

# Punishing Mere Immorality? Skeptical Thoughts from a Comparative Perspective

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*This essay explores the issue of using the criminal law to enforce moral beliefs, a topic that has been traditionally addressed by continental criminal law scholars by resorting to the theory of the “legal good” (Rechtsguttheorie). In turn, Anglo-American scholars have tackled the same issue through the lenses of the harm principle. However, both theories proved inadequate to solve this long-standing penal policy dilemma. Despite the many declarations of the principle of secularism in academic debates, the question of whether merely immoral conducts should be punished remains open to this day. This essay argues that a viable solution would be to shift the focus of the discussion from the legitimacy of prosecuting to the opportunity of punishing. Therefore, the debate should be re-oriented to focus on the mandatory preconditions to be met in a democratic and efficient system—one that sees criminal punishment as the real last resort to deal with contentious issues—before the criminal law can be deployed.*

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The Limits of the Criminal Law and the Continental Theory of the “Legal Good” ( <i>Rechtsguttheorie</i> ) .....	324
The Anglo-American construction of the harm principle: from Mill to Feinberg .....	326
The Rise and Affirmation of the Harm Principle in the U.S. System.....	330
The Crisis and Decline of the Philosophy of Harm .....	332
The Role of Feminist Scholarship and the Broken Windows Theory of Crime Prevention.....	333
Punishing Mere Immorality? The Barrier of Secularism and the Weakness of the Opposing View .....	336
Towards a Viable Standard of Criminalization.....	338
The Ultima Ratio Requirement .....	339
The Effectiveness of Criminalization .....	340
The Empirical Verifiability of the Effectiveness Requirement.....	341
Conclusion: Advocating for a Culture of Subsidiarity .....	342

### **The Limits of the Criminal Law and the Continental Theory of the “Legal Good” (*Rechtsguttheorie*)**

“Why study vice?” ask Frank Zimring and Bernard Harcourt in the preface of the second edition of their textbook on *Criminal Law and the Regulation of Vice*.<sup>1</sup> The authors explain that this represents “an important topic that differs from the criminal law regulations with clear victims.”<sup>2</sup> The authors pose a complex issue that is dealt with differently in the continental criminal law tradition and in the Anglo-Saxon legal and philosophical culture. The former look at the issue through the lenses of the theory of the “legal good” (*Rechtsguttheorie*), while the latter has traditionally relied on the harm principle.

The centrality of the notion of legal good (*Rechtsgut*) in continental criminal law is without discussion. As Dubber notes,

It is so basic and essential a concept . . . that [continental] criminal lawyers find it difficult to imagine a system of criminal law

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<sup>1</sup> FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, *CRIMINAL LAW AND THE REGULATION OF VICE* iii (2d ed. 2014).

<sup>2</sup> *Id.*

without it. . . Most fundamentally, the concept of legal good defines the very scope of criminal law. By common consensus, the function of criminal law is the “protection of legal goods,” and nothing else. Anything that does not qualify as a legal good falls outside the scope of criminal law, and may not be criminalized.<sup>3</sup>

However, despite the high level of the scholarly debate,<sup>4</sup> it must be acknowledged that, even today, continental scholarship has not yet succeeded in defining the concept of legal good in a way that offers a clear and substantive delimitation of the operative boundaries of the criminal law.<sup>5</sup> Recent continental textbooks also reaffirm that the theoretical definition of criminal offense as an act endangering or injuring selected legal goods does not solve the problem of what the content of criminal law provisions ought to be. And this is precisely because the definition of the legal good—a value or interest worth of protection by means of the criminal law—is not binding for the legislatures nor does it provide any guidance on the choice and selection of those values and interests that should be elevated to the status of legal good, and hence safeguarded by means of criminalization and punishment.<sup>6</sup>

If this conclusion is right, then penal policymakers and scholars are left without any clear and reliable guidance, especially with regard to choices of criminalization when it comes to contentious issues.<sup>7</sup> For this very reason, over the past few decades continental criminal law scholarship has been more open in speaking about the “identity crisis” of the notion of the legal good,<sup>8</sup> primarily with regard to its limitations to

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<sup>3</sup> Markus D. Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. LAW 679, 683-84 (2005). An extensive scholarship exists on this topic. In the Italian literature see, e.g., Gabrio Forti, *Per una Discussione sui Limiti Morali del Diritto Penale, tra Visioni «Liberali» e Paternalismi Giuridici*, in 1 STUDI IN ONORE DI GIORGIO MARINUCCI 290 (E. Dolcini & C.E. Paliero eds., 2006).

<sup>4</sup> See, e.g., WINFRIED HASSEMER, *THEORIE UND SOZIOLOGIE DES VERBRECHENS* (1973).

<sup>5</sup> See CLAUD ROXIN, 1 STRAFRECHT: ALLGEMEINER TEIL 5, 13 (3rd ed. 1997).

<sup>6</sup> See GIORGIO MARINUCCI & EMILIO DOLCINI, 1 CORSO DI DIRITTO PENALE 487 (3d ed. 2001).

<sup>7</sup> See Wolfgang Wohlers, *Le Fattispecie Penali Come Strumento per il Mantenimento di Orientamenti Sociali di Carattere Assiologico? Problemi di Legittimazione da una Prospettiva Europea Continentale e da una Angloamericana*, in SULLA LEGITTIMAZIONE DEL DIRITTO PENALE: CULTURE EUROPEO-CONTINENTALE E ANGLO-AMERICANA A CONFRONTO 125 (G. Fiandaca & G. Francolini eds., 2008) (describing this situation as “particularly irritating”).

<sup>8</sup> See MASSIMO DONINI, *TEORIA DEL REATO: UNA INTRODUZIONE* 140 (1996); VITTORIO MANES, *IL PRINCIPIO DI OFFENSIVITÀ NEL DIRITTO PENALE* 74 (2005).

serve as an effective tool of selection.

The prevailing interpretation holds that the notion of legal good safeguards both *individual* and *collective* interests. At the same time, legal goods do not necessarily have to be tangible but, rather, must be susceptible to offense.<sup>9</sup> However, these observations change nothing since the catalog of values and interests to be deemed worthy of protection by means of the criminal law—the legitimate object of criminal law provisions—remains “absolutely unclear in its essential core.”<sup>10</sup> Because of such criticism on the inadequacy of the legal good, in recent decades the North American theory of the harm principle has gradually begun to attract the attention of legal scholars in civil law jurisdictions.<sup>11</sup> Yet, as I shall discuss, it was a sunset mistaken for a dawn. Continental scholarship saw in the harm principle the guiding principle they had been looking for, even though meanwhile the harm principle was already facing demise within the same legal culture in which it was originally developed.

### **The Anglo-American construction of the harm principle: from Mill to Feinberg**

The Anglo-American debate on the moral limits of the criminal law and on the harm principle has deep-seated roots. The renowned liberal thinker, John Stuart Mill formulated his classical theory in the essay *On Liberty* published in 1859:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.... That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>12</sup>

Mill’s theory aims at the maximum openness and tolerance towards lifestyles that contrast with dominant morality. However, Bernard Harcourt rightly pointed out that we owe the in-depth discussion of the harm principle to the twentieth century work of H.L.A Hart and, in

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<sup>9</sup> See *id.* at 197.

<sup>10</sup> Wohlers, *supra* note 7, at 127.

<sup>11</sup> See, e.g., Alberto Cadoppi, *Liberalismo, Paternalismo e Diritto Penale*, in *SULLA LEGITTIMITAZIONE*, *supra* note 7, at 83.

<sup>12</sup> JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., 1978).

particular, Joel Feinberg.<sup>13</sup>

The 1950s were characterized by the ideological contrast between Hart and Lord Patrick Devlin, who, in his famous Maccabean Lecture at the British Academy in 1959, spoke of the need to criminalize homosexuality and prostitution: his lecture, was published alongside other essays in 1965 and represented the manifesto of the ideology known as “legal moralism.” According to this view, immoral conducts must be criminally sanctioned merely because they are immoral.<sup>14</sup>

Joel Feinberg gets most of the credit for a more sophisticated deepening of the theory of penal liberalism. In his famous book *The Moral Limits of the Criminal Law*, Feinberg criticizes Devlin’s position by focusing on the harm principle. In his formulation, which is more cautious than Stuart Mill’s, the criterion of the harm principle is premised on the need to limit the invasiveness of criminal sanctions, “a brand of censure and condemnation that leaves one, in effect, in permanent disgrace.”<sup>15</sup>

It is not possible to sum up in a few lines Feinberg’s extraordinary theoretical contribution. It shall suffice here to note that in his tetralogy the eminent philosopher, adopting a minimalist perspective, issues guidelines to “an ideal legislature in a democratic country”<sup>16</sup> regarding coherent and plausible principles that should represent the basis for the drafting of penal laws. “It is not my purpose,” Feinberg observes, “to try to specify what such a body would choose to include in its ideally wise and useful penal code, but rather what it may include, if it chooses within the limits that morality places on legislative decisions.”<sup>17</sup>

Feinberg specifically lists the principles that limit the freedom of conduct of the individual. Regarding the *harm principle*, he states, “It is always a good reason in support of a proposed criminal prohibition that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting).”<sup>18</sup> In relation to the *offense principle*, he instead maintains, “It is always a good reason in support of a proposed criminal prohibition that it is probably

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<sup>13</sup> See generally BERNARD E. HARCOURT, *The Collapse of the Harm Principle*, 90 J.CRIM. L. & CRIMINOLOGY 122 (1999); *id.*; Joel Feinberg, *On Crime and Punishment: Exploring the Relationship between the Moral Limits of Criminal Law and the Expressive Function of Punishment*, BUFF. CRIM. L. REV. 145 (2001).

<sup>14</sup> See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

<sup>15</sup> JOEL FEINBERG, *HARM TO OTHERS* 24 (1984).

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.*

<sup>18</sup> JOEL FEINBERG, *HARM TO SELF* xvi (1986).

necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted.”<sup>19</sup>

It is worthwhile to reflect briefly on the distinction between *harm* and *offense* in Feinberg’s theory. According to the author, to have any relevance at the legal level, the notion of *harm* must be “binary.” This means it must be structured based on two elements that have to be present at the same time to legitimize the decision to criminalize a certain conduct:

- (1) The conduct must produce a setback to interests in which one has a stake;<sup>20</sup>
- (2) The conduct must entail the violation of a person’s right.<sup>21</sup>

To avoid any misunderstanding, Feinberg explains his theory as follows: criminally-relevant interests should not be interpreted as *passing wants* nor as *instrumental wants, or focal aims*;<sup>22</sup> they must instead be understood as *welfare interests*, that is, interests aimed at achieving the “*basic requisites of a man’s wellbeing*.”<sup>23</sup>

What role do offenses play instead in this theory? As von Hirsch states, offenses are all those harassments of a public nature.<sup>24</sup> To Feinberg, it is thus fundamental that, in order to be relevant, harassment must occur in a public space and entail an affront to an individual’s sensibilities. These two principles, “duly clarified and qualified,” exhaust “the good reasons for criminal prohibitions,”<sup>25</sup> while they exclude both legal paternalism and legal moralism as acceptable rationales for criminalization.

In his work entitled *Harm to Self*, Feinberg presents his basic ideas on the concept of paternalism, which is important to the topic of the present essay. After pointing out the ambiguous and protean nature of accepted meanings of the term “paternalism,”<sup>26</sup> Feinberg defines the concept of legal paternalism, qualifying paternalistic law as a coercive law.<sup>27</sup> Whether it threatens the imposition of punishment, monetary or

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<sup>19</sup> *Id.* at xvii.

<sup>20</sup> FEINBERG, *supra* note 15, at 15.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 31.

<sup>23</sup> *Id.* (providing examples of physical health, normal functioning of one’s body, and emotional stability).

<sup>24</sup> *Id.* at 6.

<sup>25</sup> FEINBERG, *supra* note 18, at xvii.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*

civil sanctions, or contractual invalidation, a law is paternalistic when “the real reason” that inspired it is paternalistic.<sup>28</sup>

This description gets at the fundamental point of the theory: the distinction between *hard paternalism* and *soft paternalism*.<sup>29</sup> *Hard paternalism* manifests itself when the use of the criminal law is deemed legitimate and justified even in the case the individual’s decision to harm himself/herself is entirely free and voluntary. (E.g., prohibitions on drinking alcohol or taking drugs when such behaviors do not harm or endanger others).<sup>30</sup> *Soft paternalism*, instead, occurs when “the state has the right to prevent self-regarding harmful conduct... *but only when* that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.”<sup>31</sup>

Similarly, when two individuals are involved, an agreement concerning A’s harmful conduct toward B is admissible only when B’s consent is “voluntary.”<sup>32</sup> In other words, *soft paternalism* emphasizes the fact that the law should not concern itself with the wisdom, prudence, or dangerousness of B’s choice but should instead determine if the choice truly is B’s. The problem then is to verify the *authenticity* of the individual’s choice and not to protect him from dangerous or harmful options.

It is for this reason that much of Feinberg’s work is dedicated to analytically examining the requirements for the “consent” of the agent and for the “voluntariness” of his decisions, which must be determined with very rigorous criteria: “[A] person’s consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts, nor manipulated by subtle forms of conditioning.”<sup>33</sup>

As some literature has rightly observed, the *harm principle* has the merit of highlighting the possible harm the criminal law can inflict upon personal autonomy<sup>34</sup>—an interference that becomes oppressive when so-called vice behaviors come under the spotlight.

The formidable book entitled *Harmless Wrongdoing*, first published in 1988, instead takes up the topic of legal moralism. Feinberg

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<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FEINBERG, *supra* note 15, at 116.

<sup>34</sup> Cadoppi, *supra* note 11, at 89.

presents two ideas of legal moralism. The “broad conception of legal moralism,” is defined as follows: “It can be morally legitimate by the state, by means of criminal law, to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that certain actions constitute or cause evil of other kinds.”<sup>35</sup> Feinberg lists the reasons commonly given to support criminalization: (1) to preserve a traditional way of life, (2) to enforce morality, (3) to prevent wrongful gain, and (4) to elevate or perfect human character.<sup>36</sup>

In the “narrow conception of legal moralism,” the forms of conduct that should lead to criminalization are instead immorality or those sins that can be committed not only in a publicly harmful or molesting manner but also privately by consenting individuals, who are thus not harmed, in private or before a consenting public. According to this narrow interpretation of legal moralism, Feinberg observes, it can be legitimate to prohibit conduct because it is immoral in and of itself, even if it neither causes harm nor molests the author of the action, or others.<sup>37</sup> It should nevertheless be noted that Feinberg eventually refuted both versions for several of their aspects, holding them to be inadmissible in a liberal ideology.

### **The Rise and Affirmation of the Harm Principle in the U.S. System**

Beyond Feinberg’s monumental conceptualization, it should not be forgotten that in the 1960s, and for twenty years afterwards, the harm principle gained strong consensus within the U.S. legal system.

It is a fact that the harm principle has deeply influenced the jurisprudence of the courts, even in delicate matters such as the refusal of medical treatment.<sup>38</sup> Furthermore, it has received strong systematic support in the most authoritative criminal law textbooks: the casebook edited by Kadish and Paulsen, for example, dedicated ample space to the topic in its first edition and for several others afterwards.<sup>39</sup>

Moreover, as Bernard Harcourt emphasizes, the harm principle

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<sup>35</sup> JOEL FEINBERG, HARMLESS WRONGDOING 3 (1990).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 4.

<sup>38</sup> Giovanni Francolini, *Il Dibattito Nordamericano sulla Legittimazione del Diritto Penale: La Parabola del Principio del Danno tra Visione Liberale e Posizione Conservatrice*, in SULLA LEGITTIMAZIONE, *supra* note 7, at 15.

<sup>39</sup> MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES 1 (1962).



represents a fundamental ideological guideline for the 1962 Model Penal Code, even influencing its language. No better proof of this is needed than Section 1.02 of the MPC, which speaks of the “purposes” of penal law, emphasizing that the main objective of the code is to “forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.”<sup>40</sup>

In the *Explanatory Note* to the final version of the MPC, the drafters of the influential project speak of the adoption of harm principle as one of the major goals of the model legislation.<sup>41</sup> The comment to Section 1.02 reaffirms that the application of the harm principle reflects “inherent and important limitations on the just and prudent use of penal sanctions as a measure of control.”<sup>42</sup>

Regarding “moral offenses” and, in general, behavior that goes against public decency, the editors observe: “The Model Penal Code does not attempt to enforce private morality.” As Herbert Wechsler, the main proponent and spiritual father of the *Model Penal Code*, states:

Private sexual relations, whether heterosexual or homosexual, are excluded from the scope of criminality, unless children are victimized or there is coercion or other imposition. Penal sanctions also are withdrawn from fornication or adultery, contrary to the law in many states. Prostitution would continue to be penalized, primarily because of its relationship to organized crime in the United States, but major sanctions would be reserved for those who exploit prostitutes for their own gain.<sup>43</sup>

“In another era,” Wechsler concludes, “spiritual error may have been a sufficient ground for penal repression, but in an age of many faiths and none, society tends to look to more objective criteria to determine what is harmful.”<sup>44</sup> In conclusion, as Harcourt writes, “from philosophy of law to substantive criminal law, the harm principle permeated the debate during the 1960s and 1970s.”<sup>45</sup>

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<sup>40</sup> A.L.I., MODEL PENAL CODE AND COMMENTARIES §1.02(1)(a) (1985).

<sup>41</sup> See HARCOURT, *supra* note 13, at 136.

<sup>42</sup> A.L.I., MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 17 (1985).

<sup>43</sup> Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1449 (1968).

<sup>44</sup> A.L.I., *supra* note 42, at 482.

<sup>45</sup> HARCOURT, *supra* note 13, at 137.

### The Crisis and Decline of the Philosophy of Harm

At the end of the 1980s, precisely at a time when in Europe it was celebrated as an effective and more viable alternative to the notion of the legal good that was experiencing an inexorable decline, the harm principle began to show sure signs of an imminent crisis in the United States. In a famous article published in 1999, Bernard Harcourt accurately describes all the phases of the crisis up to the final collapse.<sup>46</sup> But what happened? Not, what might seem at first glance, a disavowal of the principle and recognition of the victory of legal moralism in American penalty. Exactly the opposite: what happened was an inexorable abuse of the concept of “harm” by the case law, by scholarship, and by the legislature.

Beginning in 1980, the harm principle gradually started a phase of inexorable decline. It went from representing a fundamental limit to the arbitrariness of courts and legislative bodies to being an empty container. It was not anymore an indispensable tool to mark the limits of criminal law but had instead become a theoretical category unable to provide any practical help from a penal policy perspective. The idea of harm as a guiding principle was gradually rejected by both liberals and conservatives, and eventually completely bereft of any meaning and value. The problem is not anymore to determine *whether* a moral offense has produced harm. This basic premise is skipped over and taken for granted. The central issues thus become: what *kind* of harm was done? What was the *amount* of damage? *How* does the harm reveal itself?<sup>47</sup>

This erosion occurred without formally subverting the basic tenets of the theory of harm. The reference criteria were not explicitly rejected: as it was the case in the 1960s, a “legal enforcement of morality” still requires that there be (1) a justifiable reason for limiting individual freedom of action, if that action causes harm to others; (2) a good reason for limiting the freedom of an individual in order to prevent serious harassment; and (3) a generally good reason for limiting non-harassing behavior just for the fact it is immoral. However, as Harcourt observes, the “map of liberalism has changed.”<sup>48</sup>

In the 1960s, as previously noted, despite the opposition of conservatives, the harm principle was triumphally acclaimed—even leading to strong pressure for the decriminalization of crimes such as pornography, homosexuality and prostitution, generally defined as

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<sup>46</sup> *Id.* at 109.

<sup>47</sup> *Id.* at 114.

<sup>48</sup> *Id.* at 115.

“victimless crimes.”<sup>49</sup> By the 1980s, no differences existed anymore between liberals and conservatives: the harm principle was no longer solely a liberal cause, having also become a symbol of conservative politics. Ironically, there were even talks of the advent of a new era of “conservative-liberalism.”<sup>50</sup>

The effects were not long in coming. Conservatives used the notion of “harm” to support the enactment of criminal offenses sanctioning prostitution, pornography, homosexuality, drug use, alcohol consumption in public, vagrancy, etc.<sup>51</sup> The argument for these campaigns of “law, morality and order” was very subtle and capable of garnering social consensus: pornography, prostitution, etc., should not be punished because they are immoral but because they are harmful—harmful because their commission is causally linked to that of other, more serious crimes.<sup>52</sup>

### **The Role of Feminist Scholarship and the Broken Windows Theory of Crime Prevention**

The feminist literature has greatly influenced this tendency. Catharine MacKinnon’s studies on the damage caused to women by pornography are well known.<sup>53</sup> According to the MacKinnon, the damage occurs in three ways: firstly, because women are used to produce and market pornographic material; secondly, women are violated by male consumers of pornography who are excited by erotic poses and induced to commit acts of sexual violence; and thirdly, pornography produces a general climate of contempt and discrimination toward women.<sup>54</sup>

MacKinnon’s appeal was not ignored: at the end of the 1990s, in various cities, including New York, mayors took drastic measures (by closing sex clubs, sex shops, etc.) to discourage pornography.<sup>55</sup> Even prostitution, traditionally considered as a mere nuisance offense when it

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<sup>49</sup> ZIMRING & HARCOURT, *supra* note 1, at 50.

<sup>50</sup> HARCOURT, *supra* note 13, at 116.

<sup>51</sup> *See id.*; *see also* DENNIS J. BAKER, THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW’S AUTHORITY 109 (2016).

<sup>52</sup> Massimo Donini, “Danno” e “Offesa” Nella c.d. Tutela Penale dei Sentimenti: Note su Morale e Sicurezza Come Beni Giuridici, a Margine della Categoria dell’ “Offesa” di Joel Feinberg, in LAICITÀ VALORI E DIRITTO PENALE: THE MORAL LIMITS OF CRIMINAL LAW IN RICORDO DI JOEL FEINBERG 64 (A. Cadoppi ed., 2010).

<sup>53</sup> *See, e.g.*, CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

<sup>54</sup> *See id.*; *see also* CATHERINE MACKINNON, ONLY WORDS 15 (1993).

<sup>55</sup> *See* HARCOURT, *supra* note 13, at 142.

did not amount to “public indecency,”<sup>56</sup> began to be attacked as a paradigmatic example of the social harm. It was MacKinnon who, again, led the attack in this context using the notion of harm principle: prostitution, just like sexual violence, bodily harm, sexual harassment and pornography constitutes “harm to women.”<sup>57</sup> It was primarily through studies on the possible harms resulting from prostitution that the broken windows theory of crime prevention began to spread, first in academic circles and then in the general public. This theory was put forward by James Wilson and George Kelling in the early 1980s.<sup>58</sup> The understanding of this theory is fundamental for understanding the inversion of tendency that was happening.<sup>59</sup>

According to the broken windows theory, the harm involved in prostitution or other forms of immoral conduct is not so much or only that caused to women, but the chance that serious criminal behavior will arise or increase as a result of it. In other words, this theory seeks to determine whether, when prostitution or other forms of immoral conduct exist in a community, more serious crimes also exist there.<sup>60</sup> Behind the theory is the idea that “disorder and crime are usually inextricably linked in a sort of progressive sequence.” According to the authors, disorderly behavior such as the scattering of garbage, vagrancy, public drunkenness, begging and prostitution can, if tolerated in one district, create fertile grounds that will inevitably “attract crime.”<sup>61</sup> While, at first sight, this behavior only appears to be annoying and not serious by itself, in fact it sends criminals the clear signal that in places where such conduct is tolerated, no police control exists and there is no risk of being arrested or criminally charged. In their own words, “one broken window, left unrepaired, invites other broken windows. Such a situation progressively breaks down community standards and leaves the community vulnerable to crime.”<sup>62</sup>

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<sup>56</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 331 (1968).

<sup>57</sup> See MACKINNON, *supra* note 53, at 139.

<sup>58</sup> See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, 249(3) *ATLANTIC MONTHLY* 29 (1982); GEORGE L. KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

<sup>59</sup> See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order – Maintenance Policing New York Style*, 97 *MICH. L. REV.* 291 (1998).

<sup>60</sup> Stuart P. Green, *Vice Crimes and Preventive Justice*, 9 *CRIM. L. & PHIL.* 561 (2015).

<sup>61</sup> Kelling & Wilson, *supra* note 58, at 33.

<sup>62</sup> BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 24 (2001).

The roots of the broken windows theory lie in the complex categories of order and disorder.<sup>63</sup> The main premise focuses on the idea that “disorderliness” acts differently depending on whether or not the concerned party is a ‘decent’ or a ‘bad person.’ Honest people living in a “disorderly” neighborhood will do all they can to move away; if they are unable to do so, they will barricade themselves in their houses, trying to avoid as much as possible any contact with the contaminated surroundings. The misfits, vagrants and, in general, all the criminals will instead be attracted to those places and try to move there to commit crimes. Those who manifest a delinquent streak will have more of a chance of committing crimes in such areas.<sup>64</sup>

The broken windows theory of crime prevention started to be used not only with regard to prostitution but also to advocate for the criminalization for other forms of conduct such as maladjustment, rebellion, existential malaise, and physical and mental discomfort—behaviors indicating disorderly lives that, it is believed, will probably lead to more serious crimes such as murder, theft and armed robbery.<sup>65</sup> In 1993 in New York, Rudy Giuliani became mayor after running on a platform centered on promoting “order” and assuring “quality of life” for the citizens.<sup>66</sup>

However, highly influential scholarship of that period debunked this thesis: while true that between 1991 and 2000 an unprecedented decline in crime rates was recorded in New York City, there is no evidence supporting the conclusion that this was due to the implementation of policies inspired by the broken windows theory. Frank Zimring has illustrated through statistics that a noticeable fall in crime rates was recorded during the same period even in areas where broken windows-inspired policies were not adopted and implemented.<sup>67</sup> Zimring notes that the decline in crime rates represents an “acid test” for the broken windows theory,<sup>68</sup> demonstrating its inherent problematic nature in supporting unnecessarily punitive penal policies and overly invasive and

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<sup>63</sup> Cf. MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE* (1988).

<sup>64</sup> See Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *LAW & SOC’Y REV.* 805, 819-822 (1998).

<sup>65</sup> See Green, *supra* note 60.

<sup>66</sup> See *ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* (A. McArdle & T. Erzen eds., 2001).

<sup>67</sup> See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 36 (2007).

<sup>68</sup> See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 125 (2012).

violent law enforcement practices.<sup>69</sup>

In conclusion, the obsessive search for harm in harmless behaviors pertaining to lifestyles with the only downside of being in contrast with the dominant morality, eventually led to the “sublimation” of the harm principle as a reliable guiding principle for criminalization and prosecutorial decision-making. Conservative arguments and, above all, the emergence of the impalpable category of “quality of life” offenses further confounded the problem of protection from immorality by means of the criminal law. By the early 2000s, the harm principle was fading once and for all.<sup>70</sup>

### **Punishing Mere Immorality? The Barrier of Secularism and the Weakness of the Opposing View**

At this point of the analysis, it has become clear that the harm principle does not offer a convincing alternative to the category of the legal good. Both constructions are ultimately not able to raise an impenetrable barrier against invasive tendencies that aim at finding room for illiberal models of criminal law.

Recent scholarship, particularly concerned with the relationship between criminal law and civil liberties, has unhesitatingly underscored the inadmissibility of criminal laws that defend moral or value-based views and conceptions: while ethical ideas can be worthy of protection also by means of the criminal law in a confessional state or in an authoritarian system embracing a single, absolute view of the world and of life, this *can never* occur in a “secular state.”<sup>71</sup>

In a pluralistic or secular society, the social pact and the dominant interpretation of legal rules are based precisely on the foundational consideration for which, within the limits of the “Right,” there can exist different ideas about the “Good.” In other words, society and law rest on the premise that “different ideas of Good compete in the market of opinions, free from the state’s influence; the state must limit itself to guaranteeing a framework of conditions within which this market can operate.”<sup>72</sup>

The secularism of criminal law must be understood as an absolute and unreachable barrier to ethically oriented actions of the legislature seeking retaliation against one or more competing lifestyles or

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<sup>69</sup> See also FRANKLIN E. ZIMRING, *WHEN POLICE KILL* (2017).

<sup>70</sup> HARCOURT, *supra* note 13, at 113.

<sup>71</sup> Wohlers, *supra* note 7, at 136.

<sup>72</sup> *Id.* at 146.

worldviews.<sup>73</sup> Any criminal law provision violating of the fundamental principle of secularism shall be repealed. This is for the aim of a democratic and pluralistic state “is not that of promoting morality.”<sup>74</sup>

Today, the principle of secularism appears *unconditionally* opposed to the criminalization of anti-aesthetic, anti-social, anti-religious, and repugnant conduct solely for the fact of being immoral, with no actual harm being done.

However, this conclusion only has the appearance of being reliable and reassuring. Despite various proclamations from European Constitutional Courts on the paramount importance of the principle of secularism,<sup>75</sup> the view that denies that the criminal law should not play any role in protecting values is “at the very least ambiguous.”<sup>76</sup> It should not be forgotten that “morality” is an inherently ambiguous concept and this has been recently recognized in both continental and Anglo-American scholarship.

German scholar Thomas Weigend in a recent study on the direction taken by the contemporary criminal law, notes its “expansive tendency” in the area of “moral infractions,” that is conducts that do not cause any material harm to individuals yet betray expectations of appropriate behavior according to “objective” standards of decorum and respect essential to a civil co-existence of citizens.<sup>77</sup> American philosopher Gerald Dworkin wrote his well-known essay on moral paternalism poignantly titled “*Devlin Was Right*” back in 1999, openly siding with Devlin in observing, “[T]here is no principled line following the contours of the distinction between moral and harmful conduct such that only grounds recurring to the latter may be invoked to justify criminalization.”<sup>78</sup>

Dworkin’s moralistic legal paternalism goes so far as to invoke the intervention of public authorities to protect citizens from moral

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<sup>73</sup> See Carlo Enrico Paliero, *Il Principio di Effettività del Diritto Penale*, 32 RIV. IT. DIR. PROC. PEN. 430, 447 (1990); SERGIO MOCCIA, *IL DIRITTO PENALE TRA ESSERE E VALORE* 215 (2006).

<sup>74</sup> HANS HEINZ HELDMANN, *DIE SINNLOSIGKEIT DES STRAFENS* 160 (1988).

<sup>75</sup> See, e.g., Italian Constitutional Court, Judgment No. 329/1997.

<sup>76</sup> Domenico Pulitanò, *Laicità e Diritto Penale*, 48 RIV. IT. DIR. PROC. PEN. 55, 64 (2006).

<sup>77</sup> Thomas Weigend, *Dove Va Il Diritto Penale? Problemi e Tendenze Evolutive nel XXI Secolo*, 9 CRIMINALIA 75, 82 (2014).

<sup>78</sup> See Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999).

harm.<sup>79</sup> Even recently, Dworkin has reaffirmed the legitimacy of using the criminal law to punish violations of an exclusively moral nature. The reasoning is that the criminal law should be deployed for the respect due to the individual as a person,<sup>80</sup> even independent of personal preferences and choices of the person at whom the prohibition is aimed.

According to this theory, what makes *moral paternalism* so unique is the assessment of the behavior that is subject to penal sanctions. “Homosexuals do not think they are engaging in immoral activities. . . Those who watch pornography do not think they are being morally corrupted. *A fortiori*, they do not think that a life without these activities is a morally superior life.”<sup>81</sup> In other words, what characterizes moral paternalism is that “we can make a person’s life better by coercing him into doing (or refraining) from various actions.”<sup>82</sup>

We must also consider that *moral paternalism* can be an effective means to combat the “weakness of the will”:<sup>83</sup> an individual may be perfectly aware of leading a degrading life but not have the strength to change. In this case, the criminal law must intervene through negative incentives, which provide the individual with the capacity “to do what he recognizes makes his life better. “By forcing them to change, we do improve their life according to their own lights.”<sup>84</sup>

### **Towards a Viable Standard of Criminalization**

The issue of punishing mere immorality is a dilemma which will continue to face us in the years ahead, emerging or remaining under the radar based on the historical period the influence of religion, and the need for order and public safety felt by society and exploited by dominant political actors.

A possible solution to this endless dilemma may be found elsewhere by shifting the discussion and rephrasing the question to be answered: from “is it legally possible” to punish immoral behavior to “is it appropriate” to do so. The debate could then focus not so much on the legitimacy of the punishment—a thorny and highly sensitive issue—but instead on the effectiveness of the punishment. A rational discussion about the practical need to punish conduct that is merely immoral might

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<sup>79</sup> See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64 (1972).

<sup>80</sup> See Gerald Dworkin, *Moral Paternalism*, 24 *LAW & PHIL.* 305 (2005).

<sup>81</sup> *Id.* at 311.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 313.

<sup>84</sup> *Id.*



represent an alternative viable way to find common ground between secularists and moralists.<sup>85</sup>

This possible way out of the above-described ambiguity derives from insightful scholarly work, for example, the three conditions listed by Jerome Michael and Mortimer Adler that must be met in order to criminalize any conduct within a pluralistic system inspired by values of tolerance: (1) the enforceability of the law, (2) the effects of the law, and (3) the absence of other means to protect society against undesirable behavior.<sup>86</sup> This represents a compelling assessment grid, which is very useful as a starting point for developing a test for criminalization, even though the order of the conditions to be verified should be in part modified. Only if all the requirements discussed in what follows are satisfied, then the legislature is allowed to proceed with the decision to criminalize a certain conduct. This represents a gradualist approach based three stages of verification.

#### *The Ultima Ratio Requirement*

The first stage is to be identified, in my opinion, in the principle of *extrema ratio*. As has been written about, there are various versions of the principle under consideration.<sup>87</sup> The one to be preferred allows the legislature to enact a criminal law only after a determination has been made that other available non-penal instruments of social control are inadequate to protect a certain social value or interest.<sup>88</sup> The *ultima ratio* principle has a twofold dimension. In addition to the idea of using penal law as a last resort protect certain social values (so-called *external* subsidiarity), there is also an *internal* dimension of subsidiarity, which means that depriving someone of his individual freedom constitutes an extreme remedy compared with other equally available non-penal sanctions. Penal policy-makers are therefore required to adopt a broader view that goes beyond the penal field and that is capable of identifying any possible means of protection of a given value or interest offered by other means of social control.

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<sup>85</sup> See generally CARLO ENRICO PALIERO, *IL PRINCIPIO DI EFFETTIVITÀ NEL DIRITTO PENALE* (2011).

<sup>86</sup> See JEROME MICHAEL & MORTIMER J. ADLER, *CRIME, LAW, AND SOCIAL SCIENCE* 356 (1933).

<sup>87</sup> See Nils Jareborg, *Criminalization and the Ultima Ratio Principle*, in *ESSAYS ON CRIMINALISATION AND SANCTIONS* 23 (M. Ulväng & I. Cameron eds., 2014).

<sup>88</sup> Cf. MASSIMO DONINI, *IL VOLTO ATTUALE DELL'ILLECITO PENALE: LA DEMOCRAZIA PENALE TRA DIFFERENZIAZIONE E SUSSIDIARIETÀ* (2004).

However, this recommendation has often been ignored by legislatures, especially with regard to merely immoral behavior. For two examples of such lack of attention, we need only consider the criminalization of mere possession (without the intent to distribute) of drugs and child pornography (the EU went even further regarding the latter, requesting member state to criminalize the simple possession of computer-generated pornographic material involving children, so-called “virtual child pornography”).<sup>89</sup>

The question then becomes whether it is necessary for such acts to be criminalized. In these cases, there is no *harm*, no *offense* (in Feinberg’s terms), but rather only the attempt to instill (a certain) morality in the population by means of the criminal law.

Sanford Kadish has authored several articles on the problem of over-criminalization, noting that a decisive factor driving this phenomenon is precisely the idea of using the criminal law (1) to promote or implement rules of private morality for example with regard to homosexuality, abortion, prostitution, gambling, and drug use. (2) To enable police and prosecutors “to provide some service or other (check laws, family support laws)”; and last but not least, (3) to give police “authority over suspected criminals they otherwise would not have (vagrancy, disorderly conduct).”<sup>90</sup>

Kadish is mostly concerned with the *consequences* flowing from the decision to punish mere immorality. In his own words,

Have you considered how the inevitable process of actual enforcement of such laws (*a*) so poorly serves the objectives you have in mind, and (*b*) in any event produces a variety of substantial costs, including adverse consequences for the effective enforcement of the criminal law generally? Consequences such as: humiliating police searches that intrude on an individual’s privacy, potentially discriminatory controls, a high risk of police corruption, threats, blackmail, extortion, and even a tangible decline in trust and respect for the criminal law.<sup>91</sup>

### *The Effectiveness of Criminalization*

The second condition that has to be met is proof of the

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<sup>89</sup> Cf. EU Directive 2011/93/EU Article 2 (c) (iii)-(iv).

<sup>90</sup> Sanford H. Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 UCLA L. REV. 719, 719-720 (1971). See also Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407 (2008).

<sup>91</sup> Kadish, *supra* note 90, at 720-21.

*effectiveness* of a criminal law. At this stage, it is necessary to demonstrate that resorting to criminal punishment is justified by based on a cost-benefit analysis: the cost of the sacrifice linked to the use of the criminal law *must* be balanced by “benefits... that have at least a high degree of likelihood.”<sup>92</sup> In other words, criminalization is tolerable only when there is the certainty that in future the threatened punishment can actually affect the behavior of citizens.

Before enacting a criminal statute, the legislator will thus have to subject it to a series of controls— “diagnoses, prognoses, verifications”<sup>93</sup>—to test its ability and likelihood to provide an effective means of social control. This represents a delicate but essential step for the decision whether to criminalize some conduct: ineffectiveness is a luxury a serious that a serious cautious lawmaker *cannot* permit itself. A low degree of effectiveness can delegitimize the entire legal system by revealing the inadequacy of the criminal justice system, while also leading to serious discrimination against “outsiders” of society.<sup>94</sup>

#### *The Empirical Verifiability of the Effectiveness Requirement*

Successfully completing this second level of verification encompasses and, at the same time, leads to the third stage: the problem of the empirical verifiability of the harmful or dangerous effects that are assumed to derive from certain conducts.

Empirical evidence means resorting to scientific knowledge. Such a burden must be met by both the law-making bodies when evaluating the appropriateness or lack thereof of criminalization and apex courts charged with judicial review of legislation when they are requested to decide whether a certain conduct that has been criminalized is actually harmful to or causing endangerment of a certain interest or value, and thus deserving of criminal punishment.

Based on the three aforementioned necessary conditions, even the staunchest defender of “legal moralism” would have to reconsider carefully his desire for penal sanctions. Criminalization free of any boundary or without appropriate pre-conditions to operate would lead to the sacrifice of too much freedom: not only individual freedom, but also the more general freedom underpinning the secular state.

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<sup>92</sup> Paliero, *supra* note 73, at 430, 464.

<sup>93</sup> *Id.* at 470.

<sup>94</sup> *Id.* at 472.

### Conclusion: Advocating for a Culture of Subsidiarity

Throughout his academic career, Frank Zimring has been an exceptionally bright, insightful, and passionate advocate for a rational, humane, and evidence-based penal policy-making. My remarks on so-called vice crimes touched on a major challenge that post-modern penal policy should deal with on a daily basis: giving meaning and content to the idea of criminal law as last resort.<sup>95</sup> Unfortunately, this has not happened up to this point. On the contrary, the criminal law has been delegated to deal with too many issues that should instead be left outside the realm of the penal system.<sup>96</sup>

Developing an authentic *culture of subsidiarity* in penal policy-making is, admittedly, a difficult task. Criminal law scholars and policymakers should look beyond the boundaries of their discipline and get experts from other branches of the legal system involved in developing guidelines finally able to give concrete form to and implement the principle of *ultima ratio*. Such an endeavor calls for a type of investigation and analysis that must be authentically interdisciplinary and interested in real life consequences of legislative choices. In this regard, Frank's scholarship will continue to represent an indispensable reference point for new generations of scholars interested in producing change and putting forward viable solutions aimed at achieving a sustainable negative growth of the criminal law.

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<sup>95</sup> See KLAUS LÜDERSSSEN, *ABSCHAFFEN DES STRAFENS?* (1995).

<sup>96</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747 (2005); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); FEDERICO STELLA, *GIUSTIZIA E MODERNITÀ: LA PROTEZIONE DELL'INNOCENTE E LA TUTELA DELLE VITTIME* 481 (3d ed. 2003).