms, give anything to such, which may labour, or presume to favour them (towards their desires) so that thereby they may be compelled to labour for their necessary Living.\textsuperscript{28}

The enactments during this period were designed with two main purposes in mind. First, the legislation of the 14th and 15th centuries had an economic purpose, which was to bring the labourers back, as near as possible, to the servile conditions of preceding generations.\textsuperscript{29} These enactments were primarily aimed at protecting the economic interests of the ruling elite.\textsuperscript{30} Secondly, the legislation had a public order/crime prevention purpose. The legislation was designed to tackle the widespread poverty, but its oppressive application led to crime and social upheavals. The number of vagrants on the roads of England

\textsuperscript{21} Humphreys, above n. 13 at 168.
\textsuperscript{22} Ibid.
\textsuperscript{23} 23 Edw 3, c. 1 (1349); 25 Edw 3, c. 1 (1350).
\textsuperscript{24} Humphreys, above n. 13 at 25–6.
\textsuperscript{25} Sec, e.g., 34 Edw III, c. 10 (1360); 11 Hen 7, c. 2 (1494); 19 Hen 7, c. 12 (1503); 22 Hen 8, c. 12 (1530). For a compendious overview of this older legislation, see Burns, above n. 10 at 7–21.
\textsuperscript{26} TenBroek, above n. 20 at 271.
\textsuperscript{27} Webb and Webb, above n. 3 at 26. Stephen also notes that: ‘Statute after Statute passed in the reign of Richard II referred to the number of persons who wandered about the country and committed all sorts of crimes, leaving their masters, associating in bands and overawing the authorities’. Stephen, above n. 7 at 267.
\textsuperscript{28} 23 Edw 3, c. 5–7 (1349).
\textsuperscript{29} Webb and Webb, above n. 3 at 25.
\textsuperscript{30} Chambliss, above n. 18.
continued to grow in the succeeding centuries despite each enactment becoming increasingly punitive.31

The welfare period (1547–1824)

After the decline of the feudal system, the justification for retaining vagrancy offences was premised on the belief that those without a consistent means of support were a dangerous class, who were likely to engage in criminal activity.32 The focus shifted from merely motivating idle members of society to working to prevent crime. From the time of the Black Death in the middle of the 14th and right up until the middle of the 17th century, large numbers of unemployed labourers and their families inundated the highways.33 In fact, although in diminishing degree, the roads were frequented by vagrants ‘right down to the reform of the poor law in the first half of the nineteenth century’.34 The majority of these men had lost their former employment and had taken to a vagrant way of life, because they had no other way of making a living.35 The increase in vagrancy during this period has been attributed to a number of factors including population increases36 in the 16th century, population surpluses gravitating towards towns, industrialisation, widespread unemployment and under-employment, disastrous harvests, inflation,37 economic stagnation, famines, demobilisation of the militia after the Spanish wars, the economic changes brought about by the Enclosure Acts,38 the collapse of the monasteries during the reign of Henry VIII, and the subsequent loss of the religious orders which had, until that time, administered a kind of ‘public assistance’ in the form of lodging.39

The increased poverty naturally led to civil disobedience and insurrection in many regions.40 Right through this period vagrancy laws were clearly aimed at the problems caused by the huge rises in poverty.41 The laws were introduced to counteract the economic and social threat posed to the social order by the increasing numbers of paupers.42 This was an age when bread riots were frequent and where English cities

31 See generally Humphreys, above n. 13.
34 Jordan notes that droves of vagrants moved around the countryside ‘living in many cases by alms supplemented by a beggary tinged with criminality’. J. Pound, Poverty and Vagrancy in Tudor England (Longman: Harlow, 1971).
35 Ledwith v Roberts [1936] 3 All ER 570 at 593.
36 ‘Urban economies in the early Middle Ages had usually managed to be reasonably prosperous as “their populations grew only slowly” so that most towns found it possible to support their poor by haphazard charity at times of exceptional distress’: Humphreys, above n. 13 at 34.
38 Ibid.
39 Ledwith v Roberts [1936] 3 All ER 570 at 593.
41 Alder, above n. 18 at 212 et seq.
42 Ibid.
were being crowded with landless farmers. Many Englishmen believed that vagrants were a major threat to the stability of society as they were beyond the positive persuasion of the church, family and community. Most of the arrested vagrants were not dangerous, but rather were genuinely unemployed and in search of work. The exact harm that vagrancy allegedly posed to the community cannot be tied to one factor. Homeless vagrants were blamed for a miscellany of serious crimes including murders, social upheavals, robberies and the like. During this period vagrants were considered to be ‘probable criminals’ rather than runaway serfs and it is without question they were a major cause of concern for the authorities during this period. While many of these vagrants were honest labourers who had been forced to live in reduced circumstances, others were considered to be rowdy rogues, who were widespread in Elizabethan times and who had allegedly been born to a life of crime. It was these and their associates who formed the notorious brotherhoods of beggars, which burgeoned in the 16th and 17th centuries: ‘They were a definite and serious menace to the community, and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed’. The vagrant was considered to be a real threat to national security. This led to numerous statutes being passed each introducing increasingly harsh penalties. Many of the unemployed had no other option but to embark upon a life of crime. Leonard points out that: ‘A man who was unemployed and had no resources had to either beg or steal. If he begged, he was whipped; if he stole, he went to one of the terrible prisons of the time’. The infamous Slavery Act, which was passed in 1547, repealed all the other statutes on the subject, because they were considered to be too lenient. It was entitled: ‘An Act for the punishment of vagabondes and for the relief of the poor and impotent persons’. Its preamble recognised the vagrant as a probable criminal: ‘For as much as idleness and vagabondage is the mother and root of all thefts, robberies and all evil acts and other mischief’s . . . partly by the perverse nature and long accustomed idleness of the persons given to loitering, the said godly statutes hitherto hath had small effect, and idle and vagabond persons being unprofitable members or rather enemies of the common weal . . .’. Idleness was attributed to personal choice rather than to the weak economic conditions.\footnote{1 Edw 6, c. 3 (1547) (emphasis supplied).}
Crime prevention was a manifestly important aspect in these early Acts, but the relationship between the vagrancy acts and poor law legislation should not be understated. By and large these early vagrancy acts were aimed at keeping the cost of providing for the poor down. In 1601 the State accepted responsibility for providing for the poor at the national level\(^\text{53}\) and from then on the aim was to keep the costs down. It was thought that this was best achieved by forcing the idle to work and by restricting people from moving to other parishes where they would be a burden. The poor law was not intended to cure the problems caused by hardship and poverty, but to reduce the cost to the public of maintaining the indigent. Once the public agreed to fund the cost of providing for the indigent it became concerned about the cost of doing so.\(^\text{54}\) Through this period crime prevention was only a secondary concern.\(^\text{55}\)

The legislation during this period was aimed at what might be described as a form of economic criminality. The nucleus of the crime was ‘idleness’, because there was a genuine fear that the idle would become a charge on the parish.\(^\text{56}\) Scott LJ states that the rationale for these early enactments was to control the activities of the members of an allegedly dangerous class that was once prevalent in England.\(^\text{57}\) This class was a major political problem for four or five centuries, they ‘taxed the forces of law and order’ to the limit and this resulted in a long chain of oppressive statutes.\(^\text{58}\) These laws were formulated for the sole purpose of dealing with this particular class, and had three objectives:

The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (a) settlement of the able-bodied in their own parish, and provision of work for them there; (b) relief of the aged and infirm, i.e., those who could not work; and (c) punishment of those of the able-bodied who would not work.\(^\text{59}\)

The spirit of all the 16th and 17th century statutes was that of assisting classes (a) and (b), and punishing class (c), so that its members would give up their vagrant way of life.\(^\text{60}\)

53 Jordan notes that: 43 Eliz c. 2, § VII (1601) ‘[w]as carefully and unambiguously drafted; a brilliantly conceived system of administration was established in which the remotest parish was linked with Westminster; and the whole realm was declared to be a single community of responsibility for the relief of poverty which threatened to overwhelm the private resources of any single locality’. Jordan, above n. 33 at 126.
54 TenBroek, above n. 20 at 286.
55 Ibid.
56 See generally Ribton-Turner, above n. 2.
57 Ledwith v Roberts [1936] 3 All ER 570 at 592–4.
58 Ibid.
59 Ibid.
60 Ibid. at 595. See also 1739 (13 Geo 2, c. 24); 1744 (17 Geo 2, c. 5); 1792 (32 Geo 3, c. 45).
Crime as conduct

After 1824 the vagrancy legislation focused almost exclusively on crime prevention. The Vagrancy Act 1824 was the first Act to operate completely separately from the poor law. Its approach was to punish ‘conduct’—it did so by labelling rogues, vagabonds and sturdy beggars according to the specific commission of criminal acts. Arguably, the trepidation of property owners following the profusion of unemployed soldiers returning from the Napoleonic wars was one of the main reasons behind the passing of the 1824 Act. It was clearly directed at crime prevention (i.e. preventing those within the criminal class from engaging in other criminal activity). Nevertheless:

the Vagrancy Act of 1824 differs little from the long string of earlier Acts in the legislature’s attitude to the clan of idle and disorderly persons... There runs all through this chain of statutes the recognition of a well-known and notorious class of unemployed poor persons, dealt with as such by Parliament according to their willingness or unwillingness or ability or inability to work.

The post-1824 vagrancy offences were considered to be a way to prevent crime from flourishing. The enactment of the legislation was evidently influenced by the tendency to perceive the idle and disorderly as probable criminals. In the debates on the Vagrants Bill in 1821, it was noted that there was a ‘class who went into the country under the pretence of looking for work, which they sought where they knew it would not be found. Large parties of these got together in lodging houses, and places of the very worst description, from whence they sallied forth every morning to seek for opportunities of theft...’. The debates also maintain that the control of vagrants needed to be continued to stop beggars and vagrants travelling and gathering in such lodging houses, which were considered to ‘be nurseries for crime of every description’. It is well recognised that in earlier history there was an unemployed class that was always regarded as a public menace. It is also well known that this class was treated as semi-criminal; after all they were referred to by such phrases as ‘outrageous enemies of the common weal’.

The public expenditure and crime prevention rationales still appear in the criminalisation debates regarding homelessness, begging and vagrancy today. The public’s attitude about expending money on beggars still focuses on the deservedness of the recipient. The British Social

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61 In the debates leading up to the enactment of the 1824 Act, one Member of Parliament commended the new Bill as it ‘distinguished the vagrant laws from the poor laws, of which, there had been some danger of them becoming a part’: Hansard, House of Commons, 1823, 1383.
62 Ledwith v Roberts [1936] 3 All ER 570 at 585–6, per Scott LJ.
64 Ledwith v Roberts [1936] 3 All ER 570 at 596, per Scott LJ.
65 Hansard, House of Commons, 1821, 957.
67 Ledwith v Roberts [1936] 3 All ER 570 at 596.
Attitudes Survey\textsuperscript{68} found that 52 per cent of those surveyed were in support of taxes being made available to train beggars so that they could access work. But there was considerably less support for providing funding to increase welfare benefits and to make welfare benefits more accessible. The public are more enthusiastic about providing money for training because this might lead to employment opportunities, but they do not want to fund beggars to remain idle.\textsuperscript{69} This ideology seems to assume that the idle beggars (most of whom are dysfunctional from drug and alcohol abuse and mental illness) are not deserving of basic provision. These findings are supported by other research that has shown that the public has a propensity towards supporting policies that help people to help themselves rather than for those that fund people to do nothing.\textsuperscript{70} The crime prevention argument has materialised again in the form of the broken windows thesis.\textsuperscript{71} However, there is no evidence to show that beggars go on to commit other crimes.\textsuperscript{72}

**Contemporary justifications for maintaining the offence of begging**

*The “broken windows” justification*

The contemporary justifications for criminalising begging and vagrancy centre around two core themes. The first is that vagrancy and begging are a *precursor to more serious crime*. The second focuses on the general offence and nuisance caused to passers-by as a result of the presence of beggars or vagrants (the public nuisance/deservedness/intimidation justification). Each will be considered in turn. The latter includes baseless claims that dishevelled persons or other people on the street are a source of intimidation—for example, certain passers-by might be intimidated by the presence of black people in quiet streets at night, but that does not mean that black people should be criminalised for appearing in quiet streets at night simply because of the unreasonable beliefs of others in the vicinity.

The UK government has cited the broken windows thesis to defend its current crackdown on begging and has argued for zero tolerance for minor incivilities.\textsuperscript{73} The broken windows thesis is cited to support the government’s claim that begging encourages others to engage in criminality. According to the broken windows thesis, neighbourhoods that

\textsuperscript{68} Alder et al., above n. 5 at 219–20; see also M. Alder, ‘Public Attitudes to Begging: Theory in Search of Data’ in Dean, above n. 4 at 163 et seq.

\textsuperscript{69} Respect and Responsibility—Taking a Stand Against Anti-social Behaviour, Cmd 5778 (Home Office: London, 2003) paras 1.8, 3.40–3.44.


\textsuperscript{73} Respect and Responsibility, above n. 69.
neglect minor signs of decay and incivilities, such as begging, open the door for more serious crime to take place.\textsuperscript{74} This thesis asserts that ‘disorder and crime are usually inextricably linked in a kind of developmental sequence’.\textsuperscript{75} The authors of the broken windows thesis argue that neighbourhoods with abandoned overgrown properties, with broken windows, undisciplined children walking the streets, gangs of teenagers hanging around storefronts refusing to move when asked to do so, unmarried people moving in, people drinking in the streets, street fights, accumulated litter, inebriates, beggars and prostitutes on the pavements and so forth attract more serious crime.\textsuperscript{76}

Wilson and Kelling argue that many residents in the broken windows neighbourhood think that ‘crime, especially violent crime, is on the rise, and they will modify their behaviour accordingly . . . Such an area is vulnerable to criminal invasion’\textsuperscript{77} Essentially, the broken windows theory postulates that neighbourhood disorder, physical decay, such as graffiti, litter, and general shabbiness; and minor incivilities, such as public drinking, begging and vagrancy will, if left unchecked, send a message to potential malefactors that the area is a defenceless target for criminal activities because no one cares.\textsuperscript{78} In a recent article Kelling stated that: ‘disorder not only creates fear but . . . it is a precursor to serious crime’.\textsuperscript{79} William Bratton, the former Police Commissioner of New York, transformed the broken windows thesis into order maintenance, which has been labelled as the ‘quality of life initiative’.\textsuperscript{80} Order-maintenance policing aims to create public order by aggressively enforcing laws against nuisance offences like public drunkenness, begging, vandalism, public urination, loitering, prostitution and other minor misdemeanours.\textsuperscript{81} This approach requires the police to focus on public order maintenance rather than mere law enforcement.\textsuperscript{82} Wilson and Kelling\textsuperscript{83} argue that the maintenance of order by police allows other community control mechanisms to thrive, thereby encouraging orderliness and ultimately law-abiding behaviour. They contend that the police should aim to create an environment in which criminality is thwarted. To achieve this, the police allegedly have to be less concerned

\begin{itemize}
\item \textsuperscript{74} Above n. 73.
\item \textsuperscript{76} Ibid. at 31–2.
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} Ibid.
\item \textsuperscript{79} G. Kelling, ‘Broken Windows: Zero Tolerance and Crime Control’ in P. Francis and P. Fraser (eds), Building Safer Communities (Centre for Crime and Justice Studies: London, 1998).
\item \textsuperscript{81} Bratton, above n. 80.
\item \textsuperscript{82} Ibid.
\item \textsuperscript{83} Wilson and Kelling, above n. 75.
\end{itemize}

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with violations of criminal law and more interested in monitoring street
life from a broader perspective.\textsuperscript{84}

Additionally, they assert that behaviour that may not appear to be
seriously criminal, such as begging, drunkenness, vandalism, litter and
soliciting have to be prevented, because these acts decrease ‘respect’ in
neighbourhoods and reduce the desire of the locals to enforce controls.
They postulate that even non-criminal acts such as rowdy children and
noise are antecedents to more serious crime.\textsuperscript{85} Criminalisation and
police action is justified on the basis that inaction will create the types of
conditions that could lead to higher crime rates.\textsuperscript{86} The broken windows
thesis does not claim that a particular person is harmed by broken
windows, rather it claims that the indirect acts in aggregate are a
precursor to more serious aggregative harm, which allegedly transpires
when independent others target the broken windows area. Hitherto,
little empirical evidence has emerged to support the idea that disorder,
left unchecked, causes crime.\textsuperscript{87} The proponents of the broken windows
thesis usually start by citing Skogan’s research from the 1980s.\textsuperscript{88} Skogan
analysed previous surveys of residents in 40 neighbourhoods through-
out a number of sizeable cities. He did find that measures of social and
physical decay correlated with some types of serious crime, but prefaced
his work with a noteworthy caveat: \textsuperscript{90}

Ironically, the data from the 40 neighbourhoods 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.

Notwithstanding this, Kelling and Coles have claimed that Skogan
established a causal link between disorder and serious crime.\textsuperscript{91} After
reanalysing Skogan’s study, Harcourt\textsuperscript{92} found that there were ‘no statisti-
cally 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

\textsuperscript{84} Above n. 83.
\textsuperscript{85} Ibid.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid, above n. 80; B. E. Harcourt and J. Ludwig, ‘Broken Windows; New
Evidence from New York City and a Five City Social Experiment’ (2006) 73(1)
University of Chicago Law Review 271. See generally R. Matthews and J. Young,
Issues in Realist Criminology (Sage Publications: London, 1992); R. J. Sampson, S. W.
Raudenbush and F. Earls, ‘Neighbourhood and Violent Crime: A Multilateral Study
of Collective Efficacy’ (1997) 277 Science, New Series 918; and J. Young, The
\textsuperscript{88} W. G. Skogan, Disorder and Decline (Free Press: New York, 1990); W. G. Skogan,
‘Disorder, Crime and Community Decline’ in T. Hope and M. Shaw (eds),
\textsuperscript{89} Ibid.
\textsuperscript{90} Harcourt, above n. 80 at 311–12.
\textsuperscript{91} G. Kelling and C. M. Coles, Fixing Broken Windows: Restoring Order and Reducing
Crime in Our Communities (Simon & Schuster: New York, 1996) 24. See also D. M.
Kahan, ‘Social Influence, Social Meaning, and Deterrence’ (1997) 83 Virginia Law
Review 349, 369.
\textsuperscript{92} Harcourt, n. 80 above at 309–29.
also disappears when the five Newark neighbourhoods are set aside’. Harcourt found that out of the 40 included neighbourhoods in Skogan’s sample, the strongest link occurred in five contiguous neighbourhoods in Newark. When those neighbourhoods were excluded the link disappeared totally. Furthermore, he notes that only a few of the calculations included data from all the neighbourhoods, because the various surveys failed to ask exactly the same questions. He asserts that overall the data did not support the broken windows hypothesis.

The quality-of-life initiative that was initiated by New York mayor Rudolph Giuliani in 1994 has also been cited in support of the broken windows thesis. As noted above, this initiative adopted the zero-tolerance approach stressed by the broken windows thesis. Giuliani ordered his police to enforce even the most minor offences such as begging, disorderly behaviour, public drinking, street prostitution and so on. After the introduction of this initiative there was a remarkable reduction in the overall crime rate, especially for serious crime. A number of conservative commentators have claimed that New York’s declining crime rates support the broken windows thesis. Harcourt argues that a number of factors contributed to the declining crime rates in New York including increased police numbers, shifting drug use, new computerised tracking facilities and demographics. He rightly notes that the current assessment 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. Harcourt acknowledges that the quality-of-life initiative perhaps did have an indirect affect on the decline in crime. But he asserts that it had very little to do with policing trivial incivility/public disorder. Instead he believes that the decline may have been attributable to the zero-policing approach adopted in New York, which arguably enhanced the scope of the power of surveillance offered, and this permitted better enforcement against actual misdemeanours.

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’. This measure does not hinge on sending a ‘message to criminals that they cannot commit crime, [but rather on]

93 Above n. 92.
94 Ibid.
95 Ibid.
96 Ibid. at 331.
98 Harcourt, above n. 80 at 331–9.
99 Ibid. at 339.
100 Ibid. at 342.
101 Ibid.
102 He notes that: ‘To 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’.
the old-fashioned idea that more police contact, more background checks, and more fingerprinting will produce better crime detection. Furthermore, a number of other cities achieved equal or greater reductions in crime during this period without invoking the zero-tolerance policing approach. At the same time San Francisco adopted a less strident law enforcement approach, which also reduced arrests, prosecutions and imprisonment rates. Although San Francisco is frequently derided by 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.

Coupled with this, a landmark study undertaken by Sampson and Raudenbush suggests that most major crimes are linked not to broken windows, but to two other neighbourhood variables: concentrated poverty and ‘collective efficacy’. The Chicago study carried out by Sampson, Raudenbush and Earls presents the concept of collective efficacy (collective efficacy is defined as social cohesion among neighbours and their willingness to intervene on behalf of the common good), which suggests that the greatest predictor of neighbourhood crime is not broken windows or disorder. Instead, they suggest that crime is deterred by community presence. The preliminary results from their study imply that the broken windows thesis lacks credibility. Sampson and Raudenbush 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’. Once the researchers factored other neighbourhood 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. Sampson and Raudenbush found that neighbourhoods 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.

104 Ibid.
106 Ibid.
109 Ibid.
110 Sampson and Raudenbush, above n. 107 at 608.
111 Ibid.
112 Ibid.
113 Ibid. at 638.
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 [begging] does not necessarily translate into high rates of violence, public disorder may not be so ‘criminogenic’ after all in certain neighbourhood and social contexts.\(^\text{114}\)

In other words, they found that structural disadvantage and attenuated collective efficacy was more likely to affect crime rates than the policing of 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’.\(^\text{115}\) Bottoms asserts that ‘[t]he “collective efficacy” approach is clearly empirically stronger than the “broken windows” thesis, but it would appear to need some development before it could directly provide such guidance’.\(^\text{116}\)

The co-author 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 . . . [p]eople have not understood that this was a speculation’.\(^\text{117}\) If the government is going to criminalise incivilities such as begging, on the basis of broken windows, it should prove that there is a credible nexus 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 criminalising begging, and should not be used to criminalise conduct that is innocuous per se, because to do so would be to hold beggars and their like responsible for the independent criminal choices of others.\(^\text{118}\) Notwithstanding this, the government has taken up the broken windows thesis with alacrity. Because the broken windows thesis postulates that there is a nexus between minor incivilities such as begging and more serious crime, once again old laws on begging and vagrancy are being used to target a particular class under the banner of crime prevention. The claims still persist that beggars are tied up in a lot of other crime and that their presence in an area leads to social deprivation and environmental decay, which ultimately induces third parties to commit more serious crime in the affected areas.

\(^{114}\) Above n. 113.
\(^{115}\) Ibid.
\(^{116}\) ‘[I]t would seem that positive control signals should encourage, as an effect, residents’ willingness to engage in the interventions that are a key element in collective efficacy. If this proposition is correct, then the “control signals” approach should be able to help to provide some of the more short-term policy options that appear to be largely missing in Sampson and Raudenbush’s account’: A. E. Bottoms, ‘Incivilities, Offence, and Social Order in Residential Communities’ in A. von Hirsch and A. P. Simester (eds), Incivilities: Regulating Offensive Behaviour (Hart Publishing: Oxford, 2006) 268–9.
\(^{117}\) Hurley, above n. 107.
Public nuisance and undeserved income justifications

The second justification that is often raised in support of maintaining begging and vagrancy prohibitions is the umbrage and nuisance that it causes to some passers-by. Robert Ellickson, a professor of law at Yale University, has argued that the public have good reason for finding begging offensive and annoying. Professor Ellickson argues that the sight of idle and allegedly unproductive beggars is enough to cause offence and annoyance to so-called productive people. According to Ellickson, many passers-by resent beggars because they perceive them as unproductive freeloaders. He argues that the public are also offended by begging as people assume that there is a high probability that the beggar’s solicitation is fraudulent. However, it is arguable that most passers-by are not so naïve as to assume that the money they give to beggars will not be used for drugs or alcohol in some cases—and as for beggars not paying tax on the money they receive—charitable income is normally tax free. Thus, if people want to give money in these circumstances it hardly makes sense to invoke the criminal law to prevent it. In addition, he suggests that passers-by resent beggars because they are fearful of them.

In some jurisdictions the fear and nuisance justifications have also been used to enact offences that prohibit people from feeding homeless persons for which the penalty is imprisonment. For instance, a recent political campaign emphasising the alleged harmfulness of homeless people was used in Las Vegas to justify the enactment of an ordinance, which makes it a crime for members of the public and charitable organisations to feed homeless people in the city’s parks. This is a stark example of politicised and unfair criminalisation. The Las Vegas City Council argues that the criminal law is needed to prevent people from feeding homeless people, because feeding homeless people allegedly lures them to public parks. This apparently led to complaints by residents about crime, public drunkenness and litter. The ordinance bans members of the public and mobile soup kitchens from providing food or meals to indigent people in the City’s parks. The law carries a maximum penalty of US$1,000 and a six-month jail term. The Mayor argued that the crackdown was necessary because families were allegedly too scared to use the parks. This seems similar to Ellickson’s justifications for criminalisation.

121 Ellickson, above n. 119 at 1181–3.
122 Ibid.
124 Ibid.
125 Ibid.
Ellickson\textsuperscript{126} sums up the thrust of these types of justifications for criminalisation in the following passage:

A chronic panhandler also annoys because he unintentionally signals social breakdown on a number of fronts. First, a regular beggar is like an unrepaired broken window—a sign of the absence of effective social-control mechanisms in that public space. Second, the activity of begging, unlike many other forms of street nuisance behaviour, is likely to signal erosion of the work ethic. All human societies attempt, in various fashions, to induce their members who are capable of work to pull an oar. Judged by Kant's Categorical Imperative, begging is a morally dubious activity; if everyone were to try to survive as an unproductive person living on the charity of others, all would starve. A pedestrian who sees an apparently employable person begging may sense the degeneration of one of the most fundamental social norms.

Ellickson\textsuperscript{127} is basically arguing that begging should be outlawed because it is an affront to the 'market economy' work ethic, causes fear and is generally a nuisance to passers-by. This type of deservedness argument is very similar to the old 'idle and disorderly' arguments that focused on the deservedness of the supplicant. Such arguments were common from the times of Edward III through to the Elizabethan era and right up until the Victorian period. All the older Vagrancy Acts were concerned with getting the idle to work and with preserving the social order of the time.\textsuperscript{128} Research carried out by Erskine and McIntosh\textsuperscript{129} in 1999 found that a large percentage of the public still find begging offensive for similar reasons. Erskine and McIntosh\textsuperscript{130} argue that little has changed over the centuries as beggars are still seen, by many, as lazy undeserving tricksters and fraudsters. Such claims are often instigated and fuelled by the media. A common claim made in certain newspapers is that it is a lucrative business and that beggars are not as disadvantaged as they make themselves out to be.\textsuperscript{131} Media reports also claim that beggars are tricksters and fraudsters who make a good living from begging.

\textsuperscript{126} Ellickson (above n. 119) erroneously argues that the Categorical Imperative imposes a duty not to beg, but it does not (I. Kant, The Metaphysic of Morals, translated from the German by M. J. Gregor (Cambridge University Press: Cambridge, 1996) 194–5).

\textsuperscript{127} Above n. 119 at 1181–3.

\textsuperscript{128} TenBroek, above n. 20 at 270.

\textsuperscript{129} A. Erskine and I. McIntosh, 'Why Begging Offends: Historical Perspectives and Continuities' in Dean (ed), above n. 4 at 41–9.

\textsuperscript{130} Ibid. at 29–30.

\textsuperscript{131} See, e.g., 'Crackdown on begging', 30 August 2002, available at http://news.bbc.co.uk/1/hi/england/2225383.stm, accessed 15 April 2009. Where Councillor Claire Cook of Bristol Council said: 'Begging has no place in Bristol. Some beggars are fraudsters and tricksters who beg for money, falsely claiming they are homeless... The majority of beggars have problems relating to drug abuse, and money they are given by well-meaning members of the public is almost always spent on drugs.'

Chief Inspector Gary Barnett said: 'Police in York today hailed their crackdown on bogus beggars a success after a week-long operation resulted in 11 arrests. Officers say there has been a noticeable fall in begging in the city centre since they began their crusade against tricksters who they claim were conning passers-by into parting with their cash. They say York is seen as a soft touch, attracting benefit fraudsters from across the country who rake in up to £80 a day from generous
Ellickson’s argument and Erskine’s findings have nothing to do with genuine moral wrongdoing and a lot to do with subjective views about deservedness. The public are offended because they are disturbed by the supposed parasitic nature of begging. They are offended by the beggar’s allegedly idle, unproductive and freeloading lifestyle, because they see these people as getting something they have not earned. Yet it is arguable that begging is not as bad as collecting welfare payments when there is plenty of work available. The difference with begging is that no one is forced to give. Furthermore, the great disproportion between income and merit that flows from the invention of celebrities makes the alleged undeserved or unearned payments that beggars receive seem rather reasonable. For instance, the charade of celebrity allows untalented entertainers to earn massive sums just for being labelled famous. It is hard to see what celebrities such as Paris Hilton or Peaches Geldof have done to earn the massive press coverage they are given, let alone the associated disproportionate income this generates for them. Intellectual property laws allow some of these celebrities to be paid over and over for the same work. Furthermore, they are paid disproportionately on merit given that they are merely reselling the same work. In many cases, the material that is being sold over and over is mere rubbish.\textsuperscript{132}

Furthermore, the lucrative sponsorship deals that Olympians and other sports stars receive allows them to earn millions in endorsements for merely waving their hands at the public or for appearing in advertisements. This might cause offence and annoyance to many consumers, because in the end they have to pay a lot more for basic necessities that carry celebrity endorsements. The great offence and annoyance caused to many by sports stars being paid millions relates to the fact that consumers are forced to pay for this unearned and undeserved income by paying extra for celebrity endorsed products (it is a non-state tax). When a person purchases everyday items such as shoes and breakfast cereals with a celebrity endorsement, unlike the begging situation, he or she is forced to pay or to find a suitable alternative, if one can be found that has not be endorsed by a celebrity. The offence might even be more profound when it involves taxpayers directly paying celebrities large sums beyond what they are worth. The recent scandal involving the taxpayer-funded celebrity, Jonathan Ross,\textsuperscript{133} highlights the nuisance and offence caused when the public learn of unearned income. Ross captured the headlines because he verbally abused an elderly man and made a number of obscene statements on air. However, as the details of his taxpayer-funded salary emerged, taxpayers became less offended by his obscene comments and more offended by the fact that he was being paid £6 million a year, which is more than the total combined income of members of the public: see ‘Bogus Beggars are Blitzed’, \textit{This is York.co.uk}, 23 December 1998.

\textsuperscript{132} S. Gare, \textit{Triumph of the Airheads} (Media Publishing: Sydney, 2006).

the top 100 professors in the UK. Arguably, most of this is unearned income, if it is accepted that the capacity of one human to produce wealth merely from individual skill and labour has its limitations, the only basis for claiming it is earned is that celebrities get on TV and glorify each other and claim they are worth a fortune. It is not too different from a banker or corrupt official setting his or her own wage.

Ellickson’s ‘unproductive person’ argument seems ironic in the present credit-crunch context, given that many bankers have apparently set salaries and bonuses for themselves, at rates way beyond what they were worth, with dire results. Enormous offence and annoyance was caused to taxpayers as it emerged that taxes had been used to bail out banks that are continuing to pay huge bonuses and pensions to those who have not earned them. In a meritocracy, professors inventing life-saving drugs and treatments, jet engines, LCD screens, computers, software, technology, etc. would surely be worth more than an entertainer such as Jonathan Ross. The infrastructure in many UK universities has been run into the ground whereas the BBC headquarters is opulent and maintained to an impeccable standard. Nevertheless, the criminal law is surely not the answer for solving deservedness problems. People have been socialised into supporting such practices for so long that it is hard to see change in the near future.

Many taxpayers are indeed deeply offended by the system that allows celebrities and bankers to be paid far more than what they are worth, but surely a windfall tax is the appropriate solution. Criminalisation cannot be invoked to protect public sensibilities in such cases. Likewise, it cannot be invoked to protect public sensibilities in the case of begging. Arguably, members of the public are subject to harm from the excesses of celebrity culture, as they are forced to pay extra for products that have been endorsed by celebrities and, in the case of the BBC, the public are directly taxed to pay for its policy of contracting individuals at excessive fees. The latter seems to be legalised theft. However, the appropriate form of regulation would be non-criminal regulation. The offence caused by taxpayer-funded celebrities being paid millions when they are clearly not worthy of the salary that they are paid is an indirect form of theft from taxpayers, but it should be regulated directly by imposing a salary cap on celebrities who are directly funded with taxpayer funds. If a research professor inventing life-saving treatments is only worth £60,000 per year, then on skill and merit an entertainer working for the


135 Fred Goodwin caused public outrage by refusing to forego a £693,000 annual pension after heading a bank that basically went bankrupt and had to be bailed out with taxpayer funds. Clearly, this is worse than some disadvantaged person asking for food on a public street. See C. Mollenkamp, A. MacDonald and J. Martinez, ‘Goodwin on RBS Giveback: No, Sir’, *Wall Street Journal*, 28 February 2009.

136 Ellickson, above n. 117 at 1181–3.

BBC does not seem deserving of more. Furthermore, the celebrities reach many people argument would not justify paying celebrities massive sums; otherwise top investigative journalists would also earn large sums.

Ellickson\textsuperscript{138} hones in on the deservedness ethic and argues that members of society who are capable of work should ‘pull an oar’. However, the discussion above demonstrates the vacuity of ‘deservedness’ arguments. The aforementioned points also show that these are complex questions about how to distribute income and tax burdens and therefore fall outside the purview of the criminal law. From the point of view of justifying the criminalisation of passive begging these sorts of offences and annoyance claims are mere epiphenomena.\textsuperscript{139} These kinds of offence arguments, which are clearly based on assumed conventional preferences\textsuperscript{140} about how the beggar should live his or her life, do not constitute wrongdoing for the purposes of invoking the criminal law. Ellickson’s community might believe that being idle and homeless wrongs others, but it is not an objective wrong. Passers-by who believe that beggars are undeserving might be offended when a beggar politely asks for financial assistance, but a polite request for assistance does not wrong anyone. The passer-by can easily ignore the solicitation and walk on. If the passer-by feels disgust and disapproval because of the beggar’s lack of deservedness, such offence is insufficient to justify criminalisation. Most beggars are unskilled, poverty stricken, suffering from addiction and mental health problems and are unemployable and thus need assistance.\textsuperscript{141}

The Home Office has presented even thinner claims for the offence felt by those who encounter beggars. It alleges that one of the reasons that begging causes offence is because it causes embarrassment to those who are approached.\textsuperscript{142} This sort of claim seems to be encouraging the public not to tolerate the sight of those who are disadvantaged. The Home Office does not expand on what it means by ‘embarrassment’. Maybe it is suggesting that beggars are a blot on the landscape. After all, Tony Blair described beggars as unsightly.\textsuperscript{143} It is not clear whether this is what the government is referring to when it describes begging as

\textsuperscript{138} Ellickson, above n. 119 at 1182.


\textsuperscript{140} Jeremy Waldron notes that personal preferences establish who would be harmed or who would be benefited in terms of what they want for themselves from some political proposal. He then refers to Ellickson’s article and notes that: ‘In cases where people feel vehemently about some matter of principle—whether they feel great because the principle has been vindicated or whether they feel offended because it is violated—it almost always misrepresents their view to say that the pleasure of vindication or the pain of offence are themselves grounds for the principle in question. From the point of view of the principle’s justification, these sorts of pains and pleasures are mere epiphenomena’: ibid. at 391–2.


\textsuperscript{142} Respect and Responsibility, above n. 69 at 3.40.

'embarrassing'. The mere sight of homeless beggars might be embarrassing to some because their appearances are an affront to the sensibilities of those members of the public who do not suffer from their disabilities. However, merely being present or existing in a public place does not wrong others. A large number of people might find beggars aesthetically displeasing, but this is not because the beggar has violated their moral rights. This kind of offence does not even provide a valid basis for claiming that one has been offended, let alone wronged. The mere sight of a dishevelled person in a public place does not cause wrongful offence in a humane society. As for the nuisance/intimidation argument, seeing a beggar in an open public space would not be as annoying as having to squeeze on to over-crowded underground trains in London. Unless the beggar is aggressive or stalks ATMs, then there is no case for criminalisation.

The right not to be criminalised and social tolerance

The right not to be criminalised is a basic human right that aims to protect individuals from unwarranted state interference.\textsuperscript{144} In particular, the right is geared towards protecting individuals from being unjustly criminalised. The right is a basic moral right,\textsuperscript{145} which aims to protect personal autonomy, but it is also a fundamental legal right. It is legally protected by specific constitutional protections as well as the more general protections found in deprivation of liberty and fair punishment rights as set out in Articles 3, 5 and 8 of the European Convention on Human Rights\textsuperscript{146} and corresponding rights in other jurisdictions, such as those set out in Articles 7, 9, and 12 of the Canadian Charter of Rights and Freedoms.\textsuperscript{147} As far as specific rights operate to protect specific freedoms (free speech, privacy, freedom of movement, etc.) from unjust criminalisation and punishment, the right not to be criminalised has proved to be a rather powerful justice constraint in the USA.\textsuperscript{148}

The rights not to be arbitrarily criminalised or subjected to disproportionate punishment also contain a general right not to be criminalised. These rights can be distinguished from specific constitutional rights because they protect the autonomy of individuals generally. Hence, the rights to avoid arbitrary detention, to be free to make private decisions

\begin{thebibliography}{99}
\bibitem{146} Above n. 1.
\bibitem{147} Constitution Act 1982 (Can). Part 1, s. 2(b), See also the corresponding rights in Articles 1, 3, 4, 5, 9, and 12 of the Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc A/810 (1948).
\bibitem{148} Lawrence v Texas, 539 US 558 (2003).
\end{thebibliography}
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concerning personal matters that do not wrong others, and not to be subjected to disproportionate punishment, form a more general personal autonomy right that allows people to engage in any conduct they like so long as it does not wrong others.\textsuperscript{149} Criminalising those who have not wronged others is arbitrary criminalisation and thus is unconstitutional. The right not to be criminalised is not a mere procedural protection, but must be interpreted as a check on unjust substantive criminal laws. Specific rights protect specific freedoms such as the right to free speech. Specific rights do not provide a person with a general right to do whatever he or she likes so long as it does not wrong others. When specific rights are involved, the criminal law must violate an exercise of the specific right involved. For example, the decriminalisation of passive begging in open places in some states in the USA\textsuperscript{150} and Canada\textsuperscript{151} was possible only because it was held to involve an exercise of the specific right that protects freedom of speech.

The traditional criterion used for determining whether a particular person’s actions wronged others, is to ask: did it cause objective harm to the victim? The harm is wrong when a human agent culpably brings it about. A dog might harm a person by biting that person, but the dog does not wrong the victim. Likewise, a person might be harmed if he loses his property and has his leg crushed in an earthquake, but the earthquake does not wrong him. The harm must also be of an objective kind. Merely claiming the sight of beggars is harmful will not do. However, criminally wronging others involves more than culpably harming them, because harm is not the only criminalisable bad consequence that can be culpably brought about for others.\textsuperscript{152} Certain harmless\textsuperscript{153} bad consequences such as those caused by public exhibitionism might be criminalised to solve coordination and cooperation issues concerning the ethical use of public places. The basis for criminalising offensive conduct in such cases is that forcing others to receive very intimate and obscene information in confined public places invades their right to be let alone.\textsuperscript{154}

If a couple decide to copulate on a public bus, the public could claim that the personal display in the confines of a enclosed public space

\textsuperscript{149} D. J. Baker, ‘Internationalizing the Right Not to Be Criminalised’ (forthcoming 2009).
\textsuperscript{150} Loper v New York City Police Dept, 802 F Supp 1029, 1042 (SDNY 1992); Benefit v Cambridge, 424 Mass 918 (1997).
\textsuperscript{151} Federated Anti-Poverty Groups of British Columbia v Vancouver (City) [2002] BCSC 105.
\textsuperscript{153} Feinberg notes that: ‘Even gross offenses such as public displays of earrings made from human foetuses, vomit eating in front of others in the confines of a public bus, copulating in public spaces and so forth do not amount to harm.’ Since, ‘[harm] even in the broad untechnical [conventional] sense rules out mere transitory disappointments, minor physical and mental “hurts”, and a miscellany of disliked states of mind, including various forms of offendedness, anxiety, and boredom as harms, since harm in the broad sense is any setback of an interest, and there is (typically) no interest in the avoidance of such states’: J. Feinberg, \textit{The Moral Limits of the Criminal Law: Offence to Others} (Oxford University Press: New York, 1985) 48.
\textsuperscript{154} Baker, above n. 152.
interferes with their right to be let alone and to avoid having intimate information pushed at them, and thus results in the objective bad consequence of inverse-privacy loss. Since the objectivity of this type of bad consequence can only be established inter-subjectively by pointing to the wider issues of coordination and cooperation, and given that its badness is conventionally contingent, any punishment would have to be limited to fines. If the objective bad consequences do not involve primitive type harms such as blinding, starvation, murder, rape (wrongs that impact all humans in the same way regardless of context or culture), criminalisation backed up with jail terms would be a disproportionate response.

The objective bad consequence and culpability criteria should be used as standards for considering the reasonableness and proportionality of state decisions that override an individual’s right not to be criminalised. The objective criteria are culpability and objective bad consequences (or objectively bad actions in the case of attempts and other forms of endangerment). Bad consequence (BC) plus culpability (C) = wrong (W); and BC × C is the formula for determining the gravity of a particular wrong and for determining how it should be labelled and punished. Criminality should be labelled according to the gravity of the culpability involved (intention, recklessness, etc.) and the gravity of the bad action/consequence involved (causing an inverse-privacy loss would not be as serious as causing actual harm and thus could not be punished with a jail term). In most cases, the bad actions/consequences will involve harm or a threat of harm.

There are two core ways in which the normative concepts of harm (and bad action/consequence more generally) and culpability form a part of the constitutional right not to be criminalised. First, they should be used as objective criteria for measuring the proportionality of punishment pursuant to Article 3 of European Convention on Human Rights. That is, the jail sentence should be proportionate to the harmfulness of the conduct being punished. Objective harm is an appropriate measuring stick for determining the proportionality of jail sentences, because jail harms the prisoner. Proportionality here is a simple matter of trying to ensure that any jail term is proportionate with the offender’s culpability and the harmfulness of her wrongdoing.

The second way in which the right not to be criminalised could be recognised in a legal or constitutional sense is via the general personal autonomy right which derives either from the deprivation of liberty right or the privacy right—and sometimes from a reading of both,
depending on the jurisdiction. Here, proportionality in the context of substantive criminal law, as opposed to procedural criminal law, would consider the badness and nature of the general societal problems caused by the unwanted harmless consequences, such as those that may be caused by public exhibitionism, and balance the individual's right to engage in such activities against the societal problems caused by allowing that freedom to take place. Under this standard, a person is unjustly deprived of his right not to be criminalised when his personal choices are restricted in order to cure societal problems that are not sufficient to warrant a criminal law response. In R v Malmo-Levine, Justices LeBel and Deschamps considered the proportionality of criminalising personal possession of marihuana pursuant to s. 7 of the Canada Charter (which protects life, liberty and security of the person) and noted:

[T]he harm that marihuana consumption for personal use may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of criminalisation chosen by Parliament seem plain and important. . . . Jailing people for the offence of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption . . . Moreover, besides the availability of jail as a punishment, the enforcement of the law has tarred hundreds of thousands of Canadians with the stigma of a criminal record. The fundamental liberty interest has thus been infringed by the adoption and implementation of a legislative response that is disproportionate to the societal problems at issue and therefore arbitrary, and in breach of s. 7 of the Charter.

159 In Canada these rights can also be read in conjunction with the disproportinate punishment provision to produce a rather wide personal autonomy protection. For instance, in R v Malmo-Levine [2003] SCC 74 at para. 169, the court held that proportionality at issue was wider than mere disproportionality of penalty. It held that: 'interaction by an accused with the criminal justice system brings with it a number of consequences, not least among them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice . . . is not exhausted by its manifestation in s. 12'.

160 [2003] SCC 74: 'For the state to be able to justify limiting an individual's liberty, the legislation upon which it bases its actions must not be arbitrary. In this case, the legislation is arbitrary. First, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the Charter, since, apart from the risks related to the operation of vehicles and the impact on public health care and social assistance systems, the moderate use of marihuana is on the whole harmless. Second, in view of the availability of more tailored methods, the choice of the criminal law for controlling conduct that causes little harm to moderate users or to control high-risk groups for whom the effectiveness of deterrence or correction is highly dubious is out of keeping with Canadian society's standards of justice. Third, the harm caused by prohibiting marihuana is fundamentally disproportinate to the problems that the state seeks to suppress. This harm far outweighs the benefits that the prohibition can bring': ibid., per Justice Deschamps.

161 Notably the European Human Rights Convention deals with this type of activity under Article 8 which deals with privacy, but also protects personal autonomy more generally: Dudgeon v United Kingdom (1981) 4 EHRR 149.

162 [2003] SCC 74 at para. 280 (emphasis supplied).
In Europe and Canada\textsuperscript{163} the privacy right, the right not to be arbitrarily detained, and the right not to be disproportionately punished could be read together as a general personal autonomy right—that is the right for a person to do whatever he or she likes so long as it does not wrong others. If the State claims that a particular activity wrongs others, then it has to produce empirical evidence to explain not only how it wrongs others, but also to explain why criminalisation is a proportionate state response. Anything less would be a human rights abuse. To satisfy the proportionality constraint when criminalising harmless conduct such as exhibitionism, the courts might point to the general societal problems that would be caused, such as coordination issues concerning the ethical use of public spaces to justify using penal fines to deter it. The general standard of proportionality means that legislative responses must be proportionate for dealing with the social problem (unwanted bad consequences of an objective kind) at hand. If the consequences are not \textit{prima facie} bad, then there will be no case for criminalisation. If they are \textit{prima facie} bad, then the criminal law response would have to be a proportionate response. The crime label is disproportionately applied when conduct is not \textit{prima facie} criminalisable—criminalisation in such cases would be a disproportionate response to the societal problems at issue and, thus, would be arbitrary.

The fundamental liberty interest protected by the general personal autonomy right found in the European Convention protects from criminalisation conduct that might not necessarily be punished with jail terms, because it outlaws criminalisation that is a legislative response that is disproportionate to the societal problems at issue. Parking fines spring to mind. Although the penalty for illegal parking is not punishable with imprisonment, it could be criminalised because it causes coordination problems, and thus the State could show that regulatory criminalisation is a legislative response that is proportionate to particular societal problems. However, if the State chose to impose jail terms for illegal parking, then the Article 3 proportionate punishment protection could be invoked to ensure that the \textit{prima facie} justifiable criminalisation is punished proportionately. Thus, the general autonomy protection has to be supplemented with the proportionate punishment constraint. The latter protects people from being subjected to unjust state punishment, rather than to unfair conviction and labelling \textit{per se}. When other constitutional rights are involved such as the procedural protections found in Article 6 of the European Convention on Human Rights, the courts should read them in sum with the substantive protections as set out in the proportionate punishment and proportionate legislative response provisions in order to ascertain whether the general right not to be criminalised has been unjustly overridden. For this to happen, however, the Law Lords and European Court of Human Rights will have to take a

\textsuperscript{163} The Canadian courts have tended to read s. 7 of the Charter as containing a personal autonomy right. In Europe, Arts 5 and 8 of the European Convention could be read together as providing a broad autonomy right.
more robust approach when considering the justice of the various override arguments than they have in the past.

Social tolerance

In earlier centuries vagrancy and begging was a genuine societal problem. However, in modern society only a minority beg for a living and most often do so in a passive manner, as they know this will increase their chances of receiving alms. The umbrage caused to passers-by in the modern context could hardly be defined as objectively harmful. It may cause subjective offence to some, but it does not cause a bad consequence of an objective kind. Since, passive begging *per se* does not have bad consequences of an objective kind for others, it should be tolerated. To tolerate is to put up with something that a person does not really approve. ‘Toleration requires a positive “acceptance component”, which does not cancel out the negative judgment but gives certain positive reasons which trump the negative ones in the relevant context’. In modern society homelessness and passive begging remain as crimes for no good reason. Aggressive and intimidating begging can be dealt with as a form of assault or as a public order offence, but there is no critical justification for criminalising passive beggars and homelessness. Beggars who sit passively with a hat in front of them to signal their plight of poverty do not cause tangible harm to others; and any annoyance should be tolerated.

Von Hirsch and Simester emphasise the importance of tolerating the different ways in which people choose to present themselves and live their lives. They assert that: ‘[p]lural society is not just a present social fact (that people have different lifestyles) that need to be “managed”’; ‘It is also a normative matter: we ought to encourage varying and sometimes even conflicting lifestyles’. In the wider sense social tolerance is about tolerating aspects of others’ lifestyles that you do not agree with. The taxpayer might be asked to tolerate the excesses of the BBC or the inadequacies of the over-crowded public transportation system in London. Others might be asked to tolerate the punk with pink, spiked hair, and so on. Here, the question being asked is whether people should tolerate conduct that is harmless, but possibly offensive and annoying to some: ‘The concept of toleration entails the idea of certain “limits of toleration”. They lie at the point where reasons for rejection become stronger than the acceptance reasons . . .’.

167 Von Hirsch and Simester, above n. 116 at 125.
168 Ibid.
169 Ibid.
170 Forst, above n. 166 at 72.
on passive begging that is targeted at audiences who can easily avoid or ignore it.

Waldron\textsuperscript{171} points out that beggars cause offence to some passers-by as they might be distressed by the message conveyed by homeless people, but that distress is beneficial for both the offended auditor and the homeless person. First, the auditor might say: ‘This is awful. I am glad I have found out about this’—additionally, the encounter might even motivate the auditor to do something about it. Such an encounter is a good consequence not a bad consequence (to the extent it is not aggressive: aggressively targeting passers-by is a form of harassment and would most likely come within the purview of the harm principle), because it forces society to acknowledge and respond to the harsh realities of indigence.\textsuperscript{172} Unwanted speech that captures the public’s attention is usually seen as a bad, but it should not be seen as a bad from the audience’s point of view: ‘As Mill rightly emphasized, there is significant benefit in being exposed to ideas and attitudes different from one’s own, though this exposure may be unwelcome’.\textsuperscript{173} The beggar, the offended, the liberal and the bigot all have an interest in articulating their views and in hearing the views of their adversaries.

The objective consequence of being forced to deal with public political discussion is somewhat different to having a copulating couple’s live presentation of their most private affairs forced upon you in the confines of a public bus. This is why Feinberg asserts that offence would hardly ever outweigh the value of free speech.\textsuperscript{174} It appears that only a very narrow range of extremely intimate displays (copulating in a bus or physical intrusions such as accessing people for prolonged periods in certain contexts in public places, etc.) would be a sufficiently bad objective action/consequence to justify a criminal law response, because to the extent that it results in a visual display of private information, it is not public information and it interferes with the auditor’s right to be let alone (right not to be included in the very private affairs of others in public contexts). Similarly, if a beggar corners a captive audience at an ATM, this would have an intimidatory effect and would not be tolerable. \textit{Per contra}, if the passer-by is intimidated merely because of his or her misconceptions about the dangerousness of beggars, then there is no genuine intimidation—as the beggar has done nothing to cause intimidation. If beggars merely beg in an open street and are not aggressive, then their conduct would be tolerable. As already noted, in modern Britain, only a small minority of people rely on begging for a source of income.

\textsuperscript{171} Waldron notes that: ‘[I]f . . . pedestrians are regarded as progressive beings, in Mill’s sense, then we should not go around saying that they have an interest in not knowing or in not perceiving the true state of affairs in their society—the condition in which some of their fellow citizens are having to live—simply because that knowledge or perception is distressing to them. If the situation of some in society is distressing, then it is important that others be distressed by it; if the situation is discomforting, then it is important that others be comforted’: Waldron, above n. 139 at 379.

\textsuperscript{172} Ibid.


\textsuperscript{174} Feinberg, above n. 153 at 38–9.
income and, unlike the situation in earlier centuries, begging and vagrancy does not pose any threat to society.

Concluding remarks

The empirical data suggest that begging is no longer a source of harm and that it is beggars who are more likely to end up victims of crime. In the past begging may have been a genuine societal problem and the early enactments were adopted in that social milieu. However, that social setting is completely different to contemporary Britain. The harms that were targeted by the older legislation no longer exist. Seventy-three years ago Scott LJ stated that it was wrong to continue to use the Vagrancy Act 1824 to arrest and prosecute:

when in [its] historical meaning is so utterly out of keeping with modern life in England. The class against which the legislation was directed has ceased to exist. The poor law legislation and the increased industrial and commercial employment of the nineteenth century together reduced it to much narrower proportions. The legislation of the twentieth century, unemployment insurance, national health insurance, public assistance, and all the other social reforms of recent years have abolished it altogether . . . To retain such laws seems to me inconsistent with our national sense of personal liberty, or our respect for the rule of law.'

Canada acknowledged the same as much nearly 40 years ago when it repealed the offence of begging in 1972. It was recognised in the Canadian House of Commons debates on 27 April 1972, by both the government and opposition that the inclusion of vagrancy in the criminal law was no longer appropriate. Begging was replaced in Canada at that time with offences that were designed to tackle conduct that was seen as being more disruptive. Some local governments have tried to reintroduce anti-begging ordinances in Canada, but have been unsuccessful because begging has been accorded freedom of expression protection in Canada. Interestingly, in 1974 in the UK a similar conclusion was reached by a Working Party when it accepted that modern-day begging was a symptom of social failing and that those who begged required rehabilitation rather than punishment. Unfortunately, the same report recommended that begging remain on the criminal statute books because it was perceived to be a nuisance, which allegedly frightened some members of the public. There was also a concern that persistent beggars needed to be stopped. Likewise, in 1981 the UK government said that it shared a Home Affairs Committee’s view that the offence of begging should be repealed at some future time, but

175 Foscarinis, above n. 141.
176 Ledwith v Roberts [1936] 3 All ER 570 at 582–94.
177 Federated Anti-Poverty Groups of British Columbia v Vancouver (City) [2002] BCSC 105 at para. 130.
178 Ibid. at para. 130.
180 Ibid.
declined from doing so at that time on the basis that it constituted a public nuisance. Nevertheless, these old laws survive in many forms not only in the UK, but also in some states in the USA and Australia. History shows that it is now time for the criminal law to be narrowly tailored so that it only prohibits begging that is genuinely aggressive and intimidating (i.e. begging in trains and near ATMs).
