Andrew Simester and Andreas von Hirsch’s *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Simester and von Hirsch 2011) is an important contribution to the philosophical debate over the nature and ethical limits of criminalisation. As they note in their reply in this symposium, one of the novel aspects of their account is that they do not advance one “unified, grand theory”. Rather, they analyse each ground of criminal prohibition—wrongfulness, harm-based, offense, and paternalistic prohibitions aimed at preventing self-harm—so as to develop guiding principles for their use (or, in the case of paternalism, the absence of an independent principle that would underwrite its use).The result is a rich set of arguments that advance a number of debates across the field of criminalisation.

However, that is not all: the participants share the view that, as Tatjana Hörnle puts it, “any theory of criminalization presupposes assumptions about the functions of the criminal law. The question ‘why should we have state punishment?’ is logically prior to ‘what should be punished?’”. But of course the question of why we have state punishment also presupposes assumptions about the state and about the nature of the persons who constitute its citizens (the degree to which, for example, we should think of them as autonomous, reason following beings). Thus political philosophers, in addition to criminal law theorists, will find arguments advanced (in both senses of that term) here that speak to their central concerns.

The contributions to this symposium—by Tatjana Hörnle, John Kleinig, John Stanton-Ife, and Thomas Petersen[[1]](#footnote-1)—reflect this richness and the result is a challenging discussion of many of the principal questions in criminalisation through which wider issues of political philosophy emerge. Some of the main themes of the discussion are mentioned in what follows, but I have not attempted to summarise the debates in their entirety.

Hörnle shares Simester and von Hirsch’s scepticism about too robust a moralistic account of the criminal law preferring to see it rather as a hybrid that combines moral condemnation with a “functionalist” preventive role. This raises the question of what, in addition to wrongfulness, is required to establish grounds for criminalisation. Simester and von Hirsch’s answer – in common with many – reaches for (a version of) the harm principle and it is here that Hörnle disagrees. Rather than harm, Hörnle favours the violation of *rights* as grounding a prima facie reason for criminalisation; rights, as she puts it, “not in the sense… granted in positive law but in the sense of rights which are to be justified in political philosophy”. In addition to making an independent case for a rights-centred account, Hörnle argues that such an approach simplifies matters by explaining in its own terms what is problematic about both offense-to-others and offense-to-self arguments.

John Kleinig objects to what he sees as the particularity with which Simester and von Hirsch treat paternalism. As noted above, Simester and von Hirsch embrace an account that treats proposed grounds of criminalisation on their own terms and not under the umbrella of some grand theory. Yet, Kleinig argues, whereas Simester and von Hirsch scrutinise and elaborate harm- and offense- to-others principles, they do not do the same for harm-to-self. Rather, somewhat “grudgingly”, they discuss the justification of paternalistic interventions only in rare circumstances. Kleinig locates Simester and von Hirsch’s reluctance to the paternalistic use of the criminal law in their commitment to the overriding importance of the “moral autonomy” of individuals. He then offers five powerful responses to the priority afforded to this value. In doing so, Kleinig offers a nuanced understanding of the relationship of autonomy and flourishing that does not associate the latter idea with too rich or perfectionist an account of a well-lived human life.

In contrast to Hörnle, who as we have seen sides with Simester and von Hirsch’s self-understanding as “hybrid” theorists, John Stanton-Ife argues that in the end it is “wrongfulness” that does the work in *Crimes, Harms and Wrongs* and that such is its all encompassing nature that it renders the other concerns – harm and offence – of little if any significance. That is, Stanton-Ife argues that the position taken by Simester and von Hirsch with respect to an independent principle of paternalism – that it is unnecessary because the work is better done by “wrongfulness together with an important, amorphous set of potential defeating conditions” – applies with equal force to Simester and von Hirsch’s proposed Harm and Offence principles. Moreover, Stanton-Ife claims, in the case of harm, Simester and von Hirsch’s interpretation of that concept is so broad as to render the reasons it generates for criminalisation indistinguishable from those based in wrongfulness or immorality. In making this argument, Stanton-Ife directs attention to Simester and von Hirsch’s liberal perfectionism and thus his argument connects with Kleinig’s concerns over flourishing.

The importance of the background account of flourishing or well-being is also central to Thomas Petersen’s contribution. Petersen argues that the case for an independent Offence Principle – that is, independent of the Harm Principle – depends on a “rather special and implausible” objective list theory of what makes a life go well. In addition to offering arguments against such a position, he thus poses a challenge to anyone – including Simester and von Hirsch – who wishes to defend an Offence Principle either to say why the account does not depend on such a theory of well-being or, if it does, to defend that theory against the well-established critiques of it that can be found in the literature.

In their response, Simester and von Hirsch engage with these criticisms and defend their harm- (rather than rights-) based account; the very limited space they give to paternalistic reasons for criminalisation; and their hybrid (rather than legal moralist) position. In so doing, they clarify some elements of the original account and expand on others. As they note at the end, “the legitimate regulation of human behaviour is a tremendously difficult problem” and many things can go, and have gone, wrong when legislators (in particular) are overconfident that they have the solution to it. That said, as is clear from the discussions in this symposium, *Crimes, Harms and Wrongs* is an important contribution to the attempt to provide a principled answer to the question of criminalisation and, as these essays show, it is one that richly rewards close examination.

**References**

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1. Petersen’s paper was not commissioned for this symposium – and is not included in Simester and von Hirsch’s response. It was submitted independently, but fitted so well with the themes of the symposium so the decision was made to include it here. [↑](#footnote-ref-1)