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OPINION

The Changing Contours of the Criminal Law

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The criminal law is sometimes accused of being applied disproportionately against the weaker and poorer elements of society. It is true that what seem to be large-scale offences are often unprosecuted. If a crime is big enough it can cease to be seen as a crime. Thus, in an old proverb, if you steal a chicken you become despised as a chicken thief whereas if you steal a kingdom you become a king. The idea is also reflected in the observation of Honoré de Balzac that 'Laws are spider webs through which big flies pass and the little ones get caught' (*La Maison Nucingen* (1838)).

An example of the limited application of the criminal law is that the legal duty to stop someone from dying is economically confined. In England and Wales, more than 23,000 elderly people died as a result of being too cold last winter. The year before, the unnecessary death toll was 29,000. Rod Griffiths, a senior public health official, stated in November 2006 that the lives of thousands of elderly people are at risk because they cannot afford to heat their homes. The charity Age Concern requested a £100 rise in the winter fuel payment but government ministers rejected this request.

Government could prevent such large-scale loss of life by increasing the winter fuel payments to old people but it seems that it will not do so; its inaction, however, is clearly outside the jurisdiction of the criminal law.

In general there is, in English law, no legal obligation to help someone in danger. The law is characterised by Arthur Hugh Clough's observation (published posthumously in 1962) in *The Latest Decalogue*: 'Thou shalt not kill; but need'st not strive officiously to keep alive'.

There are, though, some circumstances in which acquiescing in an unnecessary death *is* punishable. Homicide by gross negligence is unlawful. This offence can be committed by an *omission to act* if the culprit has a duty to intervene, as does a prison to its prisoner or a hospital to its in-patient. An omission might also be criminal where the deceased was a social or familial dependant of the person or institution which failed to act. Parents who permit their young dependent children to starve could be convicted of manslaughter. This type of crime, though, has never been applied to any governmental inaction. Governmental inaction

* The views expressed in this article are those of the author and do not necessarily reflect the views of The Open University or *The Journal of Criminal Law*.

while elderly people die from the cold is not a crime, although it is not hard to see why many people would use the word 'criminal' to describe such a situation.

It is true that many elderly people are dependent on the State. It is also clear that government has a moral duty to help protect its citizens—that much is already evidenced by the existence of the winter fuel payment system. How much money is spent, though, is a political decision, and it cannot be argued in a law court. It is a non-justiciable issue, and does not become justiciable however contestable are governmental spending priorities. Consider a recent decision in contrast to the negative one on winter fuel payments. The Culture minister, Tessa Jowell, recently told Parliament (*Hansard*, 5 December, 2006, col. 287W, and see http://news.bbc.co.uk/1/hi/uk_politics/6167504.stm, accessed 15 January 2007) that a slip in the Olympic financial accounting had entailed the need for some previously unforeseen extra cash: £900 million. No government minister has, in consequence, called for the 2012 London Olympics to be cancelled. Government will find that extra £900 million. We have joined-up government responsible for co-ordinated policy on both geriatric health, and the Olympics. The energy bill to stop 20,000 old people from freezing to death, according to the relevant charities, is about £2 million. But the decision to pledge £900 million on fun and commerce while denying dependent elderly people the £2 million of life-preserving fuel is quite lawful—spreadsheet manslaughter is not a crime known to the law. Article 2 of the European Convention on Human Rights guarantees the right to life, but it has not been applied in a way that would assist those endangered this winter.

What this matter of 'avoidable death without legal culpability' illustrates is the inadequacy of any definition of criminal law founded alone upon the serious nature of morally reprehensible harms. It shows that, notwithstanding the crime of corporate killing being specifically criminalised in the Corporate Manslaughter and Corporate Homicide Bill, at least one type of deliberative committee decision-making resulting in unnecessary death will remain perfectly lawful. This is not to argue that the avoidable deaths of the old people who will die this winter from the cold *should* necessarily be treated as a crime, but to demonstrate the limits of the criminal law.

Legal institutional responsibility for death by omission to act is known in another branch of the law. Outside the normal categories of the criminal and civil law, such avoidable deaths are within the category of 'death by neglect' used in coroners' courts. In *R v HM Coroner for North Humberside and Scunthorpe, ex p. Jamieson* [1994] 3 All ER 972 at 991, Sir Thomas Bingham MR noted that:

... Neglect in this context means a gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter *or warmth* for someone in a dependent position (because of youth, *age*, illness or incarceration) who cannot provided it for themselves. (emphasis added)

Referring, however, to the similar verdict in a coroner's court of death caused by 'lack of care', Croom Johnson LJ said in *R v Southwark Coroner, ex p. Hicks* [1987] 2 All ER 140 at 146 that:

This verdict should not be used as a means of levelling disguised criticism at people who do not act in an emergency or take a wrong or inadequate decision in such cases. I doubt if the inaction of the priest and the Levite who passed by on the other side would have justified such a verdict . . .

Turning to the broader issue of criminal law being limited by the political economy, what is the distinguishing characteristic of a crime? What puts one type of wrong in the category of a crime, and keeps another as a civil wrong? The truth is that there is no scientific way of differentiating wrongs on that basis. It is impossible to be definitive about the nature of a crime because the essence of criminality changes with historical context. As Glanville Williams has observed (*Textbook of Criminal Law* (1983) 27):

. . . a crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.

Lending money and charging interest was, anciently, the crime of usury. Now if done successfully it might earn a banker a knighthood. Cocaine used to be a legal narcotic used both for recreational purposes and toothache, now it is illegal.

A crime is anything that the State has chosen to criminalise. This analysis was taken by Lord Atkin, who said (in *Proprietary Articles Trade Association v Attorney-General for Canada* [1931] AC 310 at 324):

The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

So what conduct does society criminalise? In general, that which is so inimical to society that it would be unsuitable to be left to be settled by private law. Misconduct at which we want society, not just the injured party, to register it has been hurt. However, not all that glisters is gold, and not all that is abhorrent is criminal. There are many things that are seriously condemned by people but which are not crimes. It is sometimes the case that considerations of political economy come into play and prevent something harmful being seen as a crime. There are clear reasons why it would be difficult to argue that a government was guilty of spreadsheet manslaughter on account of the economic spending decisions it made, even if, because of its priorities, those decisions inevitably entailed unnecessary death.

The point that all this goes to show is a simple one: that there is outside the purview of the criminal law conduct of comparable moral culpability and harmfulness as conduct that is within it. However, the content and contours of the criminal law change with the times. So perhaps, one day, some form of spreadsheet manslaughter—the deliberate setting of peacetime spending priorities that will almost certainly result in the premature and avoidable death of citizens from acute

causes, and which does do so—will become criminal. Such law would not entail governments being prosecuted for homicide left, right, and centre but it would mark out an important criterion of civilised government. Similarly, the Genocide Act 1969 has never been used but that does not mean it is a useless law.

That might seem far-fetched but then, when first mooted, so did the idea of prosecuting a company for manslaughter. The distinct legal personality of a company was widely seen as something to which benefit could attach (limited shareholder liability) and from which corporate civil liability could flow. That a company could commit unlawful homicide, though, was not appreciated. Until quite modern times, companies were seen as capable of criminal wrongs but only of non-violent criminal wrongs. In fact, prosecuting a company for homicide was still being seen by some as impossible right up to the first corporate manslaughter prosecution in 1965. Today, though, corporate manslaughter is an embedded feature of the criminal law, and is the subject of a dedicated 23-section piece of legislation.