

CRIMINALISING REMOTE HARM AND THE CASE OF ANTI-DEMOCRATIC ACTIVITY

*Shlomit Wallerstein**

Recent years have seen a growing exposure of western countries to acts of terror both from foreigners and from their own citizens as a result of the expansion of extremist ideologies and global connections. Many countries responded to these growing threats by, among other things, introducing new criminal offences, the principal aim of which is to allow the state to intervene at earlier stages of the criminal enterprise. The common feature of these new offences is that they penalise acts that cause, at most, remote harm. The underlying assumption is that security is an overriding justification that silences all other concerns: the state has a duty to protect its citizens and this duty grants the state permission to use whatever means it finds necessary to attain this protection. This assumption, however, is not a trivial one, and is not necessarily reflected in the general principles that govern state coercion in democracies. The foremost objective of such principles is to define the margins of the state's ability to intervene in its citizens' lives. One of the main restrictions on a state's power is with regards to its permission to proscribe acts that cause only remote harm. Three principles ensure these limitations: the harm principle, the minimalist principle, and the principle of fair imputation. These principles require that a special justification be given for any expansion of criminal law beyond the proscription of acts that cause direct harm, and even then strict limitations are imposed on the possibility to proscribe remote harm.

A consequence of the move towards remote harms is that it has become necessary to explain how terrorism differs from other "ordinary" crimes. This, in turn, means that special attention has to be given to the motivation of the offenders. Distinct motivations may result in different types of threats and possibly yield different answers to the question regarding the extent to which criminal law may stretch. It may be that the boundaries of the various justifications prove to be

* Fellow in law at St. Peter's College and a lecturer at Oxford University. D.Phil., M.Stud. Oxford University, L.L.B, Hebrew University. I wish to thank Professor Andrew Ashworth and Professor John Gardner for their valuable comments. Any mistakes found in this paper are mine alone.

similar to a large extent, but that possibility does not render an analysis of the various motivations unnecessary. In this paper I have chosen to concentrate on motivations based on some version of anti-democratic ideology. This decision was driven by the fact that anti-democratic ideology is a common motivation for terrorism, and it poses one of the more severe threats. If any motivation justifies the criminalisation of remote harm in accordance with the general principles, anti-democratic ideology should be among those motivations that allow for the widest permission. Nevertheless, I argue that the principles discussed place strict limitations on the use of power by the state.

The first part of this paper concentrates on the analysis of the general principles. In Section I, I discuss the harm principle. The aim of the discussion is not to provide a comprehensive analysis of the principle, nor is it aimed at defending the harm principle against critiques that question its viability as a distinguishing principle. This paper assumes the convention that the harm principle is a (if not the) basic principle that governs criminal law, and it addresses only the type of guidance it provides. Section II discusses the supporting minimalist principle. I explain the justification for this principle and suggest a different reading of it, one that does not view the principle as solely protecting desert, but rather as a principle that balances the ideas of desert and prevention. In Section III, I present the difficulties connected with the criminalisation of remote harm, and in Section IV, I address the principle of fair imputation developed by Andrew Von Hirsch to help assess the possibility to penalise remote harm.

In the second part of the paper I conduct a detailed analysis of the application of the general principles to anti-democratic activity: Part V explains why I address the possibility of criminalising anti-democratic activity rather than concentrating on terrorism. I then identify various types of anti-democratic activity, and examine what types of anti-democratic activity can be criminalised in accordance with the harm principle and the minimalist principle. Part VI concentrates on the extent to which it is possible to justify the criminalisation of anti-democratic activity that causes remote harm, based on the imputation principle and the minimalist principle, in the principle's wider (suggested) interpretation.

Finally, it is essential to stress that the principles that govern criminal law must be adhered to even though anti-democratic agents may seek to destroy or undermine the very political order that these principles uphold. Indeed, as John Rawls recognised: "[a] person's right to complain is limited to violations of principles he acknowledges himself. A complaint is a protest addressed to another in good faith. It

claims a violation of a principle that both parties accept.”¹ The anti-democratic agent does not share our belief in democracy or in the need to tolerate the liberty of others. Thus, she cannot justly claim for her interests to be respected according to democratic values. So, it may be argued, we no longer need to look for a justification to defend ourselves from anti-democratic ideologies, since the victim’s interests would always have the upper hand. Yet, not giving the anti-democratic agent a stand does not mean that we automatically have a right to suppress and restrict her activities. As Rawls explains:

[O]thers may have a right to complain. They may have this right not as a right to complain on behalf of the intolerant, but simply as a right to object whenever a principle of justice is violated. For justice is infringed whenever equal liberty is denied without sufficient reason We are not released from [the natural duty of justice to uphold it] whenever others are disposed to act unjustly.²

Hence, it is important to maintain the requirements of justice, and, in this case, adhere to the restriction imposed by the general principles, even if anti-democratic agents have no say in the matter.

I. THE HARM PRINCIPLE

The harm principle is the most commonly recognised criterion for criminalisation in democratic societies.³ John Stuart Mill was the first to define the principle. According to Mill, the only purpose for which the state is permitted to restrict actions is to prevent harm to others.⁴ The principle thus stated includes two separate principles: the first is the core idea of the harm principle according to which harm prevention is the only justification for state intervention; the second is the anti-paternalism principle. In other words, state intervention is limited to preventing harm *to others*. Intervention for the purpose of preventing harm to oneself, i.e., for paternalistic reasons, is prohibited. The subsequent discussion of the harm principle will concentrate on the first of these two principles. More specifically, I will concentrate on two problematic aspects of the harm principle which are closely connected to questions of criminalisation of anti-democratic activity: the

¹ JOHN RAWLS, A THEORY OF JUSTICE 190-91 (1999).

² *Id.* at 191-92.

³ *But see* Donald A. Dripps, *The Liberal Critique of the Harm Principle*, 17 CRIM. JUST. ETHICS 3 (1998). Dripps argues that the harm principle is deficient as a limiting principle. He suggests a procedural criterion as an efficient alternative. Other forms of democratic theories may offer supplementing criteria such as paternalism or morality, but the discussion of such principles is beyond the ambit of this paper.

⁴ JOHN STUART MILL, ON LIBERTY 13 (1991) (1859).

difficulties of restricting remote harm, and the difficulties of restricting speech and expression. Indeed, the criminalisation of speech and expression often turns on the expression's role in bringing about some further harm, but, as shall be seen, this sub-category of remote harm has some unique features that may call for a different treatment.

A. *Excluding Thoughts and Beliefs*

Whatever the exact meaning of the harm principle is, it is indisputable that thoughts and beliefs are excluded from consideration, and therefore cannot be restricted. The rationale is simple. Thoughts and beliefs, in themselves, do not involve any communication with the surroundings—they cause no change in the world. It is only when a person *causes* (direct or sometimes even indirect) harm or an unacceptable risk of harm that she can be restricted. To *cause* harm presupposes performance, a change in the world (or a failure to perform where there is a duty to do so). Hence, thoughts and beliefs that are not accompanied by actions *cannot cause any harm to others*. A second reason for not restricting thoughts is that thoughts and beliefs cannot be fully controlled,⁵ and it is the capacity to choose to think or do otherwise that is one of the basic principles for criminalising.⁶ Moreover, thoughts are part of the decision-making process and the act that follows is the result of that decision. The value we place in autonomy is the value we attach to the independence of individuals to choose their conduct. Criminalisation of thoughts would ban the possibility of making these decisions.⁷ On a more pragmatic level, it should also be remembered that even if thoughts and beliefs were

⁵ As a known saying says: "if thoughts were punishable—we would all be criminals." Jeremy Waldron brings forth a similar argument provided by John Locke in A LETTER CONCERNING TOLERATION (James H. Tully ed., 1983). According to Locke, we must tolerate other religious beliefs because religious and moral beliefs are not subject to the human will. One cannot acquire a belief simply by intending or deciding to believe. After receiving the idea, the process of understanding is more or less automatic. Coercive measures work by operating on a person's will. They pressurise his or her decision-making with threat of penalties. Hence, using coercive measures to prevent thoughts and beliefs is inefficient. See JEREMY WALDRON, LIBERAL RIGHTS 94, 107-13 (1993).

⁶ H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28-53 (1968).

⁷ Joseph Raz might object to this reasoning, arguing that autonomy is only valuable when one is choosing between valuable choices. There is no value in the choice between murdering and not murdering someone, and hence no loss of value to autonomy if that choice is taken away. See JOSEPH RAZ, THE MORALITY OF FREEDOM 378-79 (1986). However, although there is no value in the choice to murder someone, there is value in *choosing* (between two options) not to murder. It is the value of knowing and preferring right over wrong. It might also be valuable for reasons of self-control, resisting temptations, etc.

restricted, it would be impracticable to apply direct restrictions⁸ as it is impossible to know a person's thoughts (unless he reveals himself through an act or expression).⁹

B. *Extending the Exemption to Expressions*

Using the same reasoning for the exclusion of thoughts and beliefs, Mill takes an interesting position regarding one type of act that may cause remote harm—acts of expression. Mill argues:

The liberty of expressing and publishing opinions may seem to fall under a different principle [than freedom of thought], since it belongs to that part of the conduct of an individual which concerns other people; *but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.*¹⁰

Therefore, he argues, speech must not be restricted. In taking this stance, Mill differentiates between remote harms that may be triggered by acts of expression and the treatment of other acts that may cause only remote harm. The former ought to be excluded from criminalisation for their similarity to thoughts. The latter are admittedly other-regarding acts and their prohibition is dependent on the further harm and their connection to it.

This classification of expressions seems naïve. Can it truly be said that expressions are self-regarding acts? Can we seriously argue that expressions cannot by their very nature cause harm? Indeed, Mill himself was aware that speech belongs “to that part of the conduct . . . which concerns other people,” and hence, he must have realised that it may cause harm.¹¹ This possibility is supported by Mill's own examples of exceptional cases in which speech is unprotected.¹² There are several ways to understand Mill's argument. Jonathan Riley interprets Mill as saying that most expressions are self-regarding acts, in

⁸ As opposed to indirect restrictions. As Waldron pointed out, although the process within a person's mind cannot be controlled directly, it can still be controlled indirectly. I can effectively control the ideas to which a person is exposed. Practically, the state can identify “dangerous” expressions and restrict them in order to alter people's behaviours and beliefs. See WALDRON, *supra* note 5, at 107-13.

⁹ Note that the last two rationales do not explain why there is no threat in thoughts. At most they can proffer weighty reasons to balance against threats hidden in thoughts (if such threats existed).

¹⁰ MILL, *supra* note 4, at 15 (emphasis added).

¹¹ *Id.*

¹² Mill gives an example of an opinion that corn-dealers are starvers of the poor or that private property is robbery. He admits that this opinion may “justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.” MILL, *supra* note 4, at 56.

other words, acts that are harmless to others.¹³ As such, they are immune from restrictions (according to the second, anti-paternalistic part of the principle). However, Mill admitted that “acts of ‘expressing and publishing opinions’ are not truly self-regarding acts, since they always pose some risks of harm to other people.”¹⁴ Thus, these acts do not receive immunity because they do not fall within the ambit of the liberty principle. Nevertheless, for the reasons discussed above, restrictions on these acts should be cautious regarding such expressions as thoughts. On this reading of Mill, expressions are other-regarding acts; nevertheless, because of the special value ascribed to them, they should be given priority in most situations as opposed to not being subjected to the usual utility calculations.

On the other hand, Daniel Jacobson reads Mill as saying that speech, like thought and belief, is a self-regarding activity, and, as such, is immune from restriction.¹⁵ For Mill, “speech isn’t just a handy way to express our thinking, but the medium in which we think.”¹⁶ Yet, in this interpretation, “speech” is restricted only to those clear acts of assertion or expression. If speech becomes more profoundly active (i.e., if it creates an obligation or incites), it is transferred from the category of thoughts to that of acts, and thus loses its immunity.¹⁷ Mill advocated “the freedom to express any factual or normative opinion, where opinions are to be understood to be individuated by their content. It is not the freedom to express that opinion in any context whatsoever”¹⁸ This position seems to be wrong for the exact reason that Mill gave—that expressions, even as understood by Jacobson, concern others, and thus may cause harm where thoughts cannot. At the same time, it is important to recognise the vital role expressions have in the process of forming opinions and beliefs and reflect it in their minimal restrictions. The nature of expressions barely differs from that of any other act that may cause remote harm. Indeed, the only difference is in the weight of the considerations that ought to be balanced against the potential harm.

¹³ JONATHAN RILEY, *MILL ON LIBERTY* 48-49 (1998).

¹⁴ *Id.* at 71.

¹⁵ Daniel Jacobson, *Mill on Liberty, Speech, and the Free Society*, 29 *PHIL. & PUB. AFF.* 276 (2000).

¹⁶ *Id.* at 284.

¹⁷ Jacobson refers to a promise to stop smoking as an example for this latter kind of speech (though it does not cause harm or create an obligation for any other person but for the person who promised). *Id.* at 285. Furthermore, this classification is *not* dependent on the speaker’s intentions or on the danger that the assertion poses. *Id.* at 286.

¹⁸ *Id.* at 286-87.

C. Defining the Harm Principle

We have identified that area which is outside the scope of the harm principle, but we still need to determine the precise extent of the principle itself. The harm principle asserts that the only purpose for which actions can be forbidden is to prevent harm to individuals or to society. According to Mill, “[t]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”¹⁹ This is not, of course, a sufficient moral condition; however, it is a necessary one.²⁰ Yet, what is to be considered as harm? And what acts are to be considered harmful? It is commonly recognized that the concept of harm includes, but is not limited to, physical injuries and material damage to property. An act of trespass is considered harmful despite the fact that no injury or damage is inflicted on the owner. Feinberg defines harm as a wrongful set-back to, or impairment of interests.²¹ Another, less stringent, definition does not view the link between wrongs and harms as necessary, and settles for a definition of harm as a set-back to, or impairment of interests.²² One implication of this definition is that a person may be harmed without her knowing about it. Criminal law protects welfare interests and ulterior interests (i.e., extensions of welfare interests beyond a minimum level).²³ Welfare interests are the

¹⁹ MILL, *supra* note 4, at 13. But see Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369 (1995) for the view that over the years this principle has turned from a shield of individual liberty into a justification for major government intervention in all its manifestations.

²⁰ JOEL FEINBERG, HARM TO OTHERS 10, 187 (1984) [hereinafter HARM TO OTHERS]. More accurately, Feinberg claims that the principle is not even necessary in the sense that:

[E]ach liberty-limiting principle puts forth a kind of reason it claims always to be relevant—always to have some weight—in support of proposed legal coercion, even though in a given instance it might not weight enough to be decisive, and even though it may not be the only kind of consideration that can be relevant.

See also Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999).

²¹ HARM TO OTHERS, *supra* note 20, at 31-36. John Kleinig defines it in similar terms as wrongfully “undergoing a change in one’s conditions in a harmful direction” (as opposed to “being in a harmful condition”). See John Kleinig, *Crime and the Concept of Harm*, 15 AM. PHIL. Q. 27, 29 (1978). Cf. ALAN GEWIRTH, REASON AND MORALITY, 211-12, 230-36 (1978).

²² Cf. HARM TO OTHERS, *supra* note 20, at 34-35 (offering another definition of harm). A third intermediate stance is to go along with Feinberg’s definition of the harm as a wrongful set-back to (or impairment of) interest, but also to adopt a more flexible definition of “wrongful” act. An act under this approach would be considered “wrongful” only when it invades an interest that one has a right to, and in so doing it generates a need for a justification or an excuse (rather than defining it as an indefensible act).

²³ HARM TO OTHERS, *supra* note 20, at 37-45, 55-61, 111-114; Kleinig, *supra* note 21, at 30-31; see also C. L. TEN, MILL ON LIBERTY (1980); H. L. A. HART, THE CONCEPT OF LAW 188 (1961) (referring to the basic (necessary) universal rules and the infringement or impairment of

minimum, stable, and durable conditions that make possible well-being and the achievement of ulterior ends.

This discussion of the harm principle and the two supporting principles takes place against a background of criticism of the harm principle, presented in different variations. It is argued that the harm principle is deficient because it does not reliably distinguish between acts that should be prohibited and acts that should not. The definition of harm in this instance allows for the inclusion of things (such as bad character or fears) that oppose the liberal principle it purports to promote.²⁴ Almost every act can be said to cause harm in some sense (even when that harm is limited “to others”) and thus the legislator can justify any restrictions he or she wishes to impose. This objection can only be answered by a careful analysis of the harm principle and the formulation of relatively precise maxims to mediate its application.²⁵ Keeping within the boundaries defined by these maxims is crucial. It is important to bear in mind that the reformulation of these boundaries, using the harm principle to cover all potential threats, would extend the principle so much that it will no longer distinguish effectively between actions that are harmful and actions that are not.

Although central to framing the boundaries of criminal law, on its own, the harm principle provides insufficient guidance to the legislator. At best, it identifies the basic interests that ought to be protected and the harms that may generate criminalisation. Further guidance can be found in other supporting principles. In the following discussion I will concentrate on two such principles that are concerned with remote harm.

II. THE MINIMALIST PRINCIPLE

The minimalist principle is based on the assumption that all coercion is evil.²⁶ Hence, the minimalist principle presents further limitations on the harm principle, stating that even when harm is involved, coercive measures ought only to be used as a last resort.

which constitutes harm). These rules correspond to the welfare interests described above. *Cf.* N. LACEY, STATE PUNISHMENT 104 (1988).

²⁴ For examples to this line of criticism, see Dripps, *supra* note 3; Epstein, *supra* note 19; Harcourt, *supra* note 20; SUSAN MENDUS, TOLERATION AND THE LIMITS OF LIBERALISM 123 (1989); RONALD DWORKIN, A MATTER OF PRINCIPLE 336 (1985). *Cf.* Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006).

²⁵ See Feinberg’s account of the purpose of his book HARM TO OTHERS, *supra* note 20, at 13-14.

²⁶ See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H. L. A. Hart eds., 1996); JOEL FEINBERG, SOCIAL PHILOSOPHY 21 (1973).

Among the different coercive measures available to the state, criminal law, all else being equal, is considered to consist of the most severe measures. This is because criminal law typically deprives the agent of basic liberties, or at least places further strict limitations on the exercise of such liberties.²⁷ The most obvious example of this is imprisonment, which deprives the agent of most or all of her liberties and entails condemnation and stigmatisation. Accordingly, the minimalist principle requires that criminal law be used only where all less severe coercive measures fail.²⁸ In this context, the minimalist principle has three aspects.²⁹ The first, which has already been referred to, focuses on the distinctiveness of the criminal sanction and the need to invoke special justifications for the choice to use it over other coercive and non-coercive controls.³⁰ The second, closely connected, aspect is the rule of *de minimis*, which requires that minor harms not be criminalised. Finally, the third proscribes the point of time of intervention—in other words, which of a chronological series of actions that may lead to a commission of harm ought to be criminalised. This is the problem of remote harm. For the purposes of this paper, the third aspect is the one of interest to us.

A. *The Third Aspect of the Minimalist Principle—The Point of Intervention*

The point of intervention, together with a supporting principle for criminalisation that of moral culpability, which justifies the use of criminal law by the blameworthiness of the agent who knowingly chooses to act while foreseeing the risk of harm that may result,³¹ found a further limiting guideline. This principle states: *In jure non remota causa sed proxima spectator* (in law not the remote but the near cause is sought for). This guideline is also known as the causal connection

²⁷ I refer to the core criminal law. In recent years many offences regarding relatively minor wrongs as well as strict liability offences were added to criminal law in various legal systems. The appropriateness of these modern supplements is, however, controversial.

²⁸ However, if in some specific circumstances other measures are found to be more coercive than the measures of criminal law, then criminal law should be preferred over the use of those other measures.

²⁹ Equivalent aspects might also be true with regard to the application of the minimalist principle on the general use of coercion. However, the following discussion will focus on the limitations this principle presents in criminal law.

³⁰ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 33-34 (5th ed. 2003).

³¹ The principle of culpability is not discussed here as it raises no special difficulties in the case of anti-democratic threats. The anti-democratic agent is culpable and acts knowingly and intentionally. It is exactly this feature of her act—the intention, or the motive—that creates the special threat.

between a wrongful act and its harmful result. The general rule is that only the direct “but for” cause of the harm may be restricted.³² Furthermore, when an intervention is an action of a free and deliberate third person, it disconnects the causal connection between the earlier cause and the harmful result. This requirement is understood to complete the harm principle.³³

1. Attempts-Preparations Distinction

Accordingly, traditional criminal law distinguishes between attempted and preparatory acts, thus limiting the extent to which these acts are considered as causing direct harm. While attempted acts are systematically punishable, preparatory acts, it is argued, are not.³⁴ An act closely related to the commission of the harm, but that falls short of a successful completion of the harmful result, is considered an attempt; an act related to the commission of the harm that falls short of an attempt, thus defined, is regarded as a preparation. Opinions vary on how far the law of attempts should extend.³⁵ Consider, for example, the difference between the “first” and the “last” act tests, each of which draws on a different approach to the “conduct element” (the *actus reus*). The “first act” test is based on the view that conduct serves mainly an evidential role. It is a manifestation of the dangerousness of the agent’s intentions, and, even at this early stage, it is harmful to the community. Accordingly, any act carried out in furtherance of a criminal intention is considered an attempt. This is a straightforward test that allows police to intervene at an early stage and thereby increase the efficacy of crime-prevention. The problem with this test is that it might be considered too broad, disregarding individual freedom as demanded by the minimalist

³² Some modifications to the “but for” conditions may be necessary in borderline cases such as situations where there are two (or more) acts that cause (or intend to cause) the harmful result. However, it is not necessary for the purposes of this paper to enter into a more elaborate discussion regarding these situations.

³³ ASHWORTH, *supra* note 30, at 28, 33-35.

³⁴ As a general rule, preparatory acts are not punishable in criminal law. For example, see the definition of attempts in the (English) Attempts Act, 1981, c. 47, § 1 (Eng.): “If . . . a person does an act which is *more than merely preparatory* to the commission of the offence, he is guilty of attempting to commit the offence.” (emphasis added). However, the criminal law recognizes exceptions to this rule such as conspiracy, going equipped for stealing (e.g., Theft Act, 1968, c. 60, § 25 (Eng.)), or possessing anything with intent to use it to damage or destroy property (e.g. Criminal Damage Act, 1971, c. 48, § 3 (Eng.)).

³⁵ I will present a brief account of the two extreme views, on both ends of the spectrum. The description is taken from R. A. DUFF, CRIMINAL ATTEMPTS 33-75 (1996). *Cf.* K. J. M. Smith, *Proximity in Attempt: Lord Lane’s “Midway Course,”* 1991 CRIM. L REV. 576 (1991); Donald Stuart, *The Actus Reus in Attempts*, CRIM. L REV. 505 (1970); ANDREW P. SIMESTER & G. R. SULLIVAN, CRIMINAL LAW—THEORY AND DOCTRINE 292-295 (2d ed. 2003).

principle: it does not treat people as autonomous beings, convicting even those agents who would voluntarily desist before the completion of the crime; it increases the possibility of intrusive and oppressive police investigations in search of evidence of criminal purpose; and it increases the possibility of bringing charges based on alleged confessions or previous similar misconducts unsupported by objectively incriminating facts.³⁶

Where the “first act” test narrows the scope of preparatory acts to only acts of planning, the “last act” test, by contrast, is based on the view that conduct is a constitutive element of criminal culpability. It responds to criticisms of the “first act” test because it permits an individual to decide to abandon a criminal act up until the point the act is committed. Taken to a logical conclusion, therefore, only the last act that depends on the agent should be criminalised. A less extreme version of this test calls for criminalising acts that “crossed the Rubicon and burnt the boat,” or are “immediately connected with” the commission of the crime. In other words, they are acts that come close to the completion of a crime and indicate an irrevocable intention to commit the completed crime (though further agent-dependent-acts may still be required for the completion of the crime).³⁷ The advantage of this latter test is that it sets a clear and straightforward criterion. Yet this advantage is lost if the wider interpretation is accepted. Once again it is necessary to decide whether the act is closely connected or whether it is more remote. The problem with this test is that it almost completely prevents police intervention prior to the completion of the crime. Furthermore, it unjustly distinguishes between the moral blameworthiness of the actor who successfully completes the crime and the one who does not.³⁸ The “last act” test substantially widens the scope of preparatory acts. Between the “first” and “last” acts, there are various tests for determining the extent of preparatory acts.

Justifications for the distinction between attempt and preparatory acts draw on the minimalist principle, as well as the principle of moral

³⁶ Cf. Andrew Ashworth, *Defining Criminal Offences Without Harm*, in CRIMINAL LAW: ESSAYS IN HONOUR OF J. C. SMITH 7, 16-17 (Peter Smith ed., 1987).

³⁷ The “irrevocable act” test may actually call for a different test of “possible intervention,” as there may be cases in which the actor may still have time to intervene and prevent the crime even after she had completed all the acts that depend on her for the commission of the crime (e.g. placing a bomb in a city centre that is set to detonate the next day). See DUFF, *supra* note 35, at 40. However, this interpretation would be even narrower than the “last act” test.

³⁸ See Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and the Common Law*, 19 RUTGERS L.J. 725 (1988). But see DUFF, *supra* note 35, at 12, 36-37, 116-27. The greater the harm one brings about, the more blameworthy she is. This view is supported by Jeremy Horder in *Crimes of Ulterior Intent*, in HARM AND CULPABILITY 153, 164 (A. P. Simester & A. T. H. Smith eds., 1996). See also SIMESTER & SULLIVAN, *supra* note 35, at 307-08.

culpability. Punishing attempts is justified for two reasons: First, although no harm has been done, the assault has started, and if prevention is to be taken as a serious objective of criminal law, it ought to allow intervention before the harm occurs when the act is considered to be the first step of the harmful action.³⁹ The second justification is based on the desert theory of criminal liability—in terms of moral culpability there is no pertinent difference in the choices made by a person who tries unsuccessfully to cause harm and one who is successful. The difference is a matter of luck.

Neither justification applies to preparatory acts. Preparatory acts do not constitute harm and are distant from the commission of the harm. Besides, there is a moral difference between the blameworthiness involved in an act of preparation and a victimising act. The performance of the harmful act has yet to begin and there remains an opportunity to repent and avoid the harmful consequences.⁴⁰ The same objections to a “first act” test for attempts can be raised more strongly against the criminalisation of preparations: it would not treat people as autonomous agents, convicting even those agents who might otherwise voluntarily desist before the completion of the crime; and it increases the possibility of intrusive and oppressive police investigations in search of evidence of criminal purpose. Lastly, in terms of the first aspect of the minimalist principle (which requires that criminal law be used only as a last resort due to its coercive and stigmatising nature), at the early preparatory stages of a commission of the harm there might be other less coercive means of preventing the harmful result.

2. Extending the Minimalist Principle: The Last Effective Opportunity to Intervene

The requirement of causal connection and the division between attempts and preparations are both grounded in the traditional interpretation of the minimalist principle as permitting only the criminalisation of direct victimising acts. This interpretation implies the prohibition of penalising actions that do not themselves cause direct harm. Nevertheless, many, if not all, legal systems have offences

³⁹ See, e.g., SIMESTER & SULLIVAN, *supra* note 35, at 291.

⁴⁰ Repentance is also recognized as an exception to the rule of attempts by the Israeli Criminal Code 1977, which states in section 28: “A person that attempted to commit an offence, will not be criminally responsible for the attempt, if he proves that only due to repentance he abandoned the commission of the crime . . .” (my translation). At present there is no parallel statutory defense of voluntary renunciation in English law and the English case law is inconclusive. SIMESTER & SULLIVAN, *supra* note 35, at 305. Cf. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 184-97 (1978).

proscribing acts that fall within the realm of preparations. The criminalisation of acts that cause only remote harm is justified by the overriding dangerousness of the possible remote harmful result and does not comply with the minimalist principle. The primary concern of criminal law is with the prevention of harm, rather than with its occurrence.

This analysis of the minimalist principle and the offences proscribing remote harm is not the only one possible. The underlying assumption that the primary concern of criminal law is the prevention of harm permits a wider interpretation of the minimal principle that allows restrictions at the “*last effective point of intervention*.” In some situations criminalising only the victimising act is not effective because it is simply too late. Such is the case for car accidents. Criminalising reckless driving alone is not enough because people who drive under the influence of alcohol, for example, do not have full control over their actions; thus, it is necessary to go a step further to prohibit driving under the influence of alcohol. This interpretation moves beyond traditional interpretations by introducing considerations of dangerousness. It implies that many of the offences that penalise remote harm will not be considered because of overriding considerations contrary to the minimalist principle; rather, they will be considered as a result of it.

Von Hirsch identifies three types of act that may cause remote harm.⁴¹ The first is “abstract endangerment.” This type of remote harm consists of conduct, “the riskiness of which depends on the existence of a contingency, but where it is not known or knowable to the actor *ex ante* whether that contingency will materialize in the particular situation.”⁴² Many criminal offences formulate a prohibition abstractly in terms that cover harmless acts that may cause some kind of remote harm. Such criminal offences include prohibitions on the sale of guns to prevent accidents or the intentional use of guns to commit crimes, and prohibitions on driving under the influence of alcohol, setting a unitary limit of 0.8 pro mil level of blood-alcohol content, regardless of individual sensitivity to alcohol. The second type of remote harm is “intervening choices,” that is to say, acts that are the first in a series of necessary steps that will bring about the harmful result. Each of these further steps entails making intervening choices, whether these are made by the same actor or by another culpable person. Von Hirsch’s final category of remote harms is “accumulative harms,” situations in which “the conduct does the feared injury only when combined with

⁴¹ Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in HARM AND CULPABILITY 259, 263-65 (1996).

⁴² *Id.* at 263.

similar acts of others.”⁴³ For example, the harm generated by carbon dioxide discharged from cars, is an accumulative harm; while no single discharge causes harm, each emission contributes to environmental damage and can therefore be restricted.

In all three types of remote harm, criminalising conduct raises the question: is criminalising the conduct the “*last effective point of intervention*” to prevent the harm? Only when the answer to this question is a positive one is the legislature permitted to criminalise an abstract endangerment.

Defining the “last effective point of intervention” is problematic. Such a consequentialist interpretation might be regarded as illiberal as it overlooks the moral blameworthiness of the agents by not treating individuals as autonomous and convicting those agents who would otherwise voluntarily renounce their actions. This criticism, however, is not unique to the “last effective point of intervention” interpretation, as has been shown. But the moral ground for penalising attempts is the settled intent of the agent, an intent which creates a moral equation between the attempt and the successful harmful act (or at least provides sufficient moral weight). On the other hand, a similar settled intention does not necessarily exist at the time of the “last effective point of intervention.”

Indeed, the third aspect of the minimalist principle in its wider interpretation is no longer an element designed solely to protect desert. Instead, it combines the considerations of desert with those consequentialist considerations of effectiveness, that is, that criminal law has to be effective in preventing the harm.⁴⁴ Desert is further protected by the principle of fair imputation, which will be discussed in detail in the next section. The minimalist principle ought not to respond merely to the declaratory and censuring purposes of criminal law, but also to its preventive purpose.⁴⁵ The limitation of “the last effective point of intervention” strikes the correct balance between these purposes, a balance that is lacking in the traditional interpretation.

⁴³ *Id.* at 265.

⁴⁴ This is a different aspect of effectiveness than those discussed in *Principles of Criminal Law*. ASHWORTH, *supra* note 30, at 34. Here, Ashworth refers to two aspects: first, that criminal law should not be used if it cannot be effective in controlling conduct, and second, that criminal law should be used only when it is the most effective means of controlling conduct. These aspects are reflected, to some extent, in the first aspect of the minimalist principle: the distinct nature of criminal law and the need for special justifications to use it over coercive and non-coercive measures. Compare this with the discussion in JONATHAN SCHONSHECK, *ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW* 63 (1994). In his discussion he uses the term “offence principle” to refer to the concept of effectiveness (the aspects that are discussed by Ashworth).

⁴⁵ These purposes are inherent to the features of criminal law as a coercive and stigmatising one. *See, e.g.*, ASHWORTH, *supra* note 30, at 22-25, 34.

Furthermore, the effect of this interpretation is more limited than it might at first seem, as a close examination of each type of remote harm shows.

Consider, for instance, the criminalisation of remote accumulative harms. This type of conduct is not a preliminary-preparatory one building up to a “real” or “direct” harmful act. Rather, each and every act causes the same type of harm. In every discharge of carbon dioxide harm occurs, albeit a fairly insignificant harm. Hence, each action is a wrong in and of itself, one deserving punishment. The notion of renunciation does not apply to this type of remote harm in the same way as, for example, we might not be prevented from charging a thief simply because she might renounce this type of action in the future.

Indeed, proscribing “intervening choice” acts of remote harm limits the possibility of renunciation. However, this problem can be mitigated by recognition of a defense of free and willful renunciation, alongside such offences. This solution is ineffective when applied to abstract remote harm. In these latter cases of conduct that causes only abstract harm, it is not known or knowable at the time of acting that the contingency will materialise in specific circumstances. Hence, it is impossible to renounce the future harmful conduct at that point.

But even in these instances, the offences that prohibit the abstract harm ought to carry a lesser punishment than the offences that proscribe the subsequent direct harm. In so doing, they reflect both that the agents are not as blameworthy as those who have completed a criminal enterprise as well as recognising the potential riskiness of the abstract conduct. In addition, such a limitation does not undermine the limitations this principle imposes by the demand of causal connection within a specific offence; only that person whose actions were the “but for” reason for the subsequent harmful result can be punished for causing that harm. The agent who caused only abstract harm is punished for her actions and not for the potential harm her action might cause.

A wider interpretation of the minimalist principle brings the exceptional offences under the scope of the general principles and recognises the need for such offences, permitting restrictions of remote harm as part of this principle. At the same time it defines clear limits of such powers—if restricting the act is the “last effective point of intervention.” These limitations are clearer than those set by a balancing test (between the minimalist principle and the considerations of security). In practice, however, the suggested interpretation does not change much as most of the exceptional offences comply with this interpretation of the minimalist principle. The offences that do not comply with this interpretation ought to be reconsidered. This interpretation should not alter the attempts-preparations distinction

because it is already incorporated into the distinction. An attempt is a remote harm, which is considered to be the last point of intervention to prevent the specific harm (at least according to the “first act” test). Furthermore, the other, more important, considerations for this distinction—the blameworthiness and the prospect of voluntary renunciation by the agent—are not undermined or affected in any way by this interpretation.

The question of whether criminalising certain conduct is the “last effective point of intervention” should not be confused with questions about costs to society. If there is a closer effective point of intervention, even though the costs of intervening at that point might be higher, then the former point of intervention is not considered the “last effective point of intervention.” It is a known fact that citizens’ rights have a high price, but we acknowledge this price as unavoidable. One important consequence of limiting criminalisation to the “last effective point of intervention” is minimising the number of innocent people and activities that would be affected by the prohibition. If the “last effective point of intervention” to avoid car accidents caused by reckless driving is in prohibiting driving with an excess of 0.8 pro mil level of blood-alcohol, then we should not restrict all driving after drinking. This limits the number of innocent people (those not affected by alcohol) who are given driving bans.

III. THE PROBLEMS OF REMOTE HARM

A. *The Standard Harms Analysis*

Accepting that some acts that do not cause direct but only remote harm may be criminalised in accordance with the minimal principle, we must then question which of these acts is covered by the harm principle? Clearly, not every act that causes remote harm, even when it is the “last effective point of intervention,” is to be restricted since many acts may cause some kind of remote harm. Possession of sharp meat knives is not restricted in any way even though such a restriction might be the last effective chance to intervene in an attempt to prevent the use of knives in incidents of domestic violence. Proscribing only the misuse of the knife itself, however, also might not be sufficient as domestic knife-crime is often emotionally-motivated and not fully controlled rather than premeditated.⁴⁶

Failure to distinguish those acts that ought to be criminalised from

⁴⁶ See ASHWORTH, *supra* note 30, at 52.

those acts that ought not would lead to the collapse of the harm principle as a useful criterion.⁴⁷ To address this concern, it is necessary to conduct a sort of cost-benefit analysis and formulate maxims to mediate the harm principle's application.⁴⁸ The importance of maintaining and adhering to the boundaries defined by these maxims should be stressed. Reformulation of these boundaries, using the harm principle to cover all potential threats, would extend the principle so much that it would no longer distinguish effectively between actions that are harmful and actions that are not.

Joel Feinberg developed such an analysis to provide a practical guide for the legislator, the three-step "standard harms analysis."⁴⁹ The first step is an assessment of the risk, that is, the gravity and probability of the potential harm. The greater the gravity and probability, the more a prohibition is justified. The second step is an assessment of the risk against the social value of the risk-creating conduct and the degree of intrusion upon the agent's choices entailed by criminalisation. Prohibition is justified according to the weight of the social value of the act or activity. The more important the social value is, the greater the risk of harm must be for its prohibition to be justified. The third and final step is the assessment of side-constraints that would preclude criminalisation, such as infringement of important rights (e.g., free speech).⁵⁰

B. *The Inherent Difficulties of Remote Harm*

Trying to use the "standard harms analysis" for acts that cause only remote harm is, however, problematic. First, the further the act is from the final harmful result, the less probable it is that the harm would occur. This reduced probability can be explained in part by the further acts or conditions that must be fulfilled for the harm to take place. This explanation would be true whether these further acts and conditions depend (a) on the intervention of another person, or (b) on further actions by the same person who made the initial preparatory act. The second reason for the decreasing probability that harmful results will materialise can be attributed to the increasing numbers of innocent people restricted by a prohibition of remote harm.⁵¹ In order to avoid

⁴⁷ This common criticism of the harm principle is posed in various versions. See, e.g., Dripps, *supra* note 3; Epstein, *supra* note 19; Harcourt, *supra* note 20.

⁴⁸ See HARM TO OTHERS, *supra* note 20, at 13-14.

⁴⁹ The name was given by von Hirsch, *supra* note 41, at 261.

⁵⁰ See *Id.*; HARM TO OTHERS, *supra* note 20, at 187-217.

⁵¹ A mathematical calculation shows that as the reference group increases to include people that are in a lower risk group, the probability of the same result decreases. For example, consider

car accidents, the law can place restrictions at different levels, for example, on reckless drivers or a restriction limited only to people deemed to be dangerous. It can go further and restrict driving with a level in excess of 0.8 pro mil blood-alcohol, a restriction that will limit a few individuals that are not affected by high levels of blood-alcohol. Yet again, by reasoning that this point is the “last effective point of intervention,” the law could go further and restrict all driving after drinking, which would limit a much larger group of people who are not affected by low levels of blood-alcohol. Finally, the law could restrict drinking altogether, thus limiting an even greater number of innocent people by including all those people who do not have a car, a limitation that would not comply with the minimalist principle.

A second, related difficulty raised by von Hirsch is that of fair imputation of the harm to the agent. The question is: “[W]hy should I be punished for conduct of a kind that does no harm in itself, merely because it might influence other persons to decide to engage in acts that are potentially injurious?”⁵² Thirdly, criminalising remote harm involves a more severe infringement of liberty. Acts that cause remote harm are often intrinsically valuable, lead to other valuable outcomes, or may support or promote some other interest. For instance, a person may sell a rifle that is later used for self-defence. Indeed, this is the reason for differentiating the subcategory of speech and expression from other types of remote harm: because of its intrinsic and consequential value and importance. Furthermore, as mentioned above, criminalising remote harm involves restricting wider circles of people, which inevitably includes increased numbers of innocent people. Such restrictions are bound to expand the criminalisation of harmless results of proscribed actions. The further we get from the victimising act, the weightier these competing interests become (whether it is the social value of the risk-creating conduct or other constraining values) and the harm principle is less weighty. It should be stressed that the latter point is not really a difficulty; more, it is a requisite feature of remote harm. The balancing point ought to change the further we get from the harmful result, fewer and fewer actions ought to be criminalised.

C. *Identifying Remote Harm (that Ought to Be Criminalized)*

two different groups of people: group 1 with high levels of alcohol in their blood, and probability of 0.9 of a car accident occurring and group 2 with a lower alcohol count in their blood, and probability of 0.5 of a car accident occurring. By adding people from group 2 to group 1 we decrease the probability of the occurrence of an accident in group 1.

⁵² See von Hirsch, *supra* note 41, at 266.

Feinberg argues that acts that cause remote harm can be identified by the “standard harms analysis” in the same way as victimising acts can. However, as has been demonstrated, remote harm changes things, and as a consequence, the “standard harms analysis” cannot stand alone. Further elements are needed to help solve the special problems raised by remote harm.⁵³ One such element is the minimalist principle in its wider interpretation. This principle responds (at least partly) to the problem encountered at the first stage of the “standard harms analysis”—the reduced probability of the occurrence of harm—by limiting restrictions to acts that can be considered the “last effective point of intervention.” In practical terms, these limits would usually be interpreted as restricting criminalisation to acts close to the harmful result and as such are more likely to materialise. Moreover, such a limitation serves to decrease the infringement of liberty and restricts the amount of innocent people who would be harmed.⁵⁴

IV. THE IMPUTATION PRINCIPLE

Von Hirsch further develops the principle of imputation, an aspect of the more general principle of moral culpability (mentioned above). The foundation of the principle lies in the supposition that a prohibited act is simply a trigger for a series of events that may include actions taken by other culpable people. The problem, then, is whether one should be held responsible for the potential consequences following the decisions of other actors or from decisions that the individual has yet to make. According to von Hirsch, “only those acts that did not merely influence the subsequent choice of the matter, but having, in some manner, underwritten that subsequent choice are to be criminalized.”⁵⁵ However, von Hirsch agrees that this principle can be overridden in exceptional circumstances on the grounds that the potential injuriousness of an act is so grave and widespread that it must supersede ordinary concerns about imputability.⁵⁶

I will now examine the limitations that the general principles discussed here impose on the criminalisation of remote harm connected

⁵³ There is no comprehensive proposal that solves all the special problems that remote harm might raise. Developing a full theory and exploring all the various aspects of remote harm requires a fuller argument than I can give here. However, it is important to examine the ramifications of the offered interpretation of the minimalist principle on the first step of the analysis of remote harm and the one problematic aspect discussed by von Hirsch.

⁵⁴ See the example of drunk-driving discussed *supra*.

⁵⁵ See von Hirsch, *supra* note 41, at 267.

⁵⁶ See von Hirsch, *supra* note 41, at 271 and his reference to the general exception given by Ronald Dworkin in TAKING RIGHTS SERIOUSLY 200-02 (1977).

to one of the most severe threats to society—the threat posed by anti-democratic ideology or, more accurately, by anti-democratic activity.

V. THE CASE OF ANTI-DEMOCRATIC IDEOLOGIES

A. *Making the Case for Anti-Democratic Ideologies*

In recent years, academic writing in criminal law has focused on terrorism and the state's response to it. This paper, however, seeks to focus on anti-democratic ideologies rather than terrorism itself. Although there is internal variation, anti-democratic ideologies can be commonly defined as undemocratic ideologies, that is, ideologies that oppose basic democratic principles and are characterised by a shared objective to alter the democratic order with an undemocratic one.⁵⁷ The common characteristics of terrorism—violence directed against civilians, public officials, or their property—constitute threats to life and physical integrity, and the motivation for such acts is irrelevant in the context of justifying state coercion. However, the motivation for a violent terrorist act is incorporated into the notion of terrorism even without a clear definition. This can be seen, for example, in subsection 1 of the definition of “terrorism” in the English Terrorism Act 2000:

- (1) In the Act “terrorism” means the use of threat or action where—
the action falls within subsection (2),
the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it—
involves serious violence against a person,
involves serious damage to property,
endangers a person's life, other than that of the person committing the action,
creates a serious risk to the health or safety of the public or a section of the public, or
is designed seriously to interfere with or seriously disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not

⁵⁷ Anti-democratic ideologies vary greatly and include ideologies from both the left and the right extremes of the political spectrum. The definition given is a general one and further discussion is needed to identify the principles common to all democratic ideologies to which undemocratic ideologies oppose. However, a general definition is sufficient for current discussion.

subsection (1)(b) is satisfied.

Concentrating on the act of terrorism itself, as defined here, the detailed motivation for the act is not relevant. If a committed terrorist executes a violent terror attack, causing harm to people or property, then there is no need to look further to justify its restriction. The reason is that such actions are at the core of the permission granted by the general principles that govern state coercion and criminal law, of which the harm principle is one. However, the picture changes as we move further from these core situations.

Recent laws, such as the United Kingdom's Anti-terrorism, Crime and Security Act 2001 and the USA PATRIOT Act 2001⁵⁸ provide the state with more powers and extend the reach of the law by adding new restrictions in order to stop terrorists at earlier stages of their enterprise. These laws deal with pre-emptive action by the state, remote harms, and the legitimisation of state use of certain powers that would not otherwise be permitted. To permit these actions, however, a justification is required to explain why terrorism is more dangerous than ordinary criminal acts. That justification, in turn, requires a detailed analysis of the reasons and motivations for terrorism. A thorough analysis into each of the reasons for terrorism may well prove that, although the means used—terror—is the same in all cases, the ends for which it is used are different.

Consequently, distinct individual and public interests may be at stake, and separate justifications for the state's protective duty may be offered according to the reasons underlying terrorism. These varying parameters would be reflected in the boundaries of each justification. It is possible that the boundaries that each of these justifications suggest would prove to be largely similar, but that does not deem as unnecessary the undertaking of an analysis of each of the justifications separately. Consider, for example, the recent suggestion by the home secretary, Mr. Clarke, to subject criminal acts by animal rights activists, such as arson, to laws on terrorism,⁵⁹ and compare the motivation of such activists with the Islamic-fundamentalist motivation of Zacarias Moussaoui who was convicted under the Terrorism Act for his involvement in the 9/11 attack on the United States.⁶⁰

⁵⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 2172.

⁵⁹ Speaking to the Joint Committee on Human Rights (a Joint Committee of House of Lords and House of Commons), the Home Secretary, Mr. Charles Clarke, said: "I certainly think that animal rights terrorism is something that has to be attacked Those who argue that committing violent acts of terror to promote the cause of animal rights and who justify it by referring to it would be covered by [the proposed Terrorism] legislation." See a copy of minutes taken before the Joint Committee on Human Rights from October 24, 2005, *available at* <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/uc561-i/uc56102.htm>.

⁶⁰ *United States v. Moussaoui*, 333 F.3d 509, 517 (4th Cir. 2003).

Focusing on anti-democratic ideologies rather than on terrorism both narrows and widens the scope of the discussion. It narrows it because, as explained above, these ideologies are only one of the motivations for acts of terrorism. On the other hand, it widens it because terrorism is only one tool among the many available, which must also be addressed, to those who profess anti-democratic beliefs.

B. *Four Types of Anti-Democratic Activity*

Anti-democratic ideology can be manifested in one of four ways:

1. *Thoughts and beliefs*—The emphasis here is on the thought or the belief itself and not on its expression or communication to another person.⁶¹ In a sense, there is no manifestation of anti-democratic ideology since this stage does not tackle the *communication* of thought. Rather it focuses on a process that takes place within the mind of the anti-democratic agent.

2. *Acts of speech and expression*—This incorporates those acts that are designed to express an opinion, a proposition, belief, attitude, feeling, emotion, thought, conjecture, or argument. It excludes instances where the expression is an instrument for a further goal, such as asking a person to pass the salt or ordering the cashier to hand over the money in a bank robbery. This category further includes all types of activity that are aimed at effectively expressing the anti-democratic views such as assemblies, demonstrations and the writing of letters or books—because whatever else these activities are, their *main* aim is to spread the anti-democratic ideology. Under this heading one can find a whole range of expressions, from a simple explanation of an anti-democratic ideology as part of an educational course, or a declaration of one's own convictions, to incitements to perform specific unlawful acts. The variety of expressions can be further divided into three types:

Direct expressions—expressions that call for specific violent and/or other unlawful acts, such as incitement to assassinate the Prime Minister;

Climate-creating expressions—including those expressions that are designed to create a climate of violence,⁶² such as praising unlawful acts

⁶¹ Communication is only an instrument by which we can discover the thought or belief and does not have, in this context, any significance in or of itself.

⁶² The distinction between the first two categories and the term “climate of violence” is offered by Miriam Gur-Arye in *Can Freedom of Expression Survive Social Trauma: The Israeli Experience* (Jerusalem Criminal Justice Study Group Working Papers Series, Working Paper No. 7, 2001), available at <http://ssrn.com/abstract=297924>. See also Justice Orr's description of the role of the sedition offence within Israeli criminal law “[to prevent] publications which, even if they do not have the potential to cause immediate acts of violence, have cumulative influence

performed by ideological agents; and

Abstract expressions—including expressions aimed at presenting or convincing others of the validity and force of an anti-democratic ideology. This category includes, for example, a lecture on fascism alongside the recruiting assembly of an anti-democratic association.

3. *Un-harmful acts*—Acts that are more than expressions but do not cause direct harm. This is a small category that includes mainly structural activity: the establishment and the maintenance of anti-democratic organizations. It covers activity that does not involve the use of violent means (such as the foundation of a political party), as well as anti-democratic activity that can be characterised as general preparations to direct harmful acts (such as the establishment and maintenance of a militant or terrorist organisation). The borders between this category and Category B are blurred in those instances where there is a combination of expressive ends (i.e. spreading anti-democratic ideology) with other practical ends. This is true especially when such activity is not a general preparation towards direct harmful acts because the only way to bring about the political change other than through violence (or threat of violence) is by gaining public support.

4. *Harmful acts*—Acts motivated by anti-democratic ideology that cause direct harm to people and property. For example, the assassination of a prime minister, or the hijacking and subsequent destruction of a passenger jet.

C. *Anti-Democratic Activity and the Harm Principle*

Obviously, Category A (thoughts and beliefs) is outside the scope of the harm principle for reasons discussed above. It is also clear that an anti-democratic ideology cannot itself be restricted in accordance with the harm principle. An ideology is a set of beliefs; therefore, to restrict an ideology is to restrict a thought or belief, as opposed to restricting *acts* carried out in the name of that ideology. Thoughts and beliefs were excluded not only for practical reasons—that is, because it is impossible to restrict thoughts directly—but also because thoughts are intrinsically valuable. Consequently, the state is not permitted to restrict anti-democratic ideologies indirectly by restricting all types of anti-democratic activity. By restricting all types of anti-democratic activity it would make it impossible to convey the anti-democratic beliefs and, thus, extinguish them. The harm principle does not permit

upon the social climate, and by the enmity and hostility they raise toward segments of the population, may lead to such acts at some time that cannot be foreseen in advance” CrimA 3338/99 Pakowitz v. State of Israel [2000] ¶ 24.

such restriction because it would add up to a restriction of an ideology – a set of beliefs.

Liberty, equal respect and, accordingly, freedom of choice⁶³ threatened by anti-democratic ideologies deserves the protection of criminal law. Even according to Feinberg's hard-line definition, which requires that the relevant act be morally indefensible, anti-democratic activity is within the reach of the harm principle;⁶⁴ the harm that anti-democratic activity generates can neither be justified nor excused. Furthermore, the wide definition of harm, as including general set-backs to interests even when no physical injury occurs, allows the criminal law to address harm that may be caused to liberty.

Direct harmful acts (of Category D) do not raise any special difficulties. Such acts cause direct harm to personal integrity or property and can thus be proscribed. However, in many cases these acts are remote from the agent's final objective. The harm, which justifies the restrictions, differs from the final harm that creates the special nature of the threat—the destruction and replacement of political and social democratic institutions. The difficulty with criminalising anti-democratic activity lie with acts of Categories B and C (acts of expression and un-harmful acts) which constitutes remote harm. The question is what type of activity may be penalised and where is the line drawn between criminal law and legitimate—even if unwanted—activity.

D. *The First Aspect of the Minimalist Principle—The Choice of Criminal Law*

⁶³ Stating that there is a direct threat to liberty assumes that we have an interest in liberty, or in political freedom, as it is sometimes referred to. In our current context, this means that promoting liberty is good for a person in any circumstance (and does not depend on what people want). However, the existence of such an interest is very contentious among political theorists. Even within the liberal tradition views vary. Some argue that we have an interest in liberty while disagreeing about whether it has an intrinsic value or only an instrumental one, grounded (among other things) in the value of (equal) respect to human beings. That is to say, human beings who are capable of forming intelligent conceptions of how they should live their lives and acting on them. On the other hand, referring to a *right* to liberty, Dworkin, for example, does not accept that such a right exists. Rather, he argues, we ought to refer directly to the value of, and interest in, equal concern and respect. DWORKIN, *supra* note 56, at 266-78. Cf. STANLEY I. BENN, A THEORY OF FREEDOM 112-17 (1988).

⁶⁴ This requirement is based on the assumption that the person harmed has a moral claim that her interests be respected. By "moral claim" I mean a claim backed by valid reasons and addressed to the conscience of the claimee or to public opinion. Cf. HARM TO OTHERS, *supra* note 20, at 109-110; Kleinig, *supra* note 21, at 32-33. I refer to a moral claim rather than a moral right, as did Feinberg and Kleinig, since other feelings, such as sympathy, also fall within its boundaries. A more acceptable definition of "right" is offered by Raz, *supra* note 7, at 166.

The first aspect of the minimalist principle states that criminal law is used as a last resort. This stance has direct implications on the criminalisation of un-harmful acts of Category C that are not general preparations to harmful acts. Anti-democratic associations that use legitimate means to achieve their goals can be managed by less coercive measures—first and foremost, through education and civil law. But, even if it is found that in order to achieve a comprehensive defence, it is essential to proscribe such activity, then administrative measures, rather than criminal measures, can be used. (For instance, by restricting anti-democratic parties from running for parliament or by refraining from any form of engagement with such organisations). In defining the conditions under which such activity ought to be restricted or dealt with, administrative and other fields of law require further discussion which is beyond the scope of the current paper. For our current discussion, it is sufficient to say that, as a general rule, preference should be given to finding solutions to possible difficulties that may be encountered in defining and implementing these less coercive measures within the same fields of law. Opting to use the more coercive measures of criminal law, even if such a solution may be the easier path, should be avoided whenever possible. The only activity within un-harmful acts of category C that needs to be considered in the following pages is that characterised as general preparations to harmful acts.

E. *Anti-Democratic Activity and the Attempts-Preparations Distinction*

The harm principle allows us to bring anti-democratic activity into the ambit of criminal law. That clarification, of course, does not provide a sufficient guidance on its own. The minimalist principle founds the further important distinction between attempts and preparations. In terms of anti-democratic activity, the limitations on criminalisation seem clear: acts of Category C that involve general preparations to harmful activity where no specific harmful enterprise is planned (general preparations),⁶⁵ as well as preparatory acts to specific harmful acts of Category D (specific preparations), ought to be excluded from the prohibited realm. Neither general preparations nor specific preparations, although motivated by anti-democratic ideology, causes direct harm. They are, by definition, preparatory.

However, there is a hidden threat in such acts, a threat found in the anti-democratic beliefs of the agents. If the anti-democratic agent is

⁶⁵ Obviously, there are other Category C acts that should be excluded from this realm.

caught at either the general or (even more) at the specific preparatory stages and is not punished, then it is highly probable that, motivated by belief in the righteousness of his or her ideas, he or she would attempt other harmful acts. The claim is for the dangerousness of the anti-democratic agent and that the efficacy of the deterrence would be reduced if preparatory acts were not punished. Further danger is found in general preparations which create and maintain the structure—the organisation—that would eventually carry out direct harmful acts. This activity is of great importance: the existence of an organisation, the mental and actual support it provides to anti-democratic agents, make the anti-democratic threat more serious as it takes the anti-democratic ideology a step closer to achieving its objectives. It would no longer be a matter of some sporadic acts but rather of an organised, consistent activity with clearer direction, plans, and possible continuity beyond any specific harmful enterprise. As such, general preparations at the organisational level add up to the probability that harmful activity will follow.

At the same time, a preparatory anti-democratic act is often further away from the intended harmful result than the ordinary preparatory act. An anti-democratic act that causes direct harm to people or property, such as a bomb exploding in a restaurant, is unquestionably punishable. However, the interest at stake is liberty, as well as the entire range of individual interests of society, rather than simply the specific interests in life and personal integrity of those who were injured.⁶⁶ Focusing on these interests, even a direct harmful act is often only a preparation or an attempt,⁶⁷ to undermine the democratic order. Subsequently, acts which amount to general preparation and specific preparation are even further away from harming the interests at stake.

F. *Possible Routes to Criminalise Preparatory Anti-Democratic Acts*

At least some of the offences that penalise direct harmful acts, even though the interest violated by the offending act differs from the

⁶⁶ Notice the current use of the Terrorism Act, 2000, c.11 (Eng.) (and preceding statutes) instead of ordinary offences of assault, murder, etc., in the case of members of terrorist organisations. Although their acts constitute ordinary offences, they are accused under the Terrorism Act 2000. This can be explained in terms of the different values we wish to protect by the different offences (liberty and the whole range of interests as opposed to the individual's interest in life), and the difference between the danger that the terrorists pose and that of ordinary offenders.

⁶⁷ An assassination of a major figure within the political institution, such as assassination of the prime-minister or the president, might be considered an attempt rather than a mere preparation since it might have a direct effect on the stability of the regime.

interest that is protected by the offence, can be regarded as belonging to an existing group of offences defined in an inchoate mode. These offences proscribe certain conduct that may produce a certain harmful outcome regardless of the occurrence of the outcome. The offence is defined so as to penalise the agent for trying to produce that outcome.⁶⁸ The use of inchoate-defined offences, which deviates from the regular result-oriented mode of definition, is justified only in special cases by reference to the importance of protected interests, the importance of prevention, the risk to large numbers of people and the voluntary wrong conduct of the agent. A further justification, relevant to those instances where the act performed is a crime in itself (though a lesser crime than the one intended),⁶⁹ is based on the accurate representative labeling of the crime; that is, the inchoate offence is a proper reflection of the nature and gravity of the act performed.⁷⁰

The need for a special justification for these types of offence is based on the fact that the inchoate offence takes its elements and maximum penalty from the crime threatened rather than the one committed. It is also based upon the growing infringement of human rights and on the extension of criminal law beyond the “last resort;” that is, it is punished even though the final objective was not necessarily achieved and the further harm did not occur.⁷¹ The further intention of anti-democratically-motivated harmful acts—to alter the democratic order—distinguishes between an ordinary harmful act penalised as a “complete” offence and a harmful act that is penalised under the inchoate-defined offence. According to this analysis, some anti-terrorism offences are to be understood as protecting the interest in democracy rather than a specific interest in life, limb and property. Indeed, the Terrorism Act 2000 is a good example for such an inchoate-defined offence.⁷² Section 1(1) defines terrorism as follows:

the use or threat of action⁷³ where— . . .

⁶⁸ Ashworth, *supra* note 36, at 8.

⁶⁹ This justification is applicable to those anti-democratic acts that do cause direct harm (even if the act is still far from the final objective of altering the regime), for such conduct is done with ulterior intention.

⁷⁰ Horder offers this justification for offences that entail “ulterior intentions” and explains why the justification is limited to situations in which the act performed is a lesser crime in itself. Horder, *supra* note 38, at 167-68. These offences are included in the wider group of inchoate-defined offence as identified by Ashworth. *Id.* at 157-65. For a detailed explanation of this representative justification, see Jeremy Horder, *Rethinking Non-Fatal Offences Against a Person*, 14 OXFORD J. LEGAL STUD. 335 (1994). On the importance of the principle of representative labeling, see A. J. Ashworth, *The Elasticity of Mens Rea*, in CRIME, PROOF AND PUNISHMENT 45, 53 (1981).

⁷¹ Ashworth, *supra* note 36, at 15-20.

⁷² Though not all the offences that are used in practice are of this “inchoate” character.

⁷³ Section 1(2) defines and limits the action to actions that involve serious violence against a person, or property or creates a serious risk to health, or safety, of the public, or interferes with

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

Nonetheless, it should be stressed that this analysis does not change the nature of the specific preparatory acts for single terror attacks or the possibility that such acts can be proscribed in accordance with the attempt—preparation distinction.

Bearing in mind that the harm principle is about crime-prevention, it may be argued that anti-democratic acts of general preparations and specific preparations can be criminalised as an exception to the general rule. The law punishes conspiracy because it finds special danger in agreement with others.⁷⁴ It recognises the effects of peer pressure, her growing commitment to the planned criminal enterprise, and the diminishing chances of the individual withdrawing from continuing with the criminal enterprise. For the same reason, other preparatory acts are exempt from the general rule that limits their criminalisation. If this is so, why is it not possible to add one or a few more exceptions that would cover anti-democratic preparatory acts to the list? This position gains extra strength with regards to specific preparations in those systems that adopt a narrow interpretation of attempts and be further supported by the general criticism of the “last act” test as lacking in opportunities for police intervention prior to the completion of the crime (though this criticism weakens the further away we get from the direct harmful act). Indeed, some general preparations are already included in this list, such as membership in a terror organisation. Is it not possible to justify these offences as an exemption to the minimalist principle?⁷⁵

The suggestion thus presented overlooks my suggested reading of the minimalist principle and the subsequent position that views offences such as conspiracy not as exceptions to the general principles, but as complying with them. As such, it suffers from the same difficulties discussed with regards to the traditional interpretation of the minimalist principle. First and foremost, the danger that the excuse of exception would become a slippery slope for further expansions of criminal law, and the argument in favour of using the security argument to justify extension of criminal law in this case, is in itself a proof of this danger.

This type of argument plays into the hands of those claiming that the harm principle is unable to set a sufficient criterion to distinguish

electronic systems in order to disrupt them. Terrorism Act, 2000, c. 11, § 1(2) (Eng.).

⁷⁴ ASHWORTH, PRINCIPLES OF CRIMINAL LAW, *supra* note 30, at 455-56.

⁷⁵ Note that the fact that some general preparations are already criminalised is not a proof that this is a justified restriction. I am trying to give the moral justification for such restrictions—whether they already exist or are yet to be enacted.

those acts that ought to be criminalised from those that should not. Furthermore, in the case of the anti-democratic agent with regards to specific preparations, unlike other exceptions that can be narrowed down to a specific acts, such a direct restriction might be impossible since victimising acts may vary greatly.⁷⁶ Instead, I suggest a wider interpretation to the minimalist principle, one that would act together with the principle of fair imputation as a filter to decide which remote harms may be penalised. Offences that cannot be justified in accordance with the minimalist principle in its wider interpretation should be abolished. Thus, the general security argument must be abandoned. Instead, it is necessary to assess whether the criminalisation of remote anti-democratic activity can be justified in accordance with the minimalist principle (in its wider interpretation) and the principle of imputation.

VI. ANTI-DEMOCRATIC REMOTE HARMS

Does anti-democratic activity that causes only remote harm comply with the minimalist principle and the principle of imputation? In the discussion thus far we have addressed the non-problematic types of anti-democratic activity: anti-democratic thoughts and beliefs of Category A, as well as un-harmful activity of Category C (i.e., using democratic means such as establishing a political party) were excluded from the criminal realm, and direct harmful acts of Category D were recognised as clear examples of activity that may be penalised. We are now left with three types of anti-democratic activity: Category B of acts of expression, general preparations of Category C and the sub-category of preparatory acts within Category D. They all involve the criminalisation of remote harm and require us to draw the fine boundaries of criminal law. The question is whether the principles that govern criminal law enable the state to restrict these three types of anti-democratic action, thus providing comprehensive protection against anti-democratic ideologies. Since the various categories of harm raise different difficulties I will examine them in turn.

⁷⁶ This reasoning is limited to specific preparations because it is possible to define, at least, some specific types of general-preparation that ought to be restricted, such as establishing a militant anti-democratic organisation.

A. *Category B—Acts of Expression*

I will proceed in two stages. First, I will examine what impediments there are to the application of the standard harm analysis on anti-democratic expressions. Then, I will explore the possibility of solving these difficulties using the supporting principles of minimalism and imputation.

Applying “standard harms analysis” to anti-democratic expressions is undertaken in three stages. The first stage is an assessment of risk. The case of remote harm does not alter the gravity of the eventual harm; what changes is its probability. The need for further actions and the possibility of intervention along with the occurrence of unknown elements turns any assessment of probability (and through this of risk) into a complicated undertaking. Anti-democratic expressions are no exception. Any attempt to assess the probability of an occurrence of harm is bound to be complicated. This is especially true with regard to climate-creating expressions and abstract expressions. The probability test loses its meaning when we try to assess an act that contributes to a climate of violence. A specific act alone cannot create a climate. A climate develops through the accumulative influence of many acts and utterances. This criticism grows stronger the closer we approach statements or utterances of abstract expressions.⁷⁷

Moreover, the content of the expression and the characteristics of further acts that are necessary for the threat to materialise are not the only factors that affect the probability of the harm. General factors such as the vulnerability of a given society and a widespread belief in an anti-democratic ideology may also influence the probability of harm. The relevance of volatile general elements makes it harder to set a single permanent prohibition that would be sensitive given the plausible variations of probability. Even so, the restrictions imposed may be defined in a way that would allow these kinds of variations. Current criminal offences that set probability tests are restrictions of this sort. An offence that prohibits expressions when they cause “clear and present danger” or “probable danger” causes different results depending

⁷⁷ Gur-Arye, *supra* note 62, at 30. Gur-Arye analyses a judgment delivered by the Israeli Supreme Court in CrimA F.H. 1789/98 State of Israel v. Kahane [2000] IsrSC 54 (5) 145. In this case the state accused Kahane of sedition after he published a pamphlet that described Israeli Arab villages as “nests of murderers” and called for the destruction of a village every time a Jew is killed by a terrorist attack. The question put before the court was whether the pamphlet satisfies the requirement of the offence of sedition. The court has acknowledged that the probability test fails when the expression only contributes to creating a climate of violence (as opposed to an expression that calls for specific action), and preferred to examine the content of the publication. Since the content included expressions of hatred, the court concluded that the publication did influence the creation of a violent climate.

on an assessment of the changes of the general elements. Alternatively, other methods may be used. For example, a more stringent test, which is based on the volatility of a given society, can be set by creating a unified presumption. Specific expressions would then be examined to determine whether they contain elements that fall within the presumption. The Israeli Supreme Court⁷⁸ assumes that expressions of hatred have some influence on the creation of a violent climate, and checks the content of publications for such expressions. Though it should be stressed that this test only responds to a limited number of difficulties. The presumption provides an answer to the question of whether or not an expression should be regarded as contributing to the creation of a climate of violence. It fails, however, to answer the straightforward question of whether restricting climate-creating expressions is permissible.

As for the second and third steps, at the start of the paper I explained why endangered interests must be balanced with other interests, even though an anti-democratic agent does not have a legitimate interest in this process. Balancing values or interests is problematic and needs at least some supporting maxims as a guide. In general, the balancing is possible evaluating the preservation of liberty on the one hand, and, on the other, the values of free speech, liberty (this time as an opposition to restrictions), and other side-constraints.⁷⁹ Even considering the endangered social values and the conclusiveness of the realised anti-democratic threat,⁸⁰ the weight of competing interests and an interest in liberty on both sides of the equation, demand some expressions to be left untouched. However, any specific compromise suggested is bound to be controversial and, therefore, the harm principle may justify only limited restrictions on anti-democratic expressions.

Can the supporting maxims solve the difficulties of Category B

⁷⁸ For more details see *supra* note 77.

⁷⁹ This general statement is subject to the exception of Scanlon's early theory of freedom of expression, which is based on the Millian principle. Scanlon argues that the Millian principle is not only a principle to be weighed against other considerations but rather a constraint that does not allow the weighing of other competing considerations. It should be noted that Scanlon himself recognised in a later article that this theory was problematic. For Scanlon's theory, see Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 205 (1971). For his later reservations, see T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 531 (1979).

⁸⁰ The conclusiveness of the threat is one of the unique features of the anti-democratic threat. Criminal law is based on the assumption that, although some offensive acts will be successful, society as a whole will survive and will be able to respond, and attempt to prevent future harmful acts from reoccurring, even when harm has been done. However, if an anti-democratic ideology is successful the social and political democratic institutions will no longer exist. There will no longer be an option to respond, repair the damage, restore democratic institutions, and prevent harm from recurring.

acts? Starting with the principle of imputation, one might argue that the punishment of anti-democratic expressions is consistent with the general principle of imputation. This might be true with regard to group activities, since the special threat that flows from these kinds of activities fulfils the requirement of “underwriting the subsequent choice of other culpable people.” The various expressions are based not on mere permitted influences, but on an exploitation of the audience’s emotions. They are carefully directed at the existing emotions of the audience and use these emotions, illegitimately, to influence the addressees’ opinions. However, this argument is problematic and unconvincing unless attention is given to direct expressions, such as incitements and other expressions in which the speaker has some underlying influence on his or her listeners.⁸¹ Can it truly be said that a particular speaker’s speech has underwritten the subsequent choice of other culpable people?

Even if this was the intention of the speaker, I find it hard to accept that abstract expressions (i.e., expressions aimed at presenting and convincing others of the validity and force of an anti-democratic ideology) underwrite the ensuing harmful result. The path from these types of expressions to harmful conduct is long and involves many further decisions by culpable people. This position contradicts the basic liberal idea of autonomy. If we truly believe that a person is autonomous, then we cannot accept that someone else has “underwritten” that person’s decisions, at least not when there are so many decisions to be taken along the way. An anti-democratic agent is not forced into believing in an anti-democratic ideology.⁸² She is not forced into making a decision to harm others, nor is she forced into choosing to commit a specific harmful act. The agent might be influenced, maybe even heavily influenced; but still, the notions of autonomy and accordingly, culpability (at least in criminal law) mean that we believe that the decisions are hers.⁸³

Even if we were to recognise external influence to a point of “underwriting the consequent result,”⁸⁴ it would be impossible to determine if it was the speaker’s influence or public support in the anti-

⁸¹ This kind of influence can be explained by the passion of the speaker and the strength of his or her arguments or by some special relationship between an agent and his or her listeners such as a spiritual guru and his students.

⁸² Except for cases of brainwashing or manipulation. But even these few situations—when the speaker acts in this way—are currently criminalised as incitements.

⁸³ This account of culpability associates blame with responsibility. Criminal law requires that a person is responsible before we can apportion blame. This account is currently expressed in some of the main defences in criminal law such as intoxication, mental disorder, etc. Yet scholars disagree about whether people must be responsible before we can blame them.

⁸⁴ See von Hirsch, *supra* note 41, at 267.

democratic idea⁸⁵ that had underwritten the agent's actions. If it is a combination, it is often not clear what the contribution of the speaker is considering all other factors. The same is true for climate-creating expressions. As Gur-Arye explains:

The distinction between creating a *climate of violence* on the one hand and *incitement* [direct expressions] on the other hand is like the distinction between expression aimed to influence conduct (incitement) and expression aimed to influence beliefs or opinions (climate of violence). Violent conduct clearly falls within the scope of the criminal law; opinions or beliefs do not. Therefore, criminal law restrictions upon expression aimed to bring about violent conduct may be justified; expression aimed to influence opinions and beliefs should be countered with opposing opinions or belief, not by the criminal law.⁸⁶

A second problem with the argument goes back to the basic criticism of the harm principle. If we accept that climate-creating and abstract expressions can be considered “underwriting subsequent results,” we could allow the imposition of prohibitions on any speech or any view that criticises government, widespread agreement or general consensus, even without calling for disobedience. This, of course, means that the harm principle would lose its distinguishing characteristics. If I were to speak against a current tax policy in a welfare state, for example, suggesting it be replaced with a capitalist policy, then the legislature would be justified in restricting me on the grounds that I might “underwrite” a subsequent act of tax evasion.⁸⁷ The fact that anti-democratic speech consists of some special threat⁸⁸ does not change the nature of the independent decisions taken by anti-democratic agents to use force, and thus cannot set a distinguishing criterion between this kind of speech and any other. In other words, the gravity or the probability of the threat entailed by anti-democratic speech is not relevant to the question of imputation and the independency of the anti-democratic actor's choices.

This objection holds even with regard to direct expressions (incitements), especially the further we get from core situations where the inciter has significant influence over the actor (e.g., a parent, a

⁸⁵ By “public support” I mean not simply the support of the public at large, but also the support of smaller groups such as friends with whom the agent associates (in situations where the ideology is preached in secrecy).

⁸⁶ Gur-Arye, *supra* note 62, at 39. It should be noted that she does not differentiate between climate-creating and abstract expressions.

⁸⁷ Even if I did not call for an act of disobedience, there is a chance that someone would be convinced by my argument and decide to stop paying taxes.

⁸⁸ The nature of the anti-democratic threat requires a fuller discussion than can be made here. For now, it is sufficient to point out that it is a threat to the social and political institutions as well as to a whole range of basic interests of all (or at least most of the) citizens as individuals.

teacher, or a spiritual mentor) and the closer we get to borderline situations of encouragement or advice to commit a crime.⁸⁹ This is also true in those cases where the incitement has no effect on the incitee.⁹⁰

However, there are two important distinctions between climate-creating and abstract expressions that do not include reference to a specific crime, and direct expressions that have the potential of encouraging a specific crime (and thus underwrite the subsequent results) and are accompanied with mens rea of intention. The first pertinent difference is in the dangerousness and the blameworthiness of the speaker that acts in a way that not only legitimises unlawful conduct based on anti-democratic ideological reasons, but also actively encourages it.⁹¹ The accompanied difference is the *direct* influence and the power to underwrite ensuing results that incitement (unlike climate-creating and abstract expressions) may have on the agent. However, the initial and further decisions to commit a specific crime are still considered independent decisions made by the anti-democratic agent. These differences set out the basis for ascribing blame to the inciter and make incitement punishable.

Even if we were to accept the claim that climate-creating and abstract expressions underwrite subsequent harmful conduct, it is still unclear whether or not such expressions ought to be proscribed. Speech in general, and political speech in particular, is vital for the very reasons criticised in the argument above, because speech is a way of encouraging people to change their minds. So, if we accept that climate-creating and abstract expressions may influence others, then expressions that are successful in convincing other people would give rise to the possibility to ascribe harm to the speaker. Only unsuccessful expressions will leave the speaker beyond the reach of the legislature. In other words, we will opt for the promotion of only ineffective expressions.

Alternatively, one might argue for the application of von Hirsch's exception, which allows for the criminalisation of remote harm that

⁸⁹ A threshold demand of "a suggestion, a proposal or a request" is defined in *R. v. Fitzmaurice*, (1982) Q.B. 1083, 1089 (Eng.).

⁹⁰ MICHAEL JEFFERSON, CRIMINAL LAW 390 (6th ed. 2003). See also the discussion of *R. v. Krause* in 18 TIMES L. REP. 238, 243 (1902). For an example of a borderline situation consider *Invicta Plastics Ltd. v. Clare*, 1976 CRIM. L.R. 131 (1976). In this case the defendant company advertised a device they produced called "Radatec" which emitted a high-pitched whine when within 800 yards of telegraphy transmissions used for police radar traps. The advertisement invited drivers to request from them more information. This information included a provision about the illegality of using these devices to avoid police radars but stated that a request to receive the device was not illegal. The court convicted the company of incitement to breach the act through the advertisement, viewing it as a whole, though the advertising was trying to persuade people to *buy* the device (which in itself is not an offence).

⁹¹ There is, of course, a substantial moral difference between criticising a policy, a view, or an ideology and a call to a specific unlawful act against such a policy, view, or ideology.

does not underwrite subsequent action, where the conduct is widespread or where there is extraordinary urgency. Countervailing concerns about preventing harm, especially the potential injuriousness of anti-democratic expressions, are of extraordinary urgency and thus override the imputation principle. One possible response is that this line of argument is a dangerous one, as it might become a slippery-slope justification for state restrictions that unnecessarily violate individual liberties. This objection would take us back to the general criticism of losing the distinguishing character of the harm principle. But the objections go much deeper and even if the slippery-slope objection were rejected, this position is controversial.

Von Hirsch bases his exception that allows for the criminalisation on that provided by Dworkin in *Taking Rights Seriously*;⁹² however, it is clear from the examples Dworkin uses that in order to show “extraordinary urgency” the connection between the act in question and a harmful result must be clear.⁹³ Expressions where such a connection is not clear cannot be restricted in accordance with this exception. The case of anti-democratic expressions (as is the case in most expressions) is of this latter kind. As shown above, it is extremely difficult, if not impossible, to assess the probability and the risk of harm consistent in the expression. Furthermore, it would be difficult to establish that climate-creating expressions and abstract expressions are of “extraordinary urgency.” Though they pose a threat by creating public support, the final objective of these speeches, and accordingly any final harmful result, is remote. Even if one were to believe that to defend society effectively against anti-democratic ideology, it is necessary to nip the ideology in the bud, one must admit that the threat that climate-creating and abstract expressions pose is not an urgent one. This position is necessary to stop the anti-democratic ideology in the early stages of development before it becomes widespread and urgent.

A second reason, suggested by von Hirsch, for overriding the imputation principle is that “the threat would be widespread.” For one thing, anti-democratic expressions may be widespread, but they might also be more limited. Conversely, restricting expressions only if they are widespread is paradoxical. The reason for restricting expression is that an anti-democratic ideology threatens to gain public support and become widespread. Yet we would not be allowed to restrict it at the beginning, but only when it is already widespread. Only when the damage has been done, and the chances of success are lower, would we be permitted to act.

The minimalist principle does not solve the difficulties

⁹² See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 56, at 200-02.

⁹³ *Id.* at 202-03.

encountered in the standard harm analysis either, although it might provide some help. If we keep to the traditional interpretation, it is obvious that climate-creating and abstract expressions cannot be restricted. There is considerable distance between an expression that creates a violent climate and a harmful result. It can by no means be considered a last resort. On the other hand, according to the wider interpretation of the minimalist principle, the criminalisation of some anti-democratic expressions might be possible (depending on the background conditions). My claim is that anti-democratic expressions are threatening because they create public support. But, if society does not intervene early on—if it waits until anti-democratic agents have committed harmful act—then it will be too late. The seeds of the ideology will already have been planted in society. The “last effective point of intervention” is at the early stages of ideological development.

Conducting a cost-benefit balance is complicated. Even before going into a detailed analysis of the competing interest of freedom of speech, it is already clear that any restrictions on climate-creating and abstract expressions are problematic and limited. Although these expressions might be said to be within the scope of the “last effective point of intervention,” the application of the other general principles proves difficult. An attempt to assess the risk involved in these types of expressions will encounter difficulties due to problems involved in evaluating probability, and, in any case, restricting such expressions falls short of the principle of fair imputation. In other words, it would be impossible to criminalise climate-creating expressions and abstract expressions in accordance with the general principles.

B. *Category C—General Preparations*

General preparations usually entail the foundation and maintenance of the anti-democratic organisational structure (founding terrorist organisations, raising money, and so forth). Thus, they involve further intervening choices. As noted previously, general preparations are of great importance mentally and physically. The organisation plans, controls, and coordinates future specific harmful activity. It is the mind behind future harmful activity, and guarantees continuity. Organised anti-democratic activity is bound to be more successful; however, there is still a long time before a specific harmful enterprise is to be carried out and there is still time for the anti-democratic agent to renounce his or her actions.

Applying the “standard harms analysis” does not attract as many difficulties as acts of Category B. As the gravity of the prospective harm does not change because it is remote, the assessment of the risk is

dependant on the probability of the occurrence of the risk. Indeed, the harmful result is dependant on further intervening choices but as the general preparations are mainly structural-organisational, they point to the seriousness of those who participate, and consequently, to a higher probability that the harmful conduct will eventually take place. The second and third stages depend on the specific activity being assessed. In most cases, those general preparations that have a single goal—promoting the harmful conduct—do not seem to entail substantial benefits in themselves. Those general preparations that have a combined goal of promoting a harmful activity and spreading the anti-democratic ideology are more problematic as they are also within the scope of acts of Category B, discussed above. Finally, in the third stage it is necessary to assess other side-constraints, and, most notably, freedom of association and freedom of religion. However, these freedoms are qualified, and, although they demand further detailed discussion, it is possible that those freedoms do not protect associations that promote harmful conduct, especially when this is the main goal of the organisational activity.

The supporting principles also point in the same direction. Since the general preparations are mainly structural, though the harm is remote, prohibitions directed at these activities can be defined in a way that will exclude innocent people altogether. Consider a prohibition on membership in anti-democratic terrorist organisation—innocent people are not going to be involved in such an organisation. All those who participate in such an organisation are bound to be devoted to the anti-democratic ideology and to its chosen means.

One might object to this position holding that an association in itself is not sufficient for criminalisation, as long as the individual members themselves do not carry out a harmful act. Consider, for example, a person who supports pirate recording of CDs for moral reasons (perhaps he believes that record companies overprice CDs) and, therefore, he gives financial and legal support to all those who are caught burning CDs illegally. That in itself does not make him a criminal. Why, then, should membership of an anti-democratic terrorist organisation be regarded as a criminal act?

The question thus presented is really a question of fair imputation: why should members in a terrorist organisation be imputed for acts that other members of that organisation carry out? The principle of fair imputation allows for the imputation of those acts that not only influence but underwrite the further choices made. The essence of the organisation and of the general preparations is exactly that—to control and underwrite the further choices and future harmful acts. In addition, the organisation provides the moral support to anti-democratic agents who would carry out the direct harmful acts. (However, this in itself is

not sufficient for fair imputation, because at best it can be considered as influencing subsequent choices rather than not underwriting them.)

The difficulty is only with regards to those members who will not themselves carry out a direct harmful act. Those members who will carry out such acts raise only one issue and that is the problem of renunciation. But, given the conclusions reached above, a prohibition that would entail gradual punishment can still be justified. That is, punishment of membership ought to be lesser than punishment of a direct harmful act, reflecting the lesser wrong of the act.

Finally, the general-structural preparations are often the last effective opportunity to prevent the future harm. The structural preparations increase the seriousness of the danger. It is the last opportunity to intervene because it is often impossible to learn about each specific harmful act, bearing in mind that the acts planned are usually of the more severe type (whether they involve killing and wounding or damages to property). At the same time, the restrictions limit the number of innocent people who may be affected.

C. *Category D—Specific Preparatory Acts*

If the various acts of expression (in which I include assemblies, demonstrations, writing letters or books), and the acts of Category C discussed in the last section comprise all the more general preparations of an anti-democratic movement on its way to achieving its end,⁹⁴ then the preparatory acts of Category D are the first in a series of acts to reach a specific result. These results would help pave the way to accomplishing the movement's final objective, such as planting a bomb or killing an official. Preparatory acts usually involve intervening choices made either by the same agent or by others. The anti-democratic agent is characterised by her commitment to the final objective of altering the democratic order with some other anti-democratic one. Her actions are focused on that end; they are deliberate and intentional. We can also assume that she desires or at least foresees the consequences of the specific act. Are such intentions and foresight sufficient grounds for imputation? When the further intervening choices are the agent's, there is no reason why they should not be. This stance, of course, does not imply that the way to criminalising such preparations lies open. I have already discussed the difficulties that are involved in such restrictions in accordance with the harm principle and

⁹⁴ However, direct expressions include expressions to perform a specific unlawful act (e.g., incitement).

the importance of an act as a constitutive element,⁹⁵ the blameworthiness, the possibility of voluntary renunciation, as well as the minimalist principle.

More interesting are the instances in which further intervening choices are made by another person or persons. Such a case would be when Amos is providing Betty with the scheduled visits of his boss Edward who holds an official position (e.g., a judge or minister) as part of Betty's preparations to assassinate Edward; or, when Debby purchases nails to be incorporated in a bomb George intends to build and place in a busy shopping centre; or, the notes Leo takes of the various escape routes from an area Leo, together with his friends, intends to attack. Is it right to ascribe to Amos and Debby the unlawful act executed by Betty or George? Does it make a difference if Leo also takes part in carrying out the plan? In all of these cases the preparatory acts do not underwrite the subsequent choices in any significant way.

Some preparations may have an effect on the decision not to go ahead with the specific criminal enterprise, for example if Leo's notes show that there are not enough escape routes from the area in which the attack is to take place. But, even in such instances, it may be argued that the effect is not dependent on Leo (they are objective), and is not under his control. Leo cannot be considered to be underwriting the subsequent choices made by another person. Furthermore, there seems to be no pertinent difference between whether the agent (Amos, Debby, or Leo) takes part in the execution of the crime or not. Yet, although the conclusion seems to argue against the criminalisation of preparations that involve the intervening choices of another person, these acts are currently punished under one of two headings: conspiracy⁹⁶ or aiding and abetting.⁹⁷ Conspiracy because, if the agent

⁹⁵ Even those who think that the act has a more evidential role are willing to go only as far as criminalising attempts, and think that the act has a constitutive role in criminalisation.

⁹⁶ Though there is criticism as to whether the offence of conspiracy is justified. See, e.g., Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992).

⁹⁷ There is another category of offences that might penalise a preparatory act—the inchoate-defined offences (though, currently, not in any systematic way, but only those acts that fall within the reach of some specific inchoate-defined offences). This group avoids the problem of imputability by ascribing to the agent only the part that she is responsible for while (unlike aiding and abetting) taking into account her intention. The agent is not ascribed with the substantial offence (though the substantial offence is the basis for penalising, or for the severity of the punishment the penalty would be less severe than the substantive intended crime), however her acts cannot be ignored due to the intention to help the criminal enterprise. The advantage of inchoate-defined offences over aiding and abetting is that it is not dependent on the commission of the principal offence. Yet, this category of offences refers, if at all, only to very few preparatory acts, and even then the acts referred to are acts that are proscribed in them and not “innocent” preparatory acts. Furthermore, the intention required in any of these offences is not the further intention of the anti-democratic actor (to alter the democratic system). Hence, some

intends to collaborate in the execution of a criminal enterprise, then we are dealing with an agreement between a number of people to commit a crime (and the preparatory act is usually evidence of the existence of such an agreement).⁹⁸ Aiding and abetting because the law is defined in a way that incorporates a prohibition on assisting an offender even before an unlawful act is carried out.⁹⁹

These two offences respond differently to the problems raised by the imputation principle. Liability for aiding and abetting, in some jurisdictions, avoids the problem of imputability. The agent is not imputed with the main criminal offence but with only that part for which she is responsible.¹⁰⁰ In other jurisdictions, such as England, the United States and France, liability for aiding and abetting is not distinguished from that of the main offence.¹⁰¹ In those legal systems, aiding and abetting must be viewed as an exception to the imputation principle which can be justified according to a consequence-based theory of deterrence.¹⁰² The problem is that the possibility to use this offence is limited only to instances in which the commission of the main unlawful act has at least begun (i.e., when there is at least a punishable attempt).¹⁰³

The offence of conspiracy is commonly viewed as an exception to the principle of fair imputation, one which is based on the potential injuriousness of the act, and the increased likelihood that the criminal enterprise will be carried out. Further, conspiracy is a recognised exception to the minimalist principle (at least in its traditional

anti-democratic actors might be able to evade punishment for these offences.

⁹⁸ Criminal Law Act 1977, c. 45, § 1(1); JOHN C. SMITH & B. HOGAN, CRIMINAL LAW 362-65 (11th ed. 2005); ASHWORTH, PRINCIPLES OF CRIMINAL LAW, *supra* note 30, at 470-71; JEFFERSON, *supra* note 90, at 399-400.

⁹⁹ *DPP for Northern Ireland v. Maxwell* (1978) 1 W.L.R. 1350 (H.L.); ASHWORTH, *supra* note 30, at 411-13; SMITH & HOGAN, *supra* note 98, at 170, 174; JEFFERSON, *supra* note 90, at 205; SIMESTER & SULLIVAN, *supra* note 35, at 190.

¹⁰⁰ Hence, for example, the Israeli Criminal Code 1977, section 32 restricts the maximum penalty for aiding and abetting to half of the statutory penalty of the principal offence, while German law restricts the maximum penalty for an accomplice to three-quarters of that of the principal. FLETCHER, *supra* note 40, at 634. For the advantages and disadvantages of this distinction between the accessory and the principal offenders see ASHWORTH, PRINCIPLES OF CRIMINAL LAW, *supra* note 30, at 426-28; FLETCHER, *supra* note 40, at 651-57; JEFFERSON, *supra* note 90, at 203-04, 198-99.

¹⁰¹ See, e.g., Accessories and Abettors Act, 1986, s 8 (Eng.).

¹⁰² I failed to find a convincing intrinsic justification that would explain how a supporting act could always be compared to the principal offence, especially when the only fault required from the accessory is awareness (and not intention—as in the case of attempts) of the act, its supporting nature and of the “essential matters, which constitute the offence.” However, see Fletcher, *supra* note 40, at 651-54. For the fault elements, see SIMESTER & SULLIVAN, *supra* note 35, at 197-98; and ASHWORTH, PRINCIPLES OF CRIMINAL LAW, *supra* note 30, at 424-25.

¹⁰³ Though in England and the United States, for example, the principal does not have to be convicted. SMITH & HOGAN, *supra* note 98, at 201-07; SIMESTER & SULLIVAN, *supra* note 35, at 219-20; FLETCHER, *supra* note 40, at 641.

interpretation), once again owing to the group element. Unlike aiding and abetting, conspiracy is an independent offence penalising the conspirators before any substantial offence has actually been committed, and regardless of the commission of the joint enterprise. Thus, making use of the existing offence of conspiracy would avoid the controversial construction of new offences.

VII. SOME FINAL THOUGHTS

The aim of this paper is to examine the viability of the assumption that security concerns trump all other concerns. Democratic countries subject themselves to a set of principles that govern state coercion. Western states decided to respond to the current threat of terrorism by means of criminal law. This choice seems a trivial one: terrorism causes severe harm to persons and property and as such it is an obvious candidate for criminal law. However, to protect society effectively, the authorities argue that they need permission to intervene at the very early stages of the criminal enterprise. They are asking to be granted powers to stop individuals whose conduct creates only remote harm, but the demand to grant the state more powers requires a special justification. It is necessary to explain why acts of terror should be treated differently to other types of violence. The answer to this question brings into the spotlight the motivation of the terrorists.

Different motivations threaten different interests and pose distinct threats. One of the most serious motivations common to many acts of terrorism is the anti-democratic ideology. Consequently, I have chosen to concentrate on the anti-democratic ideology and ask whether the threat posed by it justifies the expansion of criminal law to all types of remote harm. Three of the general principles that govern state coercion deal with situations of remote harm: the harm principle, the minimalist principle, and the principle of fair imputation. In this paper, I have conducted a thorough analysis of the applications of these principles onto the various types of anti-democratic activity, concluding that the minimalist principle—even in its wider interpretation—and the principle of fair imputation impose strict limitations on the powers granted to the state to penalise remote harm.

This conclusion is not necessarily the final answer to the question posed at the beginning of this paper. Indeed, it may be that the limited permission to expand criminal law to include some forms of remote harm is sufficient in order to provide effective protections to citizens. If this is so, then the assumption that security considerations trump all other concerns is proven right, or more accurately, is not disproved in

this case. However, the limited permission to penalise remote anti-democratic activity may be insufficient to allow for an effective and comprehensive permission. If this point is so, then it is necessary to examine whether there might be another principle that would allow for an additional expansion of criminal law, and if so what limitations it imposes, a discussion that I will leave for another.¹⁰⁴

¹⁰⁴ For a possible principle, see my article, Shlomit Wallerstein, *The State's Duty of Self-Defence: Justifying the Expansion of Criminal Law*, in SECURITY AND HUMAN RIGHTS (Benjamin J. Goold & Liora Lazarus eds., forthcoming, 2007).