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RESEARCH ARTICLE

Public order as a protectable interest

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Abstract

Public order as a protectable interest is an important criterion for determining a consistent and rational scope of crimes against public order. From the specific perspective of everyday life, Feinberg's theory of minimum welfare interests neglects those kinds of interests that relate to a smooth or harmonious life. Socio-legal perspectives make it clear that safety interests, which directly concern basic living (bodily existence), do not include various kinds of order interests – and thus life order interests in convenience, comfort and peace, distinguishable from safety interests that are protected by English public order laws, can be construed as the public order interest. By critically adopting Feinberg's individualistic approach to analysing public interests in three types of case, the test of being public is further clarified. Typical categories of public order are socially and normatively identified before concluding with a discussion of the effects the identification made by the paper might make to the scope and nature of public order law and offences.

Keywords: public order; public order act; protectable interest; smooth everyday life; life quality

Introduction

The definition and scope of public order as a protectable interest in criminal law is a relevant starting point for valid criminalisation in respect of public order. Generally, criminalisation theory begins by identifying protectable interests. It looks for the 'interest' or 'good' to be protected – such as bodily integrity or property rights in the cases of offences against the person or property – before considering how this might be harmed or wronged. The reason for this approach is that 'prerequisites for criminal liability' 'include interference with … interests'.[1] This premise of protectable interests has been commended in criminalisation research. A typical example is found in the first volume of Feinberg's *The Moral Limits of the Criminal Law,* 'Harm to Others', which starts by constructing a network of protectable interests.[2] Specifically, Feinberg identifies offence categories by the assignation of specific offences to specific interests. The definition and scope of crimes against public order, whether in legislation or textbooks, depends first on the definition and scope of public order, identified as a relevant interest. If the definition and scope of public order is unclear, there can be no achievable consensus on whether the category of 'crimes against public order' should include or exclude a specific crime. It follows that an appropriate starting point for the existence of an organised or rational public order law must be to address the question of whether public order can and should be perceived as a protectable interest.

However, there is little existing work clarifying the definition and scope of public order as a protectable interest. Feinberg's *The Moral Limits of the Criminal Law* avoids developing a rigorous definition of public order as a protectable interest. Although some notable contemporary texts such as

†I would like to thank Professor Lindsay Farmer, Professor James Chalmers, Professor Fiona Leverick and Dr Lewis Kennedy for their help during the writing and revision of this paper. This paper is supported by Program for Young Innovative Research Team in China University of Political Science and Law.

[1]See MD Dubber *An Introduction to the Model Penal Code* (New York: Oxford University Press, 2015) p 22.

[2]See J Feinberg *The Moral Limits of the Criminal Law, Vol 1: Harm to Others* (Oxford: Oxford University Press, 1984) ch 1.

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Smith and Hogan's Criminal Law do incorporate a chapter on crimes against public order, they do not discuss what public order actually is, but proceed directly to discuss specific public order crimes.[3] *Scots Criminal Law: A Critical Analysis* does raise the question: 'What is the comparable value in public order?' (compared to that in other interests), but without offering an answer.[4]

I will look at the definition and scope of public order as a protectable interest: whether it is possible to identify something called 'public order' – and, if so, what this is comprised of – whether this should be understood as a protectable interest for the purpose of criminal law – and finally, what the specific categories of public order are. First, I consider how public order can be understood as an interest in terms of existing theories of legal interests and relevant laws. My proposition will be that the key elements of public order are life convenience, comfort and peace. I will then further consider public order as either a collective interest or as an interest of individuals – and, if it is the latter, how it can be deemed sufficiently serious as to be protectable. I will clarify the test of publicness as that of multiple subjects of an interest – as opposed to one specified person in private. Finally, after determining the two basic dimensions of public order, I will argue that there are typical categories of public order interest.

1. Public order as an interest

The socio-economic and cultural 'nature of the interests recognised in a specific system' should be clarified.[5] Public order in criminal law is often related to abstract and general social order. After considering a paradigmatic sociological approach, I will argue that it is possible to identify public order as a specific kind of order interest for everyday life – and that the core elements of this interest can be identified from theoretical, social and legal perspectives.

(a) Distinguishing public order in criminal law from abstract order in society

What kind of order is public order? Considering the notion of order itself may be helpful to define public order as a specific kind of order. Order as a sociological concept is described as a 'secure and happy condition'.[6] Without perceived regularities, structure or association, there is randomness or chaos.[7] Similarly, in a specific domain of sociology (criminology), order is 'the operations of society and the ability of people to function efficiently'.[8]

With this notion of order in mind, public order in (criminal) law might be 'a state of stability and peace'[9] or 'the smooth running of orderly society'.[10] It has also been defined as the state of peaceful co-existence and quiet living among members of the general public,[11] without which there is a breach of the (king's) peace ('royal authority and the structure of the state').[12] Dession similarly defined public order as 'that measure of peace and observance of basic value patterns of a culture upon which the fruitful pursuit of legitimate interests in the given society depends'.[13]

But these explanations are too abstract and broad – and refer to 'social order' in a general sense. Every crime interferes with the smooth running of orderly society – it is undeniable that single crimes

[3]See D Ormerod and K Laird *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 14th edn, 2015) p 1227. See also ATH Smith *The Offences against Public Order: including the Public Order Act 1986* (London: Sweet & Maxwell, 1987); P Thornton *Public Order Law: including the Public Order Act 1986* (London: Financial Training, 1987).

[4]PR Ferguson and C McDiarmid *Scots Criminal Law: A Critical Analysis* (Edinburgh: Edinburgh University Press, 2nd edn, 2014) p 397.

[5]L Paoli and VA Greenfield 'Harm: a neglected concept in criminology, a necessary benchmark for crime-control policy' (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 359 at 369.

[6]DH Wrong *The Problem of Order: What Unites and Divides Society* (Boston: Harvard University Press, 1995) p 12.

[7]Ibid, p 11.

[8]See LJ Siegel *Criminology: Theories, Patterns, & Typologies* (California: Wadsworth Publishing, 10th edn, 2010) p 426.

[9]A Ristroph 'Criminal law as public ordering' (2020) 70 (supplement 1) University of Toronto Law Journal 64.

[10]J Law and EA Martin (eds) *A Dictionary of Law* (Oxford: Oxford University Press, 7th edn, 2009) p 378.

[11]See DM Walker *The Oxford Companion to Law* (Oxford: Oxford University Press, 1980) p 1015.

[12]J Bellamy *Crime and Public Order in England in the Later Middle Ages* (Boston: Routledge & Kegan Paul, 1973) p 1.

[13]GH Dession 'Sanctions, law and public order' (1947–1948) 1 Vanderbilt Law Review 8.

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against the person, such as murder, or crimes against property, including theft or robbery, are disruptions against the operations of society and the ability of people to function efficiently. Dession's introduction of public order is a technique to know how the use of negative sanctions preserves desired aspects of a culture or promotes desired culture change.[14] The negative sanctions here include all the criminal measures. The problem, therefore, with the above definitions of public order is that they cannot substantively differentiate between public order in a specific area of criminalisation (public order crimes) and in its more general sense (social order). Lacking substantive content or internal categorisation, they cannot define and limit the scope of crimes against public order.

The general and abstract order above focuses on stable authority and the smooth running of important social organisms and systems such as the family, religion, community and state. The notion of general and abstract order resonates with the classical sociological school, which values the abstract institutional environment of a society by looking at macro-sociological organisms, social systems, social structures, etc: 'macrosocial theories of social order posit a structured system of institutions and norms that shape individual behavior from the top down'.[15] However, it gives no answer to the substantive and categorised contents of public order as a specific kind of interest in criminal law.

Hopefully, the perspective to identify public order interests in law may be drawn from another sociological school. As Sztompka, the former President of the International Sociological Association, argues, the prevailing ethos in contemporary sociology, rather than merely focusing on macro institutional elements of a society, has turned to focus on everyday life as the dominant social existence and human experience.[16] Accordingly, can we identify a specific kind of order in everyday life – such as due respect to and smooth running of everyday life – and confirm this specific order as public order? In the following section I will argue that this approach to respecting everyday life situations in contemporary sociology provides a special perspective, which can help us identify a specific kind of social order as public order.

(b) Demarcating public order as a specific kind of interest

(i) Distinguishing specific order from safety interests

Scholars such as Gross have analysed interests in a succinct way, listing 'interests regarding life, liberty, property, physical well-being, and security' as 'the most important and most general classes', before sensibility interests, collective community interests and governmental interests.[17] To identify public order interests, Feinberg's more recent theory of interests offers a more credible starting point because he has considered interests in general and identified specific forms in more than one sophisticated chapter. More importantly, for Feinberg, an interest which is protected by law should be a realistic and stable condition based on people's wants and be instrumental in attaining ultimate and ulterior life goals (eg 'producing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully raising a family').[18] He argues that welfare interests – such as minimum health, resources, assets and political liberty – are minimal, non-trivial and non-momentary conditions of well-being.[19] Welfare interests characteristically affect to a significant extent an individual's capacity to choose and order one's way of living. They are necessary generalised means to a great variety of important ultimate goals and aspirations; without *any* one of them, the whole network of ulterior goals is usually seriously defeated. Accordingly, he identifies welfare interests as central protectable interests and central to a personal standard of well-being. 'An invasion of a welfare interest is the most serious, but not the only kind of harm a person can sustain'.[20] Then what are the other interests of a person that can be harmed and may be protectable?

[14]Ibid.
[15]BS Turner *The Cambridge Dictionary of Sociology* (Cambridge: Cambridge University Press, 2006) p 2.
[16]See P Sztompka 'The focus on everyday life: a new turn in sociology' (2008) 16 European Review 1.
[17]H Gross *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) pp 119–121.
[18]See Feinberg, above n 2, pp 37–45.
[19]Ibid, pp 37, 57–59.
[20]Ibid, pp 37–38.

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Feinberg's notion of interests basically neglects the dimension of everyday life. Feinberg's theory of interests constructs welfare interests as protectable interests mainly for minimum living, failing to clearly identify other generalised conditions for the smooth running of everyday life. Everyday life consists of activities which individual members of a society do for the continuation or improvement of their own lives: sport, study, work, leisure, amusement, worship, travel, religion, etc.[21] The smooth running itself of everyday life in this conception is less ultimate and less important than the ulterior goals in Feinberg's conception. Everyday life interests – in the sense of interests for the smooth running of everyday life activities – are less important than welfare interests for more ultimate and more important ulterior goals; without any one of them (everyday life interests), the whole network of everyday life is not usually seriously defeated.

Inside the network of welfare interests, Feinberg lists categories such as 'emotional stability, the absence of groundless anxieties and resentments' and 'a tolerable social and physical environment'.[22] Although these two categories may appear to cover some of the everyday life interests we need, these everyday life interests are basically missed in Feinberg's arbitrary list of these two categories without clear explanation of every category. His readers would not confidently know that he also advocates interests for non-ultimate, non-ulterior everyday life when he emphasises that protectable welfare interests are elementary and durable for ultimate and ulterior goals.

Ouside the network of welfare interests, he argues that instrumental wants such as exercising or working late 'are means to the advancement of more general, stable, and permanent goals like health and financial sufficiency in which we certainly do have an interest'.[23] That is, among everyday life activities, study and working contribute to economic security, exercise can contribute to bodily health and relaxing activities (leisure amusement, religious worship) help sustain mental health and well-being. They all seem to contribute towards the welfare interests that Feinberg would recognise. However, the fact is that many people may exercise or work late not necessarily for health or economic reasons, but just because such activities provide satisfaction or simply alleviate boredom. That is, these everyday multifarious wants are not inherently instrumental to realising ulterior goals, ie promoting minimum interests such as health or property, *but* are ends in themselves, being the inherent components of everyday life and being essential to support one's everyday life quality and well-being. Everyday life has its own meaning and is worth maintaining independently of basic living. Modern human existence lies not merely in the biological body which can be maintained by welfare interests, but more in the everyday life activities with which an individual constructs his or her own self.[24] The focus of exercising or relaxing activities is not on actual realisation of ultimate ulterior life goals such as health or wealth, but on the means or capabilities to achieve a certain level of everyday life quality.

The new sphere of interests in everyday life has not only a basis in sociology but can be supported by an approach whereby legal sociology correlates to legal interests. The approach differentiates safety from order in its narrow sense by the test of whether the interest can concern basic living. Basic living relies mainly on individual *safety* interests: specifically life, health, bodily integrity and material living interests.[25] Similarly, Andrew von Hirsch and Nils Jareborg have recognised that such interest dimensions as physical integrity and material support do concern subsistence (elementary human capacities to function), while other interest dimensions do not concern subsistence or most basic human satisfaction, but concern adequate or enhanced comfort, satisfaction and quality of life.[26] In this sense, safety interests do not include specific order interests that do not directly concern basic living in the sense of subsistence or minimal well-being, such as the internal teaching order of an institution

[21]See Sztompka, above n 16, at 9–11.

[22]Feinberg, above n 2, p 37.

[23]Ibid, p 57.

[24]See B Randall *Modernism, Daily Time and Everyday Life* (Cambridge: Cambridge University Press, 2008) p 20.

[25]See S Liu and Z Guo 'What are legal interests: explanations of legal sociology and legal economics' (2008) 6 Journal of Zhejiang University 103–106.

[26]See A von Hirsch and N Jareborg 'Gauging criminal harm: a living-standard analysis' (1991) 11 Oxford Journal of Legal Studies 1.

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– or the order in a general public place like streets – or the order in social administration areas such as immigration control.

The test of basic living proposed is more a systematic conceptual framework of making tutored judgments about safety interests and order interests, than a precise formula. The judgement of the concerned interest dimension depends on factual findings about the supposed effects of conduct and even on the normative value assessments of the effects. Any differentiation test is unavoidably somewhat arbitrary, but one should be able to apply the test to make rough distinctions. Then is passive smoking an issue of welfare, safety or comfort? The expression, 'prejudice to health or a nuisance' means that environmental law adequately regulates both safety and order problems.[27] Smoking is believed to be harmful to health and smoking in public places harmful to public health.[28] However, the harm occasioned by a single transient act of smoking in public places is usually not significant enough to be regarded as a safety crime (against health); rather, it is more properly seen as an offence against public life order in respecting others' comfort.[29] The harm is to sensory amenity, something which is not negligible to most people, as it hinders them from benefiting from interesting and enjoyable aspects of life.

This socio-legal difference between basic living interests and everyday life interests can be considered psychologically. Maslow's theory of the hierarchical needs of humans suggests that once their primitive and basic, physiological needs and safety needs are met, people then pursue high-level needs to actualise their full potential.[30] Low-level needs are mainly met by minimum welfare conditions, while high-end goals are additionally dependent on other conditions. People first need personal safety and property safety – preconditions without which they cannot exist, let alone conduct meaningful lives. However, life is not just about money or health. Life is a healthy balance of all hierarchical needs.[31] High-level needs can only be realised by living life – and a good life entails the smooth use or enjoyment of life conditions. These further conditions are 'flesh on the bone', which render the bodily existence meaningful. Every person needs to be able to pay attention to his everyday life activities. By complete engagement with everyday life, he or she claims ownership of his life and may even live a rich and vital life.[32]

This everyday attention needs a kind of life order, ie 'smooth life'. Since public order can be defined as 'the smooth running of orderly society',[33] I would argue here that an orderly life also needs to run smoothly, and 'smooth life' can be literally understood as where relevant life activities progress comfortably, free of problems, troubles, stresses and disruptions. Interests to be identified should include order interests which are instrumental to this smooth life.

The identification of life order interests accords with the everyday focus of the police. 'The idea that the management of minor offenses and disorderly behaviors is an essential function of public police has become well established since the 1980s'.[34] Enormous policing resources are put into cases of life order.[35] For example, for the purposes of Part 2 ('Complaints and Misconduct') of the Police Reform Act 2002, 'a person is adversely affected if he suffers *any form* of loss or damage, distress or inconvenience…'[36] This means that 'any form' of distress or inconvenience is qualified as being a legitimate

[27]Environmental Protection Act 1990, s 79(1).

[28]PR Ferguson '"Smoke gets in your eyes…": the criminalisation of smoking in enclosed public places, the harm principle and the limits of the criminal sanction' (2011) 31 LS 259.

[29]Similarly, 'dust falling on vehicles' 'might be an inconvenience to their owner' or users, and 'dust in the eyes or hair even if not shown to be prejudicial to health would be an interference with personal comfort'. See J Bates et al *Liability for Environmental Harm* (Haywards Heath: Tottel Publishing, 2004), p 40.

[30]See AH Maslow 'A theory of human motivation' (1943) 50 Psychological Review 370.

[31]See G Bergmann *The Seven Human Needs: A Practical Guide to Finding Harmony and Balance in Everyday Life* (Iceland: Hanuman, 2006) p 15.

[32]See M Csikszentmihalyi *Finding Flow: The Psychology of Engagement with Everyday Life* (New York: Basic Books, 1998).

[33]Law and Martin, above n 10, p 378.

[34]JJ Wills 'A recent history of the police' in MD Reisig and RJ Kane (eds) *The Oxford Handbook of Police and Policing* (Oxford: Oxford University Press, 2014) p 12.

[35]See D Thacher 'Order maintenance policing' in Reisig and Kane, ibid, p 135.

[36]Police Reform Act 2002, s 29(5) (emphasis added).

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subject of complaint and worthy of investigation. The heart of 'disorder policing' is to define and regulate the fair use of a public place enumerated by quality of life standards.[37] This policing focus resonates with the contemporary notion of everyday life in sociology.

(ii) Examining existing laws and confirming life order interests as substance of public order

As will be shown, English public order laws relate closely to safety interests, although they also reveal or summarise infringements of public order. However, public safety and public order are different concepts. First, this is because order interests are distinguished from safety interests by the above social-legal test of whether basic living or merely life quality is affected. Basic living interests are safety interests of individuals, and when they are brought into public life, whether general (ie general public places) or specialised (eg in a factory or bank), private safety interests become public interests in safety. Similarly, life order interests are order interests of individuals, and they can become public order interests in public life occasions and contexts. Equally importantly, it is because some crimes traditionally perceived as being against public order are suggested to be, or even have been, crimes against public safety, ie are or have been different from other crimes against public order. Public nuisance is commonly recognised as a typical example of a crime against public order.[38] It should be replaced by 'a general offence of doing anything which creates a major hazard to the physical safety or health of the public'.[39] In this way, public nuisance is not a crime against public order but against public safety. The Canadian Criminal Code, section 108, defines common nuisance similarly, limiting it to living safety interests. In New Zealand, 'criminal nuisance' (Crimes Act 1961, section 145) is analogous. Lastly, British textbooks inferentially support this conceptual difference between safety interests and public order, by treating public order as something different from personal and property safety. For example, scholars consider that public order offences focus on tranquility, freedom from the offensive and the inconvenient, and are rarely harmful to personal safety or property safety.[40]

Therefore, we can identify interests protected by 'public order' laws and then exclude safety interests from them, before confirming the remaining interests (in life convenience, comfort and peace) as the *key* elements of public order. This is logically workable.

First, the common law crime of public nuisance can be regarded as a persuasive example, illustrating the interests that public order laws protect. In the landmark decision of *Rimmington*, public nuisance was described as an offence 'endanger[ing] the life, health, property, or comfort of the public or exercise or enjoyment of rights common' to members of the public.[41] Life, health and property are safety interests categorically concerning living safety while other interests of 'comfort' and 'rights' seem to be public order interests. However, it is not clear precisely what kinds of 'comfort' or'right' are envisaged here.

Specific interests may be inferred from the potential statutory form of public nuisance as proposed in a 2015 Law Commission report. It was proposed that in a statutory offence of 'public nuisance', 'serious nuisance' should be defined as including 'serious harm', as well as 'obstruction' 'in the exercise or enjoyment of rights': specifically, '(1) death, personal injury or disease; (2) loss or damage to property; or (3) serious distress, annoyance, inconvenience or loss of amenity; or [where someone] is put at

[37]Thacher, above n 35, pp 122–123. The Anti-social Behaviour, Crime and Policing Act 2014, s 59, provides the power to make a public space protection order to prevent activities from affecting 'quality of life', and s 43 gives the power to issue a community protection notice to prevent conduct from being detrimental to the 'quality of life'.

[38]See Ormerod and Laird, n 3 above, ch 32; D Ormerod et al *Blackstone's Criminal Practice 2016* (Oxford: Oxford University Press, 2015) p 664.

[39]JR Spencer 'Public nuisance – a critical examination' (1989) 48 CLJ 55.

[40]Ferguson and McDiarmid, above n 4, pp 397–398. Similarly, in a standard England textbook, offences against personal and property safety are analysed before and independently of 'offences against public order': Ormerod and Laird, above n 3.

[41]In *R v Rimmington; R v Goldstein* [2006] 1 AC 459, in which it was held that 'exercise' means convenient use as distinct from comfortable enjoyment. Equally, statutory public nuisance protects 'the peaceful passage through, or enjoyment of, a public place by a member of the public', under reference to the Summary Offence Act 2005 (Queensland), s 6.

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risk of suffering any of these things'.[42] Factors (1) and (2) refer to safety interests: viz (1) personal safety: life, body integrity and health interests; and (2) property safety. Then, after excluding safety interests, consideration would be given to what interests are protected as public order interests in (3). Before drawing any conclusion as to defining public order interests from this suggested list, we may need to consider the preexisting body of public order statutory law.

The Public Order Act 1936 (POA 1936) and the Public Order Act 1986 (POA 1936) also protect public safety interests and other interests – most obviously, public order. In the POA 1936, the then section 4 which prohibited the possession of offensive weapons at public meetings and processions was primarily concerned with public safety, while section 5, which prohibited offensive conduct conducive to breaches of the peace, and sections 1, which prohibits 'uniforms in connection with political objects' in any public place or at any public meeting, can be seen as concerned with public order. The new offences created in Part I of the POA 1986 address harassment, alarm and distress – conduct which is directed against an order interest (life peace), while Part II of the Act regulates processions and assemblies with the professed purpose of preventing 'serious public disorder, serious damage to property or serious disruptions to the life of the community', thus engaging both safety interests and public order interests.

Among all the above listed setbacks to public order, the concepts of alarm, distress and annoyance seem to be specific inner states militating against smooth life – while obstruction, inconvenience, discomfort, loss of amenity, breach of the peace, harassment, disorder and disruption can be characterised as external setbacks to smooth life. Arguably, the notion of inconvenience means difficulty with – or even the impossibility of – using a life condition, which includes obstruction. A classic example would be the notice 'out of order/use, sorry for the inconvenience'. The notion of discomfort or loss of amenity should worsen the desirability or usefulness of a life feature or facility. Meanwhile, the breach or disruption of life peace by distress, alarm, harassment, disorder disturbs the original stable or harmonious state (or equilibrium), entailing active interference from external factors.

From the above lists of setbacks in public nuisance and public order acts, key elements of protected public order interests can be properly categorised into three types of conditions of smooth life: life peace; life convenience (in use); and life amenity/comfort (in enjoyment). These life conditions are general conditions involving the use of public places and public facilities for an individual to conduct their life smoothly – in the sense of being able to participate in relevant life activities, progressing conveniently and comfortably, free of disruptions. The first element of public order interest is life convenience, ie a life condition being useful, easy or suitable. A further element is amenity/comfort, ie pleasantness resulting from an agreeable life condition, which is a matter of degree of satisfaction with access/use.[43] Another element is the maintenance and enjoyment of external and inner peace.

It appears uncontentious that we all have an interest in avoiding discomfort, inconvenience or a loss of amenity, but there are other interests we have in maintaining the smooth running of public life, including economic, social and political interests. Why is it that these interests – 'convenience, comfort and peace' – are afforded prominence? Economic interests are orderly patterns, structures and states mediated by economic rules and norms and they usually include fair competition order, foreign trade order, company administration order, finance administration order etc. Political interests usually include democratic rights and rule of law. These economic and political interests are indeed good for smooth public life. But first, not all of them are necessary for the smooth *everyday* life of the public. Foreign trade, company administration or election rights may not directly affect one's smooth everyday life. The purpose of section 2 of the POA 1936, in prohibiting 'quasi-military organisations', is

[42]Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 4.3. Obstructing the exercise or enjoyment of rights is a kind of inconvenience or loss of amenity in item (3) and thus there is no need to list obstruction separately.

[43]In this sense, the words 'convenience' and 'amenity' in the report seem more precise respectively than 'exercise of rights' and 'comfort'/ 'enjoyment of rights' in the decision. The 2015 report thinks 'comfort' is wide and vague in everyday speech and even includes trivial pleasure. See Law Commission, above n 42, para 3.43. But in this paper, plain language is preferred, thus comfort and amenity are not strictly differentiated, but are interchangeable – viz comfort means amenity.

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clearly – from the text of the provision – to protect multifarious political administration orders, such as 'the [legal] functions of the police or of the armed forces of the Crown' or 'the [legal] use or display of physical force in promoting any political object' in a democracy, which is different from specific public orders for qualify of life. If an economic or political interest does have a direct bearing on everyday life in exceptional cases, it can be a public order interest. But still, life order interests in 'convenience, comfort and peace' are the *key* contents of public order, in the sense that they are inherently instrumental to the smooth everyday life of the public. Secondly, the above established public order statutes and Law Commission reports usually protect interests in smooth everyday life in the first place, while they usually do not include such economic and political interests, so it is good not to stretch too much the relatively clear criminal law structure regarding public order. Economic or political interests have complex systems in a separate sphere of social life and deserve separate treatment in criminal law and in scholarship.

So do most social interests. As argued, it is not clear what Feinberg means by 'a tolerable social and physical environment'. It seems that social environmental interests mean orderly social patterns, structural systems and social relations mediated by social life rules and national administration, and it may include public health, drug control, prostitution, obscenity control etc. These interests can be better analysed and tackled in a separate chapter of, say, social administration, than by being mixed with life convenience, comfort and peace.

As to physical environmental interests, I do agree that in many cases they can be included in life order interests. Public order includes the public enjoyment of general, natural and sensory environmental conditions, eg sound, light, temperature, humidity or odour, without unreasonable disturbance. It is personal comfort/amenity based on sensory responsiveness to external stimuli.[44] Environmental nuisances tend to constitute the offence of public nuisance. 'Smells, noises, waste deposits and water pollution all have the potential to constitute nuisances which may be sufficiently widespread and indiscriminate in their effect to amount to a public nuisance'.[45] For example, making a noise could be an offence of preventing public meetings (starting or continuing),[46] because public enjoyment of an existing sound condition is disturbed – noisy participants or bystanders can make it practically impossible to hold a public meeting.

In summary, the substantive meaning of public order as an interest does not mean focusing on the protection of welfare interests in the sense of basic living safety, but extends to respect for convenience, comfort and peace conditions for smooth life.

2. Publicness and protectability of public order

Now that public order has been preliminarily defined as life order interests whose key elements are life convenience, comfort and peace, I consider two further questions. First, can public order interests be understood not as interests of individuals (ie life being convenient, comfortable or peaceful), but as separate collective interests of the community? Secondly, if public order were really an interest of individuals, how can it be serious enough to warrant protection?

(a) Collective interests or interests of individuals

Can we understand public order as conditions of the community? For example, the Law Commission's proposed framework of statutory public nuisance offence refers to conduct, which harms 'members of the general public or a section of it' – or obstructs 'the public or a section of it in the exercise or enjoyment of rights common to the public at large'.[47] Should public order consist of interests 'common to

[44]Bates, above n 29, p 17.

[45]N Parpworth 'Public nuisance in the environmental context' (2008) 11 Journal of Planning and Eenvironmental Law 1526.

[46]See Summary Offences Act 2005 (Queensland), s 20.

[47]Law Commission, above n 42, para 3.48.

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the public at large' or 'a section of it', eg collective interests of the community that are apparently protectable? To take another example, Parts 3 and 3A of POA 1986 protect groups of people from hatred. Does the law protect a collective interest such as mutual cooperation or civility? I will argue in this section that public order consists not of collective interests, but of the aggregated interests of individuals in some cases.

(i) Not collective interests

The publicness of an interest/crime is a complex and profound question. Duff understands crimes as public wrongs, which require a response from the community.[48] This is to understand all crimes from a political perspective, proposing public wrong as a requirement for calling a citizen to answer for a criminal offence.[49] We should perceive the problem of public wrongs as the problem of the nature of crimes, and either public harm to the interests of the community or public wrong committed against the community is 'mistaken in locating the nature of crime in wrongs done to the public' – crimes 'are public wrongs in the sense that they are wrongs that the community is responsible for punishing, but *not* necessarily wrongs against the public itself'.[50] In short, the concept of a public wrong does not refer to public harm *to* an interest of society or the community. It does not help people understand a specific category of crimes from the perspective of the subject of the concerned interest.

Duff's approach reminds us that there may be a general interest or common good that cannot be reduced to the interests of individuals. Amitai Etzioni advocates the social responsibility of maintaining civil order in a community, shoring up the moral order of, for example, respecting each other.[51] In relation to defining the 'common good' or 'public interest' some reference could be made to such ideas. That is, for certain crimes, the subject of the interests in question may be seen as the community. There are multifarious collective interests identified in offences of hatred (including Holocaust denial in countries other than the UK). In the preamble to the New York Hate Crimes Act 2000, the legislature admonishes that the identified harm and its severity are sufficient to justify criminalisation, by: '…tear[ing] at the very fabric of free society', disrupting 'entire communities and vitiat[ing] the civility that is essential to healthy democratic processes'.[52] Similarly, in the German Criminal Code, Holocaust denial or minimisation is criminalised because of the risk of 'disturbing the public peace'.[53] 'The public peace', as well as the trust and sense of it, is theoretically understood as general security.[54] The then legislative intention was to prevent 'the poisoning of the political climate by the playing down of the violent and arbitrary rule of National Socialism'.[55] In specific judicial activities, 'the public peace' may include 'the flourishing mutual cooperation between Jews and other groups in the population and … Jews in their feeling of security and in their trust in protection by the law'.[56]

However, recognising these collective interests is problematic. General security and mutual cooperation are 'pointless' when every single crime violates them. Psychological trust in the law and the sense of general security are such abstract and nebulous concepts as to be incapable of being objectively measured (such claims tend to be merely subjective).[57] So-called collective interests of the community are not protectable because their setbacks cannot be recognised consistently. The same is true of the 'fabric' or 'civility' of the community.

[48]See RA Duff *Answering for Crime, Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007).

[49]See I Leader-Elliott 'A critical reading of RA Duff, *Answering for Crime*' (2010) 31 Adelaide Law Review 47.

[50]See G Lamond 'What is a crime?' (2007) 4 Oxford Journal of Legal Studies 609 (emphasis added).

[51]See A Etzioni *The Spirit of Community Rights, Responsibilities and the Communitarian Agenda* (New York: Crown Publishers, Inc, 1993); *The Third Way to a Good Society* (London: Demos, 2000).

[52]See NY Penal Law, s 485.00.

[53]Section 130(3). See M Nohlander *The German Criminal Code: A Modern English Translation* (Oxford: Hart Publishing, 2008) p 115.

[54]See T Hörnle 'Offensive behavior and German penal law' (2001) 5 Buffalo Criminal Law Review 255.

[55]See MD Dubber and T Hörnle *Criminal Law: A Comparative Approach* (Oxford: Oxford University Press, 2014) p 624 (emphasis added).

[56]Ibid, p 623.

[57]See Hörnle, above n 54.

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Moreover, it is notable that Feinberg denies the existence of a 'large super-person ['the public'] with super-interests of his own'.[58] 'A community is an assemblage of individuals with interdependent interests in the preservation and enhancement of their common possessions [collective interests] taken as an end itself'.[59] Some individuals believe that they, as a community, have 'a personal stake in the preservation of [their] *community traditions*' [collective interests].[60] They conceive collective interests, such as abstract civility of the community, in a *vicarious* stake way: You and I are members of this community and I think that it is in your and my interest to preserve this community tradition or symbol.[61] To preserve the community traditions at the cost of others' interests is to treat other people as means, or rather, as elements of one's own environment.[62] In short, the concept of a collective interest may justify moralistic and paternalistic interference.

After refuting collective interests, Feinberg's theory of interests deconstructs public interests into three situations of assemblage of individual interests mainly 'on the same objects or instrumentalities'.[63] In the following two sections I will argue that this perspective is pragmatically sensible, but that the relevant test of an interest being public should be clarified with a coherent account and specified by reference to standards.

(ii) Three situations of public interests deriving from individual interests

For Feinberg, there are generally three types of public interest. This structure affects how a safety or order interest can be public. First, when the object of a public interest is 'a collection of specific interests … possessed by a large and indefinite number of private individuals', such as where public safety is endangered by a large bomb being placed in a central station, every individual has an interest in his own safety.[64] The endangered or victimised public interest is a compound of my personal safety, yours and others. This kind of public interest is merely an aggregation of individual interests (usually of the same kind).

Secondly, when the object of a public interest is single, specific and widely shared – such as a sound economy and environment and the maintenance of public services – the subject of the interest is most or even all of the persons in a community. Each person has an interest in the same object.[65] These public interests are 'so widely shared that they can be said to be possessed by the community itself' ['community interests'].[66] 'The harm [if any] to many or all private citizens is direct and [even] serious'.[67]

Although the interest in both of Feinberg's first two types of public interest can be endangered without specific individuals being placed at risk, the second is different from the first in that a shared object can be harmed without harm to specific individuals, eg in cases of damage to the environment. In this sense, a community interest cannot be reduced to individual interests, but is expressed as a kind of common good. However, the interests in a shared object such as a public facility, place or a general natural condition still belong to individuals.

In Feinberg's third type of public interest, the direct subject of the interest is not individuals, but an entity such as a government when the object of interests is the operation of government systems of registration, taxation, customs etc.[68] Feinberg argues that 'governmental interests' are 'ascribed to

[58]J Feinberg, *The Moral Limits of the Criminal Law, Vol 4: Harmless Wrongdoing* (Oxford: Oxford University Press, 1988) p 33.

[59]Ibid, p 36.

[60]Ibid, p 37.

[61]Ibid.

[62]Ibid, pp 67–68; J Schonsheck *On Criminalisation: An Essay in the Philosophy of the Criminal Law* (Berlin: Springer-Science +Business Media, B V, 1994) pp 225–226.

[63]Feinberg, above n 58, p 36.

[64]Feinberg, above n 2, pp 222–223.

[65]Ibid, p 223.

[66]Ibid, p 63.

[67]Ibid, p 11.

[68]Ibid, pp 63–64.

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the government' and an individual is 'not seriously harmed by a single act'.[69] When the harm is to one's fellow citizens, such as in cases of tax evasion, the objectionable conduct is unfair to the public. But 'like community interest, governmental interests in the last analysis belong to individual citizens'.[70]

Three situations involve understanding public interests as being made up of individual interests. Public interests are 'derivative from independently defined individual interests'.[71] While these situations are labelled public rather than private, this is alongside the notion 'that the public is composed of private individuals standing in complex social and legal relations to one another'.[72] For example, 'the term health of the nation is fictive and only disguises that fact that it concerns the protection of the health of many individual members of the nation'.[73] In the case of a river deteriorating, the public interest consists of my aesthetic comfort; your drinking or watering amenity; her interest in cooling or enjoying fresh air, and so on. In a system of taxation, except what many see as a crucial characteristic of a tax system – that it be fair or just in its allocation of burdens according to means – the public interest consists of A's fair competition, B's pension acquisition and C's welfare expectations, etc. So in the second and third types above, the 'near ultimate' interest bearers of the government, the environment etc all rest on the ultimate bearer of individuals, but the severity of a crime may be difficult to determine given that the exact interests or number of individuals affected may not be determinate and that 'the harm to any given individual is highly dilute and unnoticeable'.[74] Given the realities of data availability and analytical complexities, the law expediently only reaches the 'near ultimate' bearer (a shared object such as a lake or a system).[75] A public interest in this case is a preventative and compound *common good* (a feature of the shared object such as a parameter of the lake or the system), different from eventual individual interests of various types, which rely on the common good to develop.

(iii) Four standards of individual life order engaging public order

Following the individualistic approach to classifying interests as public, we can examine various archetypal public order scenarios. Public order in the sense of smooth everyday life clearly is not an interest generated in governing activities listed in Feinberg's third type of public interests. In the first type, public order is the convenient use and/or comfortable enjoyment of one's own life conditions by many individuals. In the second type, public order appears to be a general community interest, which is not reducible to individuals' own interests. This kind of public disorder involves harm to a shared public object, normally a public place such as a road, lake, park, or public utility service such as 'garbage collection, street lighting, the provision of electricity power, telephone and postal services',[76] or a general environmental condition. All of these embody general interests, which meet public needs of convenient and comfortable life.

However, Feinberg does not explicitly provide a holistic concept of publicness. So, it is not precisely clear why he sets out these three specific situations of public interests, rather than others, and how he systematises them. Is there a unifying test of publicness? He seems to understand publicness in three types of public interest as requiring that the interest in question is possessed by 'a large *and* indefinite number of private individuals'.[77] This test is stricter than the test in public nuisance, which limits

[69]Ibid, p 63.
[70]Ibid.
[71]Feinberg, above n 58, p 35.
[72]Feinberg, above n 2, p 1.
[73]CC Lauterwein *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Farnham: Ashgate, 2010) p 16.
[74]Feinberg, above n 2, p 11.
[75]See VA Greenfield and L Paoli 'A framework to assess the harms of crimes' (2013) 53 British Journal of Criminology 864.
[76]Feinberg, above n 2, p 223.
[77]Ibid, p 222 (emphasis added).

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public order to cases affecting 'a substantial section of the public'[78] and which understands publicness with a test of 'widespread in its range *or* so indiscriminate in its effect'.[79] These tests are illuminating in determining the meaning and standards of publicness. I would argue that when the affected (victim) is *not 'single and specified'*, the interest and the crime is said to be public. 'Public' just means *many individuals are actually or possibly affected*, whether or not the exact number of them is clear. It includes, but is not limited to, 'widespread' and 'indiscriminate' cases. Accordingly, four standards can expand the scope of 'public' order (crimes); each of these is elucidated further below.

As to the number of affected persons, first, when the conduct affects the life order of many and unspecific persons, it is a crime against public order. The obstruction of a public way creates widespread and indiscriminate inconvenience to multiple persons and is thus a public nuisance.[80] Intrinsically repetitive disorderly behaviour such as intrusive begging would affect many persons.[81]

Secondly, when the class of persons affected is not indiscriminate but is extensive, the conduct remains a crime against the public. The operation of an entertainment venue that discomforts many neighbouring dwellers by noise is also a public nuisance.[82] In this case, the dwellers are in a private place, and the effect on them may not be entirely random. Nevertheless, the standard of extensiveness should be considered to determine the case as public.

Thirdly, when the conduct affects an indiscriminately chosen person, rather than an extensive group, it is still public. Exposure to one person in a public place, although targeted at a single person, victimises a random person and this means that many persons are put at risk: other members of the public, who are likely to be in the same vicinity, are also in jeopardy. For example, soliciting an undercover officer for sex on a public highway is still public in circumstances in which it is not only the officer who was likely to be affected.[83] Similarly, in considering the English common law crime of outraging public decency, the Law Commission approaches publicness as meaning a public place, which the public can access, view or hear.[84] The crime is based on a risk of offence to many people, but it does not ultimately matter whether many people are in fact affected.

Fourthly, when the person affected has been chosen (not indiscriminately), and the conduct is in public, there is nevertheless a public order problem. Life consists of private life and the public life/sphere.[85] When there are bystanders – witnesses to an event who are not direct participants – the event is public rather than private.[86] This sociological idea has normative implications. The Scottish common law crime of breach of the peace requires discoverability by, and thus potential alarm to, a third party.[87] The existence of a third party (even a hypothetical one) renders the disorder public. There is not only one 'victim' specifically, but inconvenience and discomfort caused or risked to other people.

The opposite of 'public' is 'private'. Liberal theorists usually contends that it is legitimate for the state to interfere in the public sphere, but not generally the private sphere. Then they face difficulties of determining what is legitimately of state/governmental or individual/familial concern. 'Private' literally means concerning a specific person or group. When the conduct takes place in private where there is only one victim and the victim is specifically targeted, it is not a public order problem, although for the liberal, the state can still intervene in this public sphere because there is a need to

[78] *Rimmington* [2006] 1 AC 459 at [36] (emphasis added).

[79] *A-G v PYA Quarries Ltd* [1957] 2 QB 169.

[80] *Wesson v Washburn Iron Co* 13 Allen 95 (1866) at 102.

[81] Even if the beggar decides to beg just once, the potential target is indeterminate (see the third standard below).

[82] *People v Rubenfeld*, 172 NE 485, 254 NY 245 (1930). The case is similar to sending suspected anthrax in a letter that led to the evacuation of many staff at the target address. The defendant was not convicted of public nuisance given the absence of *mens rea*. See *R v Rimmington; R v Goldstein* [2006] 1 AC 459.

[83] For the case see *DPP v Fearon* [2010] 2 Cr App R 22.

[84] See Law Commission, above n 42, para 4.11.

[85] See Sztompka, above n 16, at 9.

[86] Ibid, at 9–11.

[87] See PR Ferguson *Breach of the Peace* (Edinburgh: Edinburgh University Press, 2013) p 111.

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prevent harm to others.[88] In private there is no third party or other victim, either actual or potential, to render the act public. This third party or other victim is important here, because one is entitled to the enjoyment of individual exclusive preserves even when she mingles with others; even if she is in a public place, she retains personal preserves that she can withhold from others and defend against those who overstep the boundaries, ie by dragging her into a disorderly scenario.[89] When this personal preserve of a third person is harmed or threatened, the disorder of one harming or threatening another's life convenience, comfort or peace becomes public.

(b) The triviality problem for individual life order interests

(i) 'De minimis' not always necessary

There seem to be good reasons to limit the scope of the Scottish crime of breach of the peace so that it may be regarded as a 'public' (*locus*) disorder crime.[90] That is, the formal label of 'public' may have a substantive role to play in identifying what should or should not be protectable by the criminal law. Such a role, however, has not been articulated. I will argue that publicness may signify the necessity of criminal law from two perspectives, but this signification is not absolutely correct.

Publicness can, first, signify the seriousness of the crime. For example, Feinberg argues that regular indecent behaviour by a neighbour on his lawn or the exhibition of obscene signs or pornographic displays on his external walls would characteristically constitute a private nuisance, which 'does annoy or inconvenience someone or other' under the civil law – while the criminal law (public nuisance) requires such conduct to occur in open places to concern the general public, because the resultant criminal sanction amounts to 'such (a) massive interference with liberty'.[91] Feinberg requires a threshold level of seriousness of nuisance in the criminal law because he considers criminal penalties so severe.

However, Feinberg regards the appropriate penalty for serious offence to others to only be a fine or, at most, modest imprisonment, for a matter of days.[92] These penalties do not necessarily interfere with liberty as substantially as other parts of the criminal law – or clearly outweigh civil liabilities. Lenient penalties in criminal law allow legislators to target nuisances of low-level seriousness.[93] Thus, the divisions between private/individual and public/general may not be that important in the drafting of legislation. Differences in gravity of offending can be assessed and valued not so much when deciding whether to criminalise an activity, but in setting criminal penalties and in criminal sentencing.

A challenge to this idea may be that there are degrees of blame and a *quantum* of blame under a given threshold is not criminal blame at all.[94] But how should that threshold be determined? More importantly, the condemnation effect can also be regarded as trivial when the public can readily consider the specific procedure involved, the relevant offence name and the applicable penalty in a case deemed to be only 'trivial'. That is, the conduct can be dealt with as an administrative violation where the penalty is only custody for a very short period (days) or fines determined and administrated by the police or a special administrative tribunal. But this is similar to Feinberg's suggestion of penalties for

[88]See E Fraser and N Lacey *The Politics of Community: A Feminist Critique of the Liberal – Communitarian Debate* (Harvester Wheatsheaf, 1993) p 47.

[89]See B von Silva-Tarouca Larsen *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) pp 19–20. For the personal preserves that matter most see E Goffman *Relations in Public: Microstudies of the Public Order* (London: The Penguin Press, 1971) p 28 ff.

[90]See Ferguson, above n 87, p 91.

[91]See J Feinberg *The Moral Limits of the Criminal Law, vol 2: Offence to Others* (Oxford: Oxford University Press, 1985) pp 9–10.

[92]Ibid, p 4.

[93]On the contrary, severe penalty is contingent on there being a serious result. Public nuisance can be punishable vy up to life imprisonment – and this is a reason why its restatement should require public and serious adverse effect. See Law Commission, above n 42, paras 4.2–4.3.

[94]See D Husak 'The de minimis "defence" to criminal liability' in RA Duff and S Green (eds) *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) p 350.

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offensive conduct. Therefore, for violations in some Western countries, the blame is considered trivial (notwithstanding that the violation may still be included in a 'criminal' code/law).[95]

It may also be reasonable to insist on this notion of publicness when private disruptions *may be* better resolved by alternative social mechanisms or by private law remedies.[96] A private disruption may 'cause or threaten the harm or evil sought to be prevented by the law' 'only to an extent too trivial to warrant the condemnation of conviction' ('thus the Court should dismiss the prosecution').[97] But the exercise of the principle of *de minimis non curat lex* in the operation of a Model Penal Code is a judicial guideline, and not a guide to legislative activities. Even if it were, its function is to avoid unnecessary criminal condemnation or criminalisation. But civil measures *may not always be* effective and the victim may have insufficient resources to fund a civil action.[98] For example, offensive 'one on one' messages should still be criminally prosecutable and punishable.[99] Thus, the division between public disorder and private disruption may not matter that much in deciding whether to criminalise the objectionable behaviour.

(ii) Discretion in criminalisation solves the problem of triviality

On the problem of *de minimis*, I would suggest that life order interests in convenience, comfort and peace should be considered protectable by the criminal law, but it is not necessary that all specific cases of a category of such interest should be so protected. The criminalisation theory (of legal interests) is just one factor in the whole project of criminalisation. The criminalisation process involves a range of factors: legislative, reporting, policing, prosecuting and court decision-making.

Recognising an interest as protectable does *not* necessarily mean that all infringements of that interest must or should be protected. Property ownership is a protectable interest, but criminal law does not protect it by generally prescribing that any conduct harming ownership is punishable – rather, it specifically proscribes several behavioural types: such as robbery, theft, fraud, vandalism or misappropriation. Criminal law selects some – but not necessarily all – behavioural types, which infringe against a protectable interest, based on a series of considerations, rather than a single one factor such as triviality. In specific interests, relevant factors will be whether a given type can be properly prescribed/described (so as to meet the requirements of predictability and fair labelling)[100] – whether it is of high frequency and thus of high priority – and whether it is of high severity and thus of high priority. Yet it is not clear what behaviour would be too difficult to prescribe or too trivial to criminalise or how this would be determined.

As for accurate proscription, the distinction in the nature and degree between different public order offences should be accurately and fairly reflected, not to cover too broad a range of disorderly conduct, otherwise people would be led to misunderstand the wrongdoing of the actor and the wrong suffered by the victim/public. Therefore, 'even if it is conceded that a certain type of behaviour merits proscription, whether this should be labelled as the crime of breach of the peace [or public nuisance], or some other, more specific, offence requires further thought'.[101] If the problem of finding fairer labels is not resolved, the shorthand label of breach of the peace (or public nuisance) and other vague formulation of external elements of a public order offence should not be adopted in a statute to cover infinitely extensible cases of public disorder.

[95]See American Law Institute *Model Penal Code* (1985) s 1.04(6).

[96]See AP Simester and A von Hirsch *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford: Oxford University Press, 2011) p 133.

[97]American Law Institute, above n 95, s 2.12.

[98]See Council of Europe *Report on Decriminalisation* (Strasbourg: European Committee on Crime Problems, 1980) p 52.

[99]See Malicious Communication Act 1988, s 1.

[100]For 'considerations in labelling offences' see J Chalmers and F Leverick 'Fair labelling in criminal law' (2008) 71 MLR 217.

[101]Ferguson, above n 87, p 92.

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As for triviality, the Law Commission suggested that public nuisance restated in a statute should cover '*serious* distress, annoyance, inconvenience or loss of amenity'.[102] But it is not clear how this would be determined. The answer can be sought by summarising Feinberg's texts on unpleasant experiences. Feinberg believes that unpleasant experiences, ie physical pains, mental suffering, non-painful forms of physical unpleasantness and forms of offendedness, when they are 'intense'/'severe', 'prolonged'/'recur continuously', or 'constantly repeated'/'constant and unrelenting') or 'occur at strategically untimely moments', qualify as harm that justifies the limitation of liberty.[103] Unpleasant experiences usually only affect life quality to a marginal degree, at the lowest level of gradation of evils, which may be neglected by legislators. However, when their intensity, length, frequency etc is strengthened, the gradation will be raised to different extents. The relationship between *length, frequency, number of actors and number of victims* can be summarised as this: length means the effect is persistent (ie 'prolonged', 'reoccur continuously' in Feinberg's words) while frequency means more than one separate time (ie 'repeated', 'unrelenting' in Feinberg's words). When an actor affects many victims or affects a victim frequently or continuously, the harm is enlarged. When the number of actors is increased, the (potential) harm is intensified. '[Begging] individuals and even twosomes are not prohibited as their potential for obstruction of pedestrian traffic is demonstrably less than three'.[104] It is not only quantitative factors that can affect seriousness in a proportional way; *qualitative factors* can also affect in a similar way. Feinberg's example of 'occur[ing] at strategically untimely moments' is a qualitative factor that intensifies the seriousness significantly. For 'noise-sensitive structures' or 'areas where noise-sensitive structures are concentrated', noise is strictly limited.[105]

A further factor can be justification and excuse. We admit the difficulty of managing competing interests, for example whose interests take prominence? To what extent do the proposals here address the tendency of public order law to simply reinforce and maintain existing social order?[106] In conducting the balancing exercise, consideration should be given to how 'vital' each interest in the interest network of its possessor actually is – and the degree to which each is reinforced by other private and public interests and their inherent moral quality.[107] For example, the building of park benches may raise the life quality of people who walk and have a short stop but may diminish the life quality of other groups in sleeping. It seems sleeping is more important to the homeless than a short rest to the walkers. So we favour the basic rights. However, if other comparably effective alternatives but less intrusive forms of sleeping are readily available, such as by governmental or social arrangements, it is hardly moral to sacrifice others' interests, even if less important, for one's own. For another example, would we criminalise the conduct of people talking on the phone while using public transport in circumstances in which more than one other individual were present, as the convenience of co-passengers, whether in reading, thinking or enjoying the silence, is adversely affected? Talking (whether on the phone or not) while using public transport is itself not a trivial disruption of public peace and can be a candidate for criminalisation, but it is arguably justifiable to talk and express oneself in a vibrant public zone where others do not have a reasonable expectation of silence. In contrast, smoking in public transport is not justifiable since others do have a reasonable expectation of comfort while the smoker does not have a persuasive right basis of free expression. Therefore, although all the interests in life convenience, comfort and peace, in the sense of a category, are protectable interests for life quality, in practice they are not always protected from all infringements.

[102]Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) para 4.3.

[103]See *Harm to Others*, above n 2, pp 46–47.

[104]*Federated Anti-Poverty Groups of BC v Vancouver (City),* 2002 BCSC 105, para 161.

[105]See Law on Prevention and Control of Pollution From Environmental Noise (1996), s 63(2)–(3).

[106]See eg M Hornqvist 'The birth of public order policy' (2004) 46 Race & Class 30.

[107]See Fineberg, above n 2.

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3. Typical interests in public order

After establishing the contents of public order interests as life convenience, comfort and peace – and specifying the standards of publicness of an interest – I will show in the following sections how *typical* specific categories of convenience, comfort and peace for contemporary life quality can be socially and normatively identified as the interests of public order. It is difficult to deduce specific categories of convenience, comfort and peace – just as Feinberg has not clearly rationalised why he lists categories of minimum welfare interests such as 'emotional stability, the absence of groundless anxieties and resentments' and 'a tolerable social and physical environment'.[108] He even has not explained what he means by these two elusive categories. I will provide intuitively and empirically summarised typical categories of life order interests, not all the possible contents of public order.[109] More importantly, each category's rationale and meaning will be enunciated in this part.

Public use of life places and facilities and public enjoyment of general environmental conditions can be easily analysed as typical life order interests of the public. Smooth life requires a variety of different external life conditions. Clearly, external life conditions include the use of life places and facilities. For example, 'Offences about quality of community use of public places' are the first concern of the Summary Offences Act 2005 (Queensland). Public order further entails the convenient and comfortable public use and operation of life facilities – eg water, heat, power, telecom, radio, television and internet facilities – without unreasonable interference. For example, a provision on public nuisance aims to prevent the lawful 'enjoyment of a facility of a public place' from being 'interfered with by the unlawful activities of another'.[110] This section will further elaborate on the communication and acquisition of information, external peace of life and inner peace. These conditions become public order interests in some cases.

(a) Public communication and acquisition of information

Contemporary smooth life requires traditional and new conditions. These new conditions reflect a flow of new desires, values and rules that are conditioned by social developments of technology, industrialisation and a new way of life, and they should be found and protected by creative legislation.[111] Public order includes the public communication and acquisition of true information without impediments or lies, because the convenience of communicating and receiving true information itself is a must for our smooth life that bases decisions and choices on information.

In the information age, typically exemplified by the internet as the information highway, the convenience of accessing true information is even more important. Some information activity bullies widespread and indiscriminate users by forcing or tricking them into visiting websites. This 'traffic hijack' causes inconvenience to information acquisition from the perspective of users and to communication from the perspective of content providers. It is an internet version of blocking others' freedom of movement in a traditional public place.

True information facilitates and guides our life and moods, but a false message can cause 'annoyance, inconvenience or needless anxiety'.[112] Communication only works when people are assumed to be normally speaking the truth, and lying and rumors considered abnormal – otherwise, society would degenerate into separate non-communicating individuals and entities.[113] False information adulterating truth or mixing impurities makes this interest in accuracy unavailable or discounts it, specificly in cyberspace where rumors are not limited by space or time and have nearly unlimited resending with

[108]Ibid, p 37.

[109]Specific categories can be inferred from typical legislative and judicial practice. A similar approach is adopted in finding typical wrongful affronts to sensibilities. See Simester and von Hirsch, above n 96, p 97.

[110]See *Weekly Hansard* Queensland Parliament (28 September 2004) col 2397.

[111]A Eser 'The principle of "harm" in the concept of crime: a comparative analysis of the criminally protected legal interests' (1965) 4 Duq U L Rev 345.

[112]Communication Act 2003, s 127.

[113]See Law Reform Commission of Canada 'Limits of criminal law – obscenity: a test case' (1975) Working Paper 10, at 21.

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low costs and threshold. Therefore, 'certain lies in certain circumstances should be made criminal'.[114]

Mass-circulation newspapers constantly publish information that turns out to be false (often almost immediately) and no-one (at least in Western democracies) considers that this a public order matter. However, different jurisdictions have previously criminalised the propagation of fraudulent rumours (without reference to specific victims) to protect public order.[115] Blackstone says 'the vice of lying is not taken notice by our law, unless it carries with it some public inconvenience, as spreading false news …'[116] It is an offence in Queensland to advertise or place a notice in a newspaper or by radio, television or on the Internet false information of birth, death, funeral, engagement, marriage or employment.[117] Although this offence is limited to important personal information and the mass media, it still illustrates the harmed interest to the convenience of the public in accessing information. This approach of restricting the scope of false news follows Blackstone's ('concerning any great man of the realm').[118] He alternatively limited the result ('to cause discord between the king and nobility').[119] These public rumours are against public order in the sense of setting back people's interest in the convenient communication and acquisition of information.

(b) Public external peace

Public order includes other stable conditions for smooth life of the public, eg external life peace, free from disruptions by harassment.[120] Harassment allegations can be junk information that actively appears in front of one's eyes and thus distracts attention, disrupting life peace. Such harassment is different from the rumors discussed above which disturb the convenience and comfort of acquiring information by passively appearing when, for example, a person searches the Internet.

When the conduct does not consist of physical contact but only troublesome disturbance, it may not be assault, but disorder. The direct result of harassment is harm to life quality.[121] That is, even in cases of continuous or frequent following or contacting, violence may not be threatened or feared, but the victim suffers because of their mind being occupied, attention called and thus their everyday life is disrupted.[122] Harassing acts such as unwanted letters or telephone calls, even if not threatening, abusive or insulting, are disorder in the sense of affecting another person's normal life: harassing letters or calls make it inconvenient for the recipient to identify and deal with legitimate letters or calls; the time and effort involved in dealing with this problem it itself a breach of the life peace of the recipient.

The disorder may be against only certain specific individuals. However, when harassment against one person happens in public, such as the sending of unwanted gifts or attempts to contact a person at their workplace, it is still a *public* order problem. More importantly, new technological developments make it much easier to disturb the life peace of the general public than before, eg by causing stubborn 'pop up' advertisements to appear on users' computer or mobile-phone screens, as well as the sending of spam emails on a massive scale. When the conduct disrupts the lives of many individuals, it is a public order problem, even if every individual experiences this disruption in the privacy of their home.

[114]BH Druzin and J Li 'The criminalisation of lying: under what circumstances, if any, should lies be made criminal?' (2011) 101 J Crim L & Criminology 529.

[115]See X Cai 'Comparative examination of criminal regulation of rumors' (2015) 2 Journal of National Prosecutors College 81.

[116]See Bl Comm 600.

[117]See Summary Offences Act 2005 (Queensland), s 21 (in pt 5 'Other Offences').

[118]See Bl Comm 634.

[119]Ibid.

[120]Harassment can be caused by *disorderly behaviour* that may not lead to alarm or distress, but only lead to disruptions to external peace, thus external peace should be protected by itself. See POA 1986, ss 4A and 5.

[121]See H-J Albrecht 'Stalking – national and international legal policy and legislative development', K Jia tr (2015) 44 Criminal Law Review (China) 429.

[122]See S van der Aa 'New trends in the criminalization of stalking in the EU Member States' (2018) 24 European Journal of Criminal Policy Research 315.

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(c) Public inner peace

Smooth life is also referable to non-external conditions. I have argued that external life peace can be a part of public order. Here I will argue that inner peace is the other dimension of life peace by looking at how inner peace can be a kind of interest, which engages public order – and then analyse its protectability in terms of constitutional consistency.

It is claimed that transient unpleasantness – including emotional unpleasantness – are neither in nor against one's interests.[123] That is, the focus of interests is on the minimum conditions necessary for various long-term life goals: 'welfare interests' include durable 'emotional stability, the absence of groundless anxieties and resentments'.[124]

However, the absence of emotional unpleasantness, even momentary sensations, is necessary for quality of life. 'Don't we all of us have an interest in tranquility? In peace of mind?'[125] Emotional unpleasantness tends to be fleeting, but the need or desire to be free from it is durable and stable. For individuals, 'functional integrity' includes protection from both physical and psychological losses such as momentary pain, discomfort or anxiety in the colloquial sense.[126] I would call the psychological stability *inner peace*, as opposed to external peace. Inner peace is psychological tranquility without unreasonable distress, fear, alarm, disgust, annoyance etc.[127]

Both Continental and Anglo-American legal theories acknowledge the possibility of emotional or psychological states being protected by criminal laws against victimisation.[128] Specifically, severe breaches of inner peace, such as intentional infliction of emotional distress,[129] are proposed as candidates for criminalisation, corresponding to their regulation in tort law.[130] Moreover, criminal law should 'permit everyone to go about their daily life without fear of harm to persons or property'.[131] Fear is a very typical breach of inner peace, which makes civil life uncomfortable and other life activities inconvenient and even impossible.[132] As an intense unpleasant feeling with strong physical demonstration because of a threat,[133] fear is an emotional state based on defined risk while anxiety is based on unidentifiable stimulus or failure of coping attempts.[134] Therefore, alarm is more like anxiety in uncontrollable states.[135] Conduct which makes people worried or causes them to suffer from pain or anxiety and weakens their ability to deal with life is also 'harmful' (in a colloquial sense).[136]

I am merely suggesting the possibility of targeting public emotional unpleasantness, rebutting Feinberg's claim that offended mental states are not infringements of our interests. When the inner peace breached is that of the public, ie the subjects are many, unspecified or present on a public occasion, it becomes a part of public order. Specifically, spreading terror hoaxes, throwing fake dangerous substances, threatening to set fire, to blast or to throw dangerous substances, are all to the alarm of the

[123]See Feinberg, above n 2, pp 45–46, 55–56.

[124]Ibid, p 37.

[125]'I do not think Feinberg has been as clear about these matters as he should have been': J Jarvis Thomson 'Feinberg on harm, offense, and the criminal law: a review essay' (1986) 10 Philosophy Public Affair 381.

[126]See Greenfield and Paoli, above n 75, at 869.

[127]Inner peace is not a natural extension of the person because it rarely affects body rights such as integrity or health. Neither is it necessarily related to personality rights such as dignity and privacy.

[128]See N Peršak *Criminalising Harmful Conduct* (New York: Springer, 2007) p 114.

[129]Grief is elicited by an individual's interpretation of an involuntary loss situation. See K Charmaz and MJ Milligan 'Grief' in M Lewis et al (eds) *Handbook of Emotions* (New York: The Guilford Press, 3rd edn, 2008) pp 516–517. Intense grief 'elicits considerable mental and physical distress' (p 519).

[130]See L Yalof Garfield 'The case for a criminal law theory of intentional infliction of emotional distress' (2009) 5 AUCL Brief 33.

[131]*R (McCann and Others) v Crown Court at Manchester and Another* [2003] 1 AC 787 at 806 (Lord Steyn).

[132]'Fear may drive a burdened man for a mile, but it is only freedom that makes his load light for the long carry': SV Benét 'Freedom from fear' *The Saturday Evening Post* (Indianapolis, 13 March 1943).

[133]A threat by itself is *not* even preparatory conduct risking *personal* safety.

[134]See A Öhman 'Fear and anxiety: overlap and dissociations' in Lewis et al, above n 129, p 710.

[135]For anxiety see RM Sapolsky *Behave: The Biology of Humans at Our Best and Worst* (London: Bodley Head, 2017) 34–35.

[136]See Law Reform Commission of Canada, above n 113, at 18.

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public.[137] Besides, public indecencies and insults may disgust,[138] annoy,[139] alarm or distress viewers: sexual activity in a public place,[140] publishing or stirring up hatred, discrimination or insult against an ethnic group, etc.[141] A further problem is that the categories of unpleasant states and corresponding acts need to be clearly defined to determine an unacceptable threshold of disrupting inner peace.[142]

Conclusion

I have addressed the hopefully intriguing topic of public order as a protectable interest, which would seem to be particularly pertinent in the era of relentless proliferation of public order-based offences curtailing individual freedoms and liberties. Public order crimes are generally seen as an expedient category comprised of crimes which are necessary, but which are not accommodated elsewhere in the criminal law. Public order as a protectable interest should be narrowed to a consistent and rational scope.

Legislation must prudently establish and protect new interests demanded by social developments and a new way of life. Turning to the perspective of everyday life, it is possible to perceive public order as a separate kind of substantive interest. We engage in everyday activities which are not necessarily 'life aims', but which may be central to our lives in important and specific ways. Thus, every person needs a kind of life order, ie a 'smooth life', where everyday activities are well respected and proceed smoothly – free from undue problems, irritants, unpleasantness or sudden disruption. The key elements of protected public order interests are conditions for smooth life: for facilities and places, comfort is the higher level of meaning for life quality, based on the convenience of use; for general natural conditions, the value is mainly the comfort of enjoyment; for information, the focus is the convenience of access; freedom from harassment and breaches of inner peace is another kind of comfort in achieving passive peace. These life interests can be public order interests when the subject is manifold, indiscriminate or appears in a public context, rather than a specific one in private. It is problematic to understand the publicness of an interest and crime, especially in respect of public order law. Public order law, by its very name and from the perspective of fair labelling, needs to explain what is meant by 'public'. I have tried to *limit* the publicness to occasions not concerning a specified victim in private – the test of being public is whether many individuals are actually or possibly affected.

In this way, public order can be seen as central to people's quality of life, and public order in criminal law thus can have its own purpose, remit and scope – crimes against public order can be characterised as an independent category of crimes in legislation and scholarship. First, from this perspective public order is different from public safety or general social administration – so the conduct connected with offensive weapons, fireworks, obscenity and pornography, political uniforms, quasi-military organisations etc, in much 'public order' regulation is not directly a public order problem. Secondly, among common law crimes that are commonly regarded as public order offences, public nuisance should be refined or narrowed from its 'catch-all' common law meaning to be formulated

[137]This kind alarm is not a real public safety concern and thus the actor cannot be convicted of a public safety crime. The real criminality of the conduct lies in creating unreasonable fear among the public and thus breaching of the peace of the public. See the contamination of or interference with goods with intention of causing public alarm or anxiety (POA 1986, s 38).

[138]In emotional knowledge, there are lists of possible stimuli of disgust: '… sexual behaviours, contact with death or corpses, violations of exterior envelope of the body (including gore and deformity), poor hygiene, interpersonal contamination (contact with unsavoury human being), and certain moral offenses': P Rozin et al 'Disgust' in Lewis et al, above n 129, p 757.

[139]Irritation or annoyance is a milder variant of anger, while fury or rage is an intensified variant, see S Schieman 'Anger' in JE Stets and JH Turner (eds) *Handbook of the Sociology of Emotions* (New York: Springer, 2006) p 494. Anger is commonly elicited by eg insults, inequity, unfairness, verbal or physical aggression (p 495).

[140]SC Deb (B) col 289 18 September 2003.

[141]See POA 1986, Pt III.

[142]See AK Eisenberg 'Criminal infliction of emotional distress' (2015) 113 Michigan Law Review 607.

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as a kind of public order offence that protects life convenience, comfort or peace – or, as Spencer suggested, as a kind of public safety offence that protects the physical safety or health of the public.

Or we can simply discard this vague offence name and enact in statutes two lists of specific, non-extensible public order/safety crimes. Having explained which sorts of crimes are excluded, the focus of my new category of public order law is conduct that causes or risks specific inner states against smooth life – alarm, distress and annoyance – and conduct that causes or risks external setbacks to smooth life – obstruction, inconvenience, discomfort, loss of amenity, breach of the peace, harassment, disorder and disruption. This sort of criminality remains in the new category of public order law. Having identified the life interests in convenience, comfort and peace, we can finally attempt to map public order offences on to them. Typical categories of offences against public order include:

(a) crimes against the convenient public use of life places, such as blocking a door to prevent entrance or to throwing an object that may disrupt a sporting event;
(b) crimes against the convenient public use of life facilities, such as to disrupt the function of post offices and hospitals;
(c) crimes against the public enjoyment of general environmental conditions, such as emitting a noise that may disrupt public meetings;
(d) crimes against public communication and the accessing of information, such as the dissemination of false news that may cause public inconvenience;
(e) crimes against public external peace, such as the creation of stubborn 'pop up' internet advertisements;
(f) crimes against public inner peace, such as involvement in public indecencies or issuing insults.

Each category's rationale and meaning has been enunciated. Categories of public order crimes should be put on a consistent and rational basis. This is an important rule to establish and develop a flow of new desires, values and rules in respect of public order, which itself is not a fixed concept but is dynamic and evolves with time.

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