The Transformational Function of the Criminal Law: In Search of Operational Boundaries

Corda, A. (2020). The Transformational Function of the Criminal Law: In Search of Operational Boundaries. *New Criminal Law Review*, *23*(4), 584–635. https://doi.org/10.1525/nclr.2020.23.4.584

Published in:
New Criminal Law Review

Document Version:
Publisher's PDF, also known as Version of record

THE TRANSFORMATIONAL FUNCTION OF THE CRIMINAL LAW: IN SEARCH OF OPERATIONAL BOUNDARIES

*Alessandro Corda**

It is often maintained that the criminal law is supposed to intervene only when a certain social norm has become so significant within a given society to justify its protection by means of penal sanctions. The criminal law is thus thought to mirror a hierarchy of values it neither shapes nor contributes to building; rather, it is required to stand at least one step behind social change. This article challenges this view, presenting a normative account that contributes to the debate on what is permissible for the criminal law to try to achieve. It does so by defining and theoretically substantiating the "transformational function" of the criminal law. The term refers to the use of criminalization and punishment to change, rather than merely reflect, social norms, attitudes, and beliefs alongside, and combined with, non-penal policy-making tools in contested domains. Four operational conditions of legitimacy are identified and discussed. Within such operational boundaries, this article contends that the criminal law can play an important role in promoting social change—i.e., the establishment

*Alessandro Corda is a Lecturer in the School of Law at Queen's University Belfast and a Fellow at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School. His research interests focus on criminal law, comparative criminal justice policy, sentencing and corrections, and the sociology of punishment. The author is grateful to the anonymous reviewers and to Antony Duff, Hadar Aviram, Richard McAdams, Robert Schehr, Julian V. Roberts, Michael Tonry, Adriana Rudling, and Taylor Derrien for their insightful comments on earlier drafts. The usual disclaimer applies. Please direct all correspondence to Alessandro Corda, School of Law, Queen's University Belfast, Main Site Tower, BT7 1NN, Belfast, UK; A.Corda@qub.ac.uk

New Criminal Law Review, Vol. 23, Number 4, pps 584–635. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2020.23.4.584.

of new norms and values—as well as helping the coagulation of norms, attitudes, and beliefs not yet fully entrenched within the societal body.

Keywords: *functions of criminal law, criminalization, punishment, social change, penal policy*

INTRODUCTION

What the law does and communicates has a tremendous power to shape the lives of individuals and society as a whole. Legislatures regularly enact statutes in the effort to change existing social norms, values, and attitudes, and not simply reflect and reinforce already established ones. The aim is to modify the way people—including those in charge of applying and interpreting the law—think and behave.[1] However, this approach to policy making faces peculiar challenges when it comes to the criminal law in light of its unique ability to coerce and condemn individuals through the imposition of hard treatment and stigma. Such distinctive characteristics have prompted many scholars to speak against the excessive use and overreach of the criminal law and in favor of limiting criminalization and punishment as much as possible to conduct that is plainly immoral or, at least, widely and strongly disapproved and condemned by the community according to deep-seated values and beliefs.

As Antony Duff argues, ideally to the citizens of a polity the criminal law should resemble as close as possible a code of ethics identifying shared values and principles that apply to all constituents.[2] A majority of scholars today advocate, whether explicitly or implicitly, for

1. *See, e.g.*, Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. Rev. 967, 972 (1997) ("Lawmaking has at least five general goals: (1) To create new rights and remedies for victims; (2) To alter the conduct of the government; (3) To alter the conduct of citizens and private entities; (4) To express a new moral ideal or standard; and (5) *To change cultural attitudes and patterns.*") (emphasis added). Jeremy Bentham is rightly considered the "prophet of rational social change through legislation." Philip Allott, *The True Function of Law in the International Community*, 5 Ind. J. Global Legal Stud. 391, 411 (1998). Bentham's principle of utility provides the foundation of the science of legislation as a means to achieve rational and organized social change.

2. R.A. Duff, The Realm of the Criminal Law 87–91 (2018).

a *minimalist* account[3] aiming for a criminal law that is (1) primarily concerned with those conducts offensive of the *ethical minimum* of a given society[4] expressing the "shared beliefs of what is truly condemnable"[5] and (2) used only as a *last resort* in contrasting unwanted behavior.[6] For this literature, therefore, the criminal law should be used parsimoniously and employed primarily to respond to violations of deeply held social norms "whose recognition is so important to us as a community of shared values that we consider [their] violation to require recourse to penal law."[7]

---

3. The ambiguous nature of expressions such as "core criminal law" and "ordinary criminal law," unable to clearly indicate the dividing border between the center and the periphery, advises against their use. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 60, 119 (2008), speaks of a "*minimalist* approach to criminal law," stressing that wrongfulness, harm, and culpability constraints should inform any theory of criminalization which calls itself respectable (noting, e.g., that "[r]educing the number of *mala prohibita* offenses would represent major progress toward achieving a minimalist criminal law."). *See also*, among others, JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 73 (9th ed. 2019) (calling criminal law minimalism a "humanitarian principle"); ARLIE LOUGHNAN, SELF, OTHERS AND THE STATE: RELATIONS OF CRIMINAL RESPONSIBILITY 51 (2020) (defining a minimalist criminal law as "most appropriate" for political, economic, and social systems informed by the values of liberalism); Mike C. Materni, *The 100-plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law*, 18 NEW CRIM. L. REV. 331 (2015) (tracing a historical genealogy of the account dating back to the classical model of liberal criminal law rooted in the work of Cesare Beccaria, which greatly influenced both Blackstone's and Bentham's writings on the subject).

4. For this notion, see GEORG JELLINEK, DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT UND STRAFE 42 (1878) (identifying the "ethical minimum" embodied in legal provisions as a set of normative, fundamental principles enjoying popular approval and essential for living in and as a society).

5. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 474 (1997).

6. For the *ultima* (or *extrema*) *ratio* principle, the criminal law must be employed only when other types of legal or non-legal sanctions prove inadequate, alone or combined, to achieve a desired objective. *See* Douglas Husak, *Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004); Nils Jareborg, *Criminalization as Last Resort (*Ultima Ratio*)*, 2 OHIO STATE J. CRIM. LAW 521 (2005).

7. Günter Stratenwerth*, Zur Legitimation von "Verhaltensdelikten"*, *in* MEDIATING PRINCIPLES: BEGRENZUNGSPRINZIPIEN BEI DER STRAFBEGRÜNDUNG 157, 162 (Andrew von Hirsch, Kurt Seelmann, & Wolfgang Wohlers eds., 2006), cited and translated by Wolfgang Wohlers, *Criminal Liablity for Offensive Behaviour in Public Spaces*, *in* LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH 247, 258 (A.P. Simesterm & Antje du Bois-Pedain eds., 2014).

As Henry Hart pointed out in his classic article *The Aims of the Criminal Law*, the main task of criminal law legislation is that of making a "sound job of *reflecting* community attitudes and needs."[8] In Hart's words, "What distinguishes a criminal from a civil sanction is . . . the judgment of *community condemnation* which accompanies and justifies its imposition."[9] This view of the criminal law asserts that penal statutes (and their enforcement) first and foremost reflect and uphold an infrastructure of community norms, attitudes, and beliefs it neither shapes nor contributes to building. The main social function of the state's punitive power would be "to *preserve* the framework of values perceived as necessary to the maintenance, stability and peaceful development of the community."[10] Socialization, it is argued, takes place primarily in settings like families, schools, churches, and other organized groups.[11] The criminal law is thus described as unable to do the heavy lifting and inherently backward-looking, endorsing and reinforcing norms, values, and attitudes already affirmed within a given society. Accordingly, in its reinforcing of preexisting social norms and values, the role of the criminal law would be primarily "to make people do what society regards as desirable and to prevent them from doing what society

8. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958) (emphasis added).

9. *Id.* at 404 (emphasis added). *See also* James B. Jacobs, *The Community's Role in Defining the Aims of Criminal Law*, *in* IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW" 119, 122, 123, 124 (Timothy Lynch ed., 2009) (noting that, for Hart, "it is the legislature's job to discern community values; where legislators find community condemnation, they should create criminal laws."). Jacobs, observing that Hart's article offers a jurisprudential rather than socio-legal contribution, asks, among others, the following two questions, extremely relevant to the discussion in this article: (1) "Would Hart think it permissible for a legislator to campaign for (and vote for) a new criminal law that is not yet, but might soon be, supported by majority or supermajority community condemnation?"; (2) "Is a criminal law ever warranted when majority opinion does not support it?"

10. NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 176 (1988) (emphasis added) (the author also notes that criminal law is "one important means of upholding framework values . . . instituted as a response to behaviour which directly violates socially acknowledged fundamental interests in such a way as to express rejection of or hostility to the values underlying those interests.").

11. *See, e.g.*, DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 276 (1990); EDGARDO ROTMAN, BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS 64–65 (1990); MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 161 (2004).

considers undesirable."[12] This view entails that the criminal law should, as much as possible, limit its intervention to cases where a certain social norm has become so significant and has reached such a widespread consensus within society to justify its protection by means of penal sanctions. As a result, from this perspective the criminal law does not seem to be particularly apt when it comes to actively participating in the norm-shaping process but mostly intervenes *ex post* to ratify shifts that already happened.[13]

---

12. Wayne R. LaFave, Criminal Law 26 (4th ed. 2003). It must be noted that the criminal law is not unanimously regarded as a means of formal social control premised on a widespread societal consensus. Authors writing from other perspectives view things in a much different way. For example, scholars writing from a Marxist standpoint view criminal law as a reflection of the interests of the ruling class and as a means of ensuring the continuation of that dominant class's power. Others see the criminal law primarily as a means to discipline and control certain groups of people, such as ethnic minorities or the poor. *See*, *e.g.*, respectively, William J. Chambliss, *Toward a Political Economy of Crime*, 2 Theory Soc. 149 (1975); Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009).

13. This perspective resonates with Émile Durkheim's discussion of criminal law and the set of shared beliefs, ideas, attitudes, and knowledge that are common to a given society. *See* Émile Durkheim, The Division of Labor in Society 81 (Free Press ed., 1964) (1893) ("[W]e must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it."); for Durkheim, therefore, before its boundaries are modified, the criminal law must await the occurrence of a change in the collective consciousness. In the "Socrates section" of The Rules of Sociological Method 71 (Free Press ed., 1964) (1895), Durkheim maintains that crime is not only normal for society, but also that without crime there could be no evolution in law. It is certainly true that, in both of the cited works, Durkheim emphasizes the ability of the criminal law to adapt to changing social mores and also acknowledges that one of the latent functions of criminal law is to cyclically re-examine and change norms that no longer serve society. However, these points neither deny nor contradict what he notes about the slow and laborious process characterizing the modification of the criminal law. In particular, in The Division of Labor, *supra* this note, at 77–78, Durkheim observes,

> The collective sentiments to which crime corresponds must . . . singularize themselves from others by some distinctive property; they must have a certain average intensity. Not only are they engraven in all consciences, but they are strongly engraven. They are not hesitant and superficial desires, but emotions and tendencies which are strongly ingrained in us. The proof of this is the extreme slowness with which penal law evolves. Not only is it modified more slowly than custom, but it is the part of positive law most refractory to change.

Accord Roger Cotterrell, Émile Durkheim: Law in a Moral Domain 73 (1999) (observing that "[f]or Durkheim penal law is stable and enduring because it is firmly

That said, over time the criminal law has become more and more involved in addressing social problems that, it is argued, should instead be dealt with primarily through non-penal measures.[14] Scholars have long identified the overreliance on criminal law for addressing a whole range of social problems as one of the main pathologies of contemporary criminal justice systems.[15] The overall picture, however, is more

---

grounded in the most fundamental shared beliefs and sentiments of the society in which it exists."); Durkheim's mistakes about the historical trajectory of legal change do not vitiate his account of the criminal law's functional relations to social mores. Even modern societies where no monolithic *conscience collective* exists do not abandon the tendency toward constructing "a shared framework of values as meaningful as possible to as many as possible." Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 843 (2000).

14. This aspect represents a facet of the so-called *overcriminalization* phenomenon defined as the constantly growing number of criminal laws citizens are required to observe, which often goes hand in hand with over-enforcement and over-punishment. For an overview of perspectives on overcriminalization, see generally Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17 (1968); HUSAK, *supra* note 3; Erik Luna, *The Overcriminalization Phenomenon* 54 AM. U. L. REV. 703 (2005); JESÚS-MARÍA SILVA SÁNCHEZ, LA EXPANSIÓN DEL DERECHO PENAL: ASPECTOS DE LA POLÍTICA CRIMINAL EN LAS SOCIEDADES POSTINDUSTRIALES (1999). Especially over the past century, as societies became more complex and criminality evolved alongside technology, legislatures have passed an exponential new amount of criminal statutes. Not only have new penal laws been enacted to tackle traditional crimes committed by means of new platforms made available by technological development (think, for example, of many new cybercrimes that, in fact, are new modes of committing "old-fashioned" property and fraud offenses); the efflorescence of so-called regulatory offenses has also been widely brought to attention as one of the main causes of the overcriminalization phenomenon. For a more nuanced approach to the traditional distinction between *mala in se* and *mala prohibita*, see Stuart P. Green, *The Conceptual Utility of* Malum Prohibitum, 55 DIALOGUE 33, 43 (2016) ("Thinking of *malum prohibitum* and *malum in se* as scalar qualities that characterize all criminal offenses to one degree or another, rather than as discrete categories into which offenses can be placed, offers a useful tool for assessing the moral content of criminal offenses."). It must be noted that the overcriminalization hypothesis is, at times, questioned because, as DUFF, *supra* note 2, at 1, observes, "it is surprisingly hard to determine just how many new offences are created each year, or how significantly the rate of crime-creation has increased in recent decades."

15. *See*, *e.g.*, Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 528 (2019) (criticizing "the continued reliance on criminal law as the regulatory tool of choice" to address societal problems); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 40–44 (2011) (describing the paradox of "neoliberal penality": on the one hand, free market ideology implies limited government in the economic sphere premised on the alleged

complicated than it might appear. Influential authors writing from a socio-legal and historical perspective have injected a robust dose of skepticism into the debate over the legitimate scope and functions of the criminal law. For these scholars, the debate surrounding the role and ambit of penal statutes should move away from a hyper-abstract approach rooted in almost unshakable basic moral principles and values. Rather, it is argued, a historical analysis of the development of the criminal law reveals the inherently contingent nature of patterns of criminalization, attribution of criminal responsibility, and punishment—and this even in regard to what are traditionally considered as core and immutable crimes.[16]

As to the use of the criminal law as an agent of change, Lindsay Farmer in particular contends that, beginning with the rise of the legislative state toward the end of the eighteenth century, various transformative programs have been advanced by means of the criminal law. As he notes, historically "an increase in the capacity of the state to do good"[17] led to a use of criminal law as "a dynamic instrument for dealing with social problems"[18]

---

incompetence of the state in this domain; on the other hand, recent decades have witnessed the growth of an expansive state apparatus when it comes to regulating through criminal law). The extensive criminalization of homelessness and the hyper-penal regulation of public spaces, frequently in a "creative" fashion, provide, among many, telling examples. On the philosophical justifications and implications of using the criminal law for regulatory (broadly conceived) purposes, see Victor Tadros, *Criminal Law and Regulation*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 163 (R.A. Duff, Lindsay Farmer, Sandra E. Marshall, Massimo Renzo, & Victor Tadros eds., 2010). That being said, this is not to deny that, as noted by DUFF, *supra* note 2, at 1, "at least some new offences seem to be created for very good reasons." Duff makes the example of two offenses of recent creation, stalking and revenge porn, "kinds of conduct that surely deserve to be marked and treated as criminal.").

16. *See* LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER 298 (2016) (emphasizing, from a historical perspective, contingent social institutions over abstract moral questions and stressing the "paradox of the modern criminal law," which, "despite being shaped by a liberal sensibility about the scope of state power and the desire to respect individual rights and liberties," has constantly expanded its reach over the past two centuries). *See also* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1359 (2001) ("Views of wrongdoing and culpability vary over time and context so that injurious acts that once were *damnum absque injuria* become *malum prohibitum* and even *malum in se* offenses. . . . Our social judgments of when injurious acts become *wrongdoing*, and wrongdoing becomes *culpable*, hinge on contextual and ideological influences.").

17. FARMER, *supra* note 16, at 94.

18. *Id.* at 89.

and "for civilizing society."[19] In his opinion, "the view of the criminal law as an instrument of social change persists,"[20] although "[t]he precise terms in which issues are raised and in which the resort to criminal law is justified has shifted in response to changing demands on the law."[21] This is confirmed by the fact that, in recent decades, criminal law has regularly become a major battleground and platform for social change. Social movements, ranging from feminist and LGBTQ+ groups to environmental and animal rights advocates and beyond, have increasingly turned to the criminal law as a vehicle and instrument for social change. Expanding criminalized conducts, making punishment harsher, and/or making law enforcement more responsive have been viewed as effective means of appealing to popular sentiment and fostering social transformation.

Hadar Aviram has effectively dubbed this trend in contemporary penal policy "progressive punitivism," a phenomenon "shar[ing] many overall laudable social goals with other projects of progressive reform, such as fostering equality and diversity, fighting oppression and enfranchising the powerless," but characterized by its "unique . . . reliance on the traditional toolbox of the criminal process as an avenue for social change."[22] In such cases, the criminal law does not necessarily "track the community's judgments about what is sufficiently condemnable to be criminal"[23] but is utilized to innovate, thus "deviat[ing] from [already established] community views."[24] This use of the criminal law clearly unsettles the aspiration of those who think that the task of legislatures passing criminal statutes—and, with due differences, of actors involved in their application[25]—should not be to impose new views on society, but rather "to give more adequate and

---

19. *Id.* at 64.

20. *Id.* at 298–99.

21. *Id.* at 298.

22. Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 204 (2020) (discussing carceral feminism in the context of the #MeToo movement and hate crimes as notable examples of areas in which the idea of progressive punitivism has gained significant popularity in recent years).

23. Paul H. Robinson, *Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform*, *in* THE STRUCTURES OF THE CRIMINAL LAW 186, 186 (R.A. Duff, Lindsay Farmer, Sandra E. Marshall, Massimo Renzo, & Victor Tadros eds., 2011).

24. *Id.*

25. *See*, *e.g.*, with particular regard to courts, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 2 (1991) (noting that "courts seemingly have become important producers of political and social change.").

practicable expression to the values that already structure the community's life and understanding."[26]

The tension between the two described accounts is apparent as far as the proper reach and legitimate role of the criminal law are concerned. This calls for a reflection on the abstract legitimacy and concrete suitability of what in this article is referred to as the "transformational function" of the criminal law.

This article argues that criminal law does not only preserve but can also have a significant role as a norm-shaping force and presents an account that contributes to the debate on what is permissible for the criminal law to try to achieve. It does so by developing a framework aimed at untangling the issue of using the criminal law as a policy-making tool in contested domains. In detail, the article first offers a contribution to the theoretical substantiation of the notion of "transformational function" of the criminal law, understood as the use of criminalization and punishment in the effort to change, rather than merely reflect, social norms, attitudes, and beliefs. This transformational function concerns the establishment of new social norms as well as the coagulation of norms, attitudes, and beliefs not yet fully entrenched within the societal body. The distinction between "criminalization" (defining something as an offense) and enforcement activities (what is usually meant by "deploying the criminal law" against actual people) is crucial and will be duly explored.[27] Following that, the article puts forward and discusses operational boundaries that should limit the use of the criminal law when resorted to for transformational purposes, in the attempt to identify when it can be legitimate—i.e., acceptable and justified—to employ criminalization and punishment to promote change in social norms alongside, and combined with, non-penal policy-making instruments.

---

26. R.A. Duff, Punishment, Communication, and Community 59 (2001). A number of competing definitions of "community" can be identified. In this article, the reference is to the people who are considered as a unit because of largely shared moral principles, norms, beliefs, and values in the context of the public life of a given society. As Duff, *supra* note 2, at 147 observes, "We are bound by and answerable under the criminal law (paradigmatically) as citizens—members of a political community." The notion of "community" adopted in this article fully acknowledges that it should not be seen as a static object, but rather understood dynamically as a matter of different social relations at various levels posing different regulatory problems. For this analysis, see Roger Cotterrell, *Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory*, *in* Living Law: Studies in Legal and Social Theory 17 (Roger Cotterrell ed., 2008).

27. *See infra* Part I and Part III.A.

This article enriches existing law and social norms scholarship as well as the literature on the functions of criminal law by developing a non-wholly expressive or symbolic account. For the sake of clarity, it is important to underscore that this article does not assert the transformational function as a descriptive claim. Thus, it does not aspire to show that the criminal law does, as an empirical matter, transform social norms.[28] Rather, the article makes a normative claim—that the criminal law can sometimes, under certain conditions, play a valuable transformational role—and is structured as a model about when it is legitimate to try to transform norms, attitudes, and beliefs through criminal law.

The article proceeds in three parts. Part I defines and discusses the notion of "transformational function" of the criminal law. Part II illustrates a significant early example of using the criminal law with the goal of fostering social change: the punishment of so-called genuine omissions (also known as Bad Samaritan laws), originally enacted, alongside other legislative measures, to help establish the value of social solidarity at the dawn of the welfare state, particularly in continental Europe. Part III considers when the criminal law can be legitimately employed to foster change in social norms and attitudes in the context of contemporary penal policy making. In particular, four operational conditions of legitimacy for the criminal law to be used under the proposed framework are identified and discussed, namely: (A) that a transformational use of the state's penal power is not supposed to constitute another way to deploy the criminal law for merely symbolic purposes; (B) that using the criminal law for transformational purposes should not amount to an unwarranted form of social dirigisme; (C) that a transformational function of the criminal law should not translate into a use of the defendant merely as a means to an end, in pursuit of consequentialist goals; and (D) that the criminal law should not be utilized to impose partisan moral views relating to the standards of right

28. Besides, no unanimous agreement exists on how one would measure social norms before and after a specific change in the law. Law and society literature has struggled to offer generalizations and establish clear causal arrows, since it is nearly impossible to carry out controlled experiments for this purpose. For this debate, see, among others, Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 Law & Soc. Inquiry 435 (1996); Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .)*, 21 Law & Soc. Inquiry 457 (1996); Johnathan Simon, *Law after Society*, 24 Law & Soc. Inquiry 143 (1999); Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 Wis. L. Rev. 171.

and wrong behavior limiting individual rights, liberties, and prerogatives in the context of democratic pluralistic societies.

I. DEFINING THE TRANSFORMATIONAL FUNCTION OF THE CRIMINAL LAW

A preliminary issue must be addressed prior to the discussion of the relationship between criminal law and social change. Throughout the article, the term "criminal law" is employed to refer to *both* criminalization and punishment. Criminalization and punishment are conceptually distinct legal processes as well as distinct social and cultural practices.[29] From this follows that the aims and functions of criminalization (the legislative action of turning a certain behavior into a criminal offense) do not necessarily coincide with those of punishment (the judicial imposition of a criminal penalty for an offense), and vice versa. Nonetheless, it is undeniable that penal statutes contain two inseparable elements: the definition of prohibited conduct and a penalty for infraction. Criminal penalties are, in principle, inseparably intertwined with the decision to criminalize a particular conduct.[30] The upholding of social norms and values and the protection of individual and collective interests deemed especially relevant by means of criminalization rely significantly on the imposition of punishment.[31]

The criminal law structurally "operates as the ground for authorizing state punishment"[32] and is "framed in terms of imposing punishment for

29. *See* GARLAND, *supra* note 11, at 16–22; FARMER, *supra* note 16, at 21–22. At times, the term "criminalization" is used by some to refer to both the enactment of new crimes *and* the enforcement of penal statutes, this way inaccurately conflating the two concepts.

30. Pathologies at the enforcement level or the occasional existence of special rules (for example, functional and personal immunities from prosecution) breaking the chain between criminalization and punishment do not seem enough to contradict this assertion.

31. Obviously, one should not forget about the importance of the criminal trial and the public dimensions of the criminal process generally. If people are seen to be prosecuted and convicted, that might make a difference even before punishment is imposed and carried out. On the significance of public criminal trials for substantive criminal law, see R.A. Duff, *Relational Reasons and the Criminal Law*, in 2 OXFORD STUDIES IN PHILOSOPHY OF LAW 175, 195–96 (Leslie Green & Brian Leiter eds., 2013).

32. Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO STATE J. CRIM. LAW 407, 409–10 (2008).

bad conduct."[33] Consequently, criminalization not followed by punishment of violators does not completely fulfill the purposes of the criminal law as the branch of the legal system setting boundaries of conduct for individual behavior in society. That said, it must be noted that even criminal statutes that remain a dead letter can still have impactful outcomes. For example, so-called sodomy laws criminalizing homosexuality in the United States, although largely unenforced, nonetheless caused lesbians and gays to self-police given their shaping effect on the public's understanding of homosexuality.[34] At the same time, enforcement gaps, as well as the symbolic meaning of modifying the criminal law if enforcement does not follow, generate their own consequences.[35]

After this necessary premise, let's move on to the discussion of the criminal law as an instrument of social change. Especially during the second half of the twentieth century, scholars calling for "a more restricted understanding of the scope of the criminal law"[36] have, to a significant extent, rebooted the discourse about the social functions of criminalization and punishment. Therefore, it is not surprising that, over the past decades, the relationship between criminal law and social change has been addressed in a rather disjointed manner in scholarly work dealing with theories and functions of penal law and frequently viewed in problematic terms.

In the 1960s, Nigel Walker discussed the concept of "declaratory function" of the criminal law, arguing that, independent of any deterrent effect, the criminal law may perform, among others, "the function of telling members of a society what is regarded as undesirable conduct, and so of influencing their moral attitudes to certain types of behaviour."[37] In the

---

33. LaFave, *supra* note 12, at 26. This explains why the debate on the functions of the criminal law as a whole is not infrequently conflated with the debate on the purposes of punishment. *See*, *e.g.*, the interesting observations by Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 10–45 (2006).

34. *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643 (2001). Sodomy laws also made gay people targets for physical assaults sometimes "perpetrated as de facto enforcement of sodomy laws . . . by both private individuals and police officers." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 110 (2000).

35. See the discussion *infra* Part III.A.

36. Farmer, *supra* note 16, at 299.

37. Nigel Walker, *Morality and the Criminal Law*, 11 How. J. Crim. Just. 209, 213 (1964). It must be noted that Walker may have been the first to use this terminology, but the idea is much older and can be found in writers like Bentham. Other scholars have developed

1970s, Johannes Andenaes discussed the role of the criminal law as a "moral eye-opener."[38] In his view, the threat of punishment would not merely deter individuals through fear and force them into compliance but might also exert a *pedagogically educative* function in making individual consciences more sensitive toward certain issues. Later in his analysis, however, the author seems rather skeptical of such a hypothesis because "the moral sentiment shapes criminal law more than the other way round."[39] In the early 1990s, in his discussion of general prevention, Thomas Mathiesen listed "moral education" and "habit formation" among the functions of the criminal law.[40] These discussions can hardly be seen as attempts to fully conceptualize the criminal law as, at least potentially, a relevant vector of social change. In fact, they may well be understood as other labels to refer to the so-called norm confirmation function, contending that the criminal law is not supposed to accomplish much in terms of value shaping.[41]

Notably, whereas the criminal law and its application certainly represent an authoritative expression of collective censure,[42] this does not necessarily entail that penal statutes and their enforcement are merely supposed to give voice to consensus rather than trying to lead it.[43] In recent decades,

---

expressive accounts of punishment focusing on the norm-projection function and the social meaning embodied in the criminal law. *See*, *e.g.*, Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHILOS. PUBLIC AFF. 208 (1984); Igor Primoratz, *Punishment as Language*, 64 PHILOSOPHY 187 (1989).

38. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 116 (1974).

39. *Id.* at 126.

40. THOMAS MATHIESEN, PRISON ON TRIAL: A CRITICAL ASSESSMENT 58–59 (1990).

41. The theory of *positive general prevention* developed in Germany and Scandinavia closely resembles the idea of norm confirmation through punishment as one of the main functions of the criminal law. *See* Gordon Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550, 552–53; Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 68–69 (1992); Markus D. Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 699–700 (2005). According to this theory, the function of the criminal law is to reaffirm and stabilize basic social norms of conduct. For such a reason, this theory may well be considered as neo-Durkheimian. *See* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1765 (1999).

42. Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965). *See also*, more recently, Dougal Husak, *The Price of Criminal Law Skepticism: The Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 36–38 (2020).

43. *Cf.* FARMER, *supra* notes 17–21 and accompanying text. See also the discussion *infra* in the introduction to Part III.

"expansionist" criminal law reforms have been pursued on several fronts, and with a range of different motives and agendas, to achieve social change. This represents an undeniable reality of present-day penal policy making in Western jurisdictions. In such cases, the criminal law leads moral consensus rather than just reflecting it. In what follows, I attempt to bring further light to this under-explored role of the criminal law, which in this article is termed "transformational function."

In the late 1960s, legal theorist Norberto Bobbio coined the term "promotional function" of law to describe a new function of legislation in the context of modern welfare states. Bobbio uses the term "modern welfare states" to indicate legal systems putting not only the protection, but also the promotion of certain rights, principles, and values at the core of their constitutional and policy agendas[44]—a framework that characterizes all contemporary Western democracies.[45] As Bobbio observes, in classical liberal legal systems, "the main function of the state seems to be a protective (or guaranteeing) one."[46] Hence, until the nineteenth century, the legal system was seen as quintessentially and primarily performing a function of social control through either safeguarding or repressive measures. On the contrary, in modern welfare states (as defined above), "the promotional function appears frequently in juxtaposition to the protective or guaranteeing role."[47] The contrast between *encouragement rules* (positive

44. *See*, *e.g.*, art. 3(2) of the German Federal Constitution ("Men and women shall have equal rights. The state *shall promote* the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist."); art. 3(2) of the Italian Constitution ("It is the duty of the Republic to *remove those obstacles* of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country."); art. 6 of the French Constitutional Charter on the Environment ("Public policies *shall promote* sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.") (emphasis added).

45. The United States is no exception. *See*, *e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990) (explaining how, during the twentieth century, American society has experienced a "rights revolution" leading to a new commitment by the national government to promote rights and interests that were simply unknown to the founding generation—from environmental and anti-discrimination protections to minority rights policy and "affirmative action" legislation and practices).

46. Norberto Bobbio, *The Promotion of Action in the Modern State*, *in* LAW, REASON, AND JUSTICE: ESSAYS IN LEGAL PHILOSOPHY 189, 198 (Graham Hughes ed., 1969).

47. *Id.*

sanctions)—like rewards and incentives—and *discouragement rules* (negative sanctions)—civil and criminal penalties—lies at the very core of Bobbio's notion of the promotional function of law.[48]

Positive sanctions, in his view, represent a noble and, above all, effective means to achieve policy objectives in a way that is seen as precluded to negative sanctions generally, and criminal penalties in particular. The former ones are indicated as the ideal means to promote and foster social change, whereas the role of the latter is mainly to safeguard the existing social structure and norms. As he writes,

> In a repressive system, the typical indirect technique will of course be one of discouragement, while in a promotional system it will be one of encouragement. . . . In any functional analysis of society, the two categories of *conservation* and *change* are always important. When we consider discouragement rules and encouragement rules from a functional standpoint, the essential feature to note is that the former are eminently fitted for the purpose of social conservation and the latter for social change.[49]

Bobbio thus seems to exclude categorically the criminal law from the branches of the law capable of performing a transformational function. He supports the view of penal statutes as tools of social conservation. At first glance, the answer to the question "Can you innovate through punishment?" seems to be negative. Similarly, the very idea of promoting social change by means of the criminal law appears as a sheer oxymoron. Yet, at a closer look, it must be noted that the categories of social conservation and social change refer to the *functions* of law. Hence, *per se*, said categories do not say anything about the *techniques* used to pursue preservation or innovation of the status quo. This means it would be inaccurate to discuss the transformational potential of law solely through the lenses of the type of sanctions—positive or negative—being used. Negative sanctions cannot be aprioristically ruled out as not capable of having transformative potential. Furthermore, no absolute generalization can be made about rewards being inherently preferable to and/or incompatible with punishment under all circumstances.[50] Rather, as noted by Joachim

48. In regard to positive sanctions, think, e.g., of contractors with a good equal employment record or high achievements in poor neighborhoods being given preference by the government in bidding procedures.

49. Bobbio, *supra* note 46, at 200–01 (emphasis in original).

50. *See* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 82 (1975) ("[T]here is no reason to believe that *all* forms of reward are superior to *all* forms of

Savelsberg, "Criminal law and an appropriate sanctioning apparatus are a constituting element of all existing welfare states. Positive . . . and negative . . . sanctions and their associated institutions must therefore be seen as interrelated."[51] In many contexts, the two types of legislative measures do not merely coexist but act jointly to achieve relevant policy objectives, including transformational ones.[52] There is no inconsistency in providing positive incentives to encourage appropriate conduct while at the same time using the criminal law to punish conduct deemed inappropriate.

These arguments support the following conclusion: the relationship between criminal law and social change cannot be seen as exclusively unidirectional, with social change, variously fostered through non-penal measures, unambiguously shaping the criminal law. Instead, the criminal law may also actively "help shape the overarching culture and contribute to the generation and regeneration of its terms."[53] To say that the criminal law can act as an agent influencing culture[54] entails that criminalization and punishment can have a significant role in influencing "the way we are."[55]

---

punishment for *all* acts. . . . Any sweeping generalization will no doubt turn out to be wrong."); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 18 ("By characterizing a behavior as good or bad rather than just inexpensive or expensive, the authority figure indicates need for a fundamental change in the basis upon which the affected person makes decisions. Different types of punishments, rewards, and methods of education may vary in their cost and effectiveness in shaping preferences."). It must be noted that Bobbio himself subsequently recanted in part his original position, conceding that it would be inaccurate to define the promotional function of law solely based on the type of sanction being used (positive-reward *vs.* negative-punishment). *See* Norberto Bobbio, *La Funzione Promozionale del Diritto Rivisitata*, 11 SOCIOL. DIR. 7, 21 (1984).

51. Joachim J. Savelsberg, *The Making of Criminal Law Norms in Welfare States: Economic Crime in West Germany*, 21 LAW & SOC'Y REV. 529, 530 (1987). The category of "negative sanctions" has different layers and options that may operate gradually. *Cf. also* Dau-Schmidt, *supra* note 50, at 23 (observing that "criminal law was created and superimposed on top of the structure of tort law" to deal with cases where damages are not sufficient to shape people's attitude). From this angle, the negligence concept in torts can be cited as another example of transformational use of "negative" sanctions. The law hopes to educate people to be more careful through remedies leveled against careless persons.

52. A notable historical antecedent of such a combined strategy can be found in ancient German law, which provided for punishment in case of noncompliance with certain duties and reward in case of compliance with such duties (so-called *punishment-and-reward* statutes). *See* FRIEDRICH OETKER, STRAFE UND LOHN (1907).

53 GARLAND, *supra* note 11, at 248.

54. *Id.* at 276

55. *Id.*

This means that the criminal law does not inescapably solely reflect a preexisting moral consensus but can also participate in generating a new one. Accordingly, the relation between criminal law and social change is best described as a "two-way process" and an "interactive relationship."[56] Social norms *generally* shape the criminal law, but the opposite—the criminal law fostering social change and helping shape social norms, cultural values, and beliefs—also happens, though admittedly with lower magnitude and frequency.

Authors arguing for a minimalist account agree that in a liberal-democratic state there must not be a criminal law acting as a "pioneer" of social transformations.[57] However, criminal law and penal policy are not just about already shared norms and beliefs within a given community, but also about how we continue to *redefine* "ourselves and our society."[58] Just like any other branch of the law, the criminal law, acting as a policy-making tool, may therefore contribute to the "cultural formation of the society in which it operates."[59] The transformational use of the criminal law can take multiple forms: criminalization of new conducts and sentence enhancements for already existing offenses, but also variations in the enforcement of preexisting provisions within specific contexts, previously considered as safe harbors vastly immune from any risk of prosecution. In these forms, the criminal law can play an important role as one of the drivers in changing social norms as well as helping the affirmation of norms, values, and attitudes not yet fully established within the societal body. After showing that, in abstract terms, the criminal law does possess the potential to perform a transformational function, the question becomes the following: When, or under what conditions, is it legitimate to deploy the criminal law for transformational purposes?

---

56. *Id.* at 248.

57. Hans-Ludwig Günther, *Die Genese eines Straftatbestandes: Eine Einführung in Fragen der Strafgesetzgebungslehre*, 18 JURISTISCHE SCHULUNG 8, 11 (1978). This is the position of those who support, more or less explicitly, a criminal law closely linked to values, norms, and beliefs that already enjoy widespread and deep-seated popular consensus. *See supra* notes 3–10, 12–13, and accompanying text.

58. GARLAND, *supra* note 11, at 276 (emphasis added).

59. David Garland, *Punishment and Culture: The Symbolic Dimensions of Criminal Justice*, 11 STUD. L. POL. & SOC'Y 191, 191 (1991).

II. SOCIAL SOLIDARITY AND THE CRIMINALIZATION OF FAILURE TO PROVIDE ASSISTANCE: AN EARLY EXAMPLE OF TRANSFORMATIONAL USE OF THE CRIMINAL LAW

Beginning in the nineteenth century, governments actively started to resort to the criminal law as a means to promote social welfare. In times of rising penal welfarism, responsibilities were changed to create new duties for citizens.[60] Before discussing the proposed framework through which the criminal law can be legitimately utilized to perform a transformational function fostering social change, it is helpful to illustrate and discuss a significant early example of using the criminal law with the goal of reshaping social norms—the imposition of criminal liability for failure to help and assist someone in immediate danger.[61] This example does not illustrate or comply with the operational conditions set forth in Part III. It rather serves the function of illustrating (1) that a transformational use of the criminal law is a feature that predates contemporary penal policy, and (2) how the early use of the criminal law for transformational purposes operated and was justified by the state.

Particularly in continental Europe, in the context of the advent of the "social state" (*Sozialstaat*)—the predecessor of the modern welfare state that progressively supplemented, and to a certain extent superseded, the previously dominant mode of government informed and shaped by the

60. *See* NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS 145–47 (2016) (discussing the relationship between the welfare state, responsibility, and ideas of citizenship); FARMER, *supra* note 16, at 89–99 (discussing penal welfarism and how responsibilities were changed to create duties for citizens); Robert Reiner, *Citizenship, Crime, Criminalization: Marshalling a Social Democratic Perspective*, 13 NEW CRIM. L. REV 241, 250–52 (2010) (discussing welfare-oriented penality).

61. A distinction is usually made between two kinds of punishable omissions: (1) *simple* (or *genuine*) omissions; and (2) *pseudo* omissions (also known as crimes of *commission by omission*). In the former case, the duty to act derives from a generalized and mutual obligation between fellow members of the community in a broad sense (i.e., *anyone*, not only national citizens). The criminalization of failing to provide assistance to someone in immediate danger, being aware of such a danger, is the paradigmatic example of a genuine omission. In such a case, a person is punished for their failure to act, regardless of the consequences (death or non-fatal injuries) for the subject in danger. In the latter case, an individual is obliged to act and prevent any harmful consequence in light of a specific duty arising from their position or role (e.g., a parent with regard to the physical integrity of their children).

principles and values of classical liberalism[62]—new state interventions aimed at increasing the social welfare of citizens represented a response to address emerging phenomena such as urbanization following industrialization and population growth.[63] The idea of "social citizenship"[64] laid at the very core of this strategy. As part of this effort, promoting social solidarity as a key community value was seen as an important policy objective. This new approach was not limited to the economic sphere but also affected the legal regulation of social interactions. One of the goals being pursued was that of strengthening social cohesion in opposition to the social atomization typical of the laissez-faire ideology. Social solidarity represented a pillar of the rising social state. Its programs were based on a notion of risk sharing, binding the fates of lower and middle classes, the young and the old, the healthy and the sick. In short, legislation became "a systematic reference point in the construction and maintenance of social solidarity."[65]

These legislative efforts did not only focus on social programs like pensions or education. The potential of the criminal law as a propelling means to achieve some of the new welfare state goals was not overlooked by policymakers. Social solidarity was also promoted by means of "expanding and intensifying the duties of solidarity amongst the citizens whose breach might generate criminal responsibility."[66] Thus, alongside the inception of many social programs, continental models of the welfare state actively

62. *See generally* David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, 55 Eur. J. Sociol. 327 (2014).

63. *See generally* Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (1944). As noted by Stein Kuhnle & Anne Sander, *The Emergence of the Western Welfare State*, *in* The Oxford Handbook of the Welfare State 61, 65 (Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger, & Christopher Pierson eds., 2010), in the 1880s, innovative policies enacted in Germany (such as, e.g., the first pension plan) were furthermore intended as a top-town attempt "to secure the loyalty of the workers to the state."

64. Thomas H. Marshall, Citizenship and Social Class and Other Essays 10 (1950).

65. Franz-Xaver Kaufmann, *Towards a Theory of the Welfare State*, 8 Eur. Rev. 291, 295 (2000).

66. Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 New Crim. L. Rev. 452, 454 (2008). Historically, omission offenses arose first as duties to report crimes, expressing an obligation of strict loyalty and cooperation with the state. On failure to report crimes, see generally Andrew Ashworth, Positive Obligations in Criminal Law 60–65, 69–70 (2013).

resorted to the criminal law with a transformational purpose: promoting "the acceptance of reciprocal obligations of aiding the rest of the members of the community"[67] based upon a "communitarian notion of solidarity."[68] By the end of the nineteenth century, more than half of European jurisdictions "recognized a general duty to rescue punishable by criminal sanctions,"[69] and the trend continued well into the twentieth century.

Unlike continental Europe, the development of social solidarity remained largely marginal on the political, economic, and cultural agenda of the government in the United States, where the values of liberty and individualism have historically played a dominant role.[70] The attachment and commitment to these core values are well reflected in the way omissions are viewed and regulated by U.S. criminal law. Bad Samaritan laws—provisions that "oblige persons, on pain of criminal punishment, to provide easy rescues and other acts of aid for persons in grave peril"[71]—have been traditionally considered troubling above all for the diminution of individual liberty they entail.[72] The same is true of English criminal law, which

---

67. Francisco Muñoz-Conde & Luis E. Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461, 2473 (2007).

68. *Id.* at 2474. As Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 LAW Q. REV. 424, 424 (1989) effectively puts it, "the social responsibility view of omissions liability grows out of a communitarian social philosophy which stresses the necessary interrelationship between individual behavior and collective goods." Whereas punishing omissions is seen by some as inherently more intrusive than the punishment of positive acts (*see* notes 69–72 below and accompanying text), a different approach can thus be considered. In the case of genuine omissions, in particular, policymakers, through a transformative use of the criminal law aimed at promoting social solidarity, seemed to attribute to the members of the community what, in Hohfeldian terms, would be defined as a *claim-right*—in this case a right to have something done to one with a reciprocal/correlative duty on fellow community members. *Cf. generally* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter W. Cook ed., 1919); Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295 (2018).

69. Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 83 (2005).

70. In his discussion of the exceptional nature of the United States, SEYMOUR M. LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1996) observes that today "the nation's ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire."

71. Heidi M. Malm, *Liberalism, Bad Samaritan Law, and Legal Paternalism*, 106 ETHICS 4, 4 (1995).

72. *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 59 (1993); Joshua Dressler, *Some Brief Thoughts (Mostly*

reflects an approach still shaped for the most part by a laissez-faire attitude typical of classical liberalism.[73]

However, it is worth noting that early nineteenth-century conceptions regarding genuine omissions in continental Europe were not much dissimilar from those found to this day in common law jurisdictions. This is confirmed, for example, by the fact that the French Penal Code of 1810, inspired by liberal values such as individualism, was almost exclusively concerned with punishing positive acts rather than omissions. The drafters of the Code were influenced by the ideals of the Revolution and did not consider social solidarity a top priority. Meaningfully, in the well-known motto "liberty, equality, and fraternity," the reference to fraternity—today better understood as social cohesiveness or communitarianism—came last.[74]

Negative) About "Bad Samaritan" Laws, 40 SANTA CLARA L. REV. 971, 986 (2000). *See also* F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 653 (1965) (noting that a law imposing a duty of this kind "would invade an area which ought to be left to other forms of social control, or to personal moral judgment, without any outside interference."). With the exception of specific statutory duties to act based on the relationship with the potential victim, the general rule in the United States is still that "one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself." WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 225 (2nd ed. 2010). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 103 (7th ed. 2015). Only three U.S. states, Minnesota, Rhode Island, and Vermont, have enacted European-like Bad Samaritan laws that apply to any bystander who witnesses an emergency. Yet, unlike their European counterparts, which usually are felonies, U.S. provisions are generally classified and punished as petty misdemeanors. *See* Ken M. Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GEO. L. REV. 607 (2010); Jen Fifield, *Why It's Hard to Punish "Bad Samaritans"*, PEW CHARITABLE TRUSTS (Sept. 19, 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/09/19/why-its-hard-to-punish-bad-samaritans (last accessed June 22, 2020).

73. *See* A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE 73 (6th ed. 2016). *See also* A.P. Simester, *Why Omissions are Special*, 1 LEGAL THEORY 311, 333 (1995) (observing that protecting individuals' right to autonomy is a significant rationale for a restrictive approach to omissions liability). *But see* Andrew Ashworth, *A New Generation of Omissions Offences*, 2018 CRIM. L.R. 354 (discussing new types of omissions offenses introduced in England and Wales during the first two decades of the twenty-first century going beyond and against the standard common law presumption against omissions liability).

74. Andrew Ashworth & Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEG. STUD. 153, 155 (1990) (noting that, initially, the individual's right to liberty was prioritized over the concept of individuals having a moral responsibility to others

III. WHAT OPERATIONAL BOUNDARIES FOR USING THE CRIMINAL LAW TO PROMOTE SOCIAL CHANGE IN CONTEMPORARY PENAL POLICY?

Scholarship focusing on the relationship between the law and informal rules governing behavior has highlighted the extreme complexity of processes of norm formation and norm change in our societies. As social psychologist Deborah Prentice remarks, "Social norms change under many conditions. For example, norms change when laws change, when knowledge and evidence accumulate, when public awareness changes, when incentives change, and when the structures that regulate behavior change."[75] In addition to this, one should never forget that "individuals are heterogeneous in many respects, including norm conformity."[76] This complexity has been captured and discussed by an impressive body of scholarly work that one article cannot even attempt to summarize.[77]

As already noted in the introduction, this article does not seek to analyze the causal link between the use of the criminal law and changes in norms, attitudes, and beliefs at the societal level. Neither does it assert the transformational function of the criminal law as a positive, empirical claim. Examples discussed in what follows are not intended to support a descriptive claim that would be extremely hard to measure.[78] When it comes to successfully producing social change, criminal law sometimes succeeds and sometimes fails.[79] Rather, this article puts forward a normative account of

---

and society. Criminal liability for genuine omissions was introduced in the French legal system only in the 1940s).

75. Deborah A. Prentice, *Intervening to Change Social Norms: When Does It Work?*, 85 Soc. Res. 115, 135 (2018).

76. Cristina Bicchieri & Alexander Funcke, *Norm Change: Trendsetters and Social Structure*, 85 Soc. Res *Social Research* 1, 1 (2018).

77. For a useful overview discussing various transformative programs from a criminal law angle, see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. Crim. L. & Criminology 467, 475–89 (2003) (tracing a genealogy and mapping the law and norms field). *See also* Eric A. Posner, Law and Social Norms (2002) (arguing that the law is critical to promote good social norms and undermine bad ones).

78. *See supra* note 28 and accompanying text.

79. For example, with respect to dueling, Kwame Anthony Appiah, The Honor Code: How Moral Revolutions Happen (2010), argues in Ch. 1 that efforts to change norms through criminal law failed for decades, and dueling did not disappear until social norms changed independently.

when it is legitimate to try to transform norms through criminal law. The examples presented aim to illustrate and explore the operational boundaries of an acceptable and justifiable use of the criminal law for transformational purposes in contemporary penal policies.

As argued, besides norm reinforcing, penal statutes can also play a further function—one of cultural orientation in promoting or supporting the appreciation of new or emerging norms, values, or attitudes. To describe the criminal law merely as a form of conservative power—as such averse to change or innovation—is therefore "not to tell the whole story."[80] This means that the role of the criminal law is not limited to validating an existing hierarchy of social norms. It may also propose a new one. The relevant question then becomes not if, but under what conditions. As discussed above,[81] many scholars seem to agree that the criminal law should be utilized neither in the attempt to shape social norms nor to perform a propulsive function. A significant part of this scholarship sees the criminal law as primarily and quintessentially having a *protective* rather than promotional/transformational function, thus endorsing the idea that penal intervention should generally stand one step behind social change.[82]

---

80. GARLAND, *supra* note 11, at 193.

81. This scholarship suggests that no or very little room is left for a "propulsive" or "tranformative" function of the criminal law. *See*, among others, LACEY, *supra* note 10; LAFAVE, *supra* note 12; Hart, Jr., *supra* note 8, at 405 (describing criminal laws as embodying the "formal and solemn pronouncement of the moral condemnation of the community"); TONRY, *supra* note 11, at 69 (observing that "[s]tark shifts in social practices, including punishment, occur because many or most people in a time and place share perceptions and beliefs that justify them"); WINFRIED HASSEMER & FRANCISCO MUÑOZ-CONDE, INTRODUCCIÓN A LA CRIMINOLOGÍA Y AL DERECHO PENAL 169 (1989) (noting that the criminal law must address and deal with developments at the societal level critically, "reject[ing] any kind of social and political 'functionalization' conflicting with its own evaluative principles.").

82. Despite different theoretical angles and traditions, scholars in common law and continental jurisdictions alike are largely in agreement on this point. *See*, *e.g.*, Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 122, 136 (1999) (discussing the language of the highly influential 1962 ALI Model Penal Code and observing, "In the preliminary article, section 1.02, the drafters addressed the purposes of criminal law and stated, as the very first principle, the objective 'to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to [already established and recognized] individual or public interests.'"); Wohlers, *supra* note 7, at 254 (noting that in Germany, like in practically every civil law jurisdiction, in all criminal law commentaries and textbooks, "explanations of particular criminal prohibitions start by

Yet today's reality shows a rather different landscape. Penal statutes are not infrequently—indeed, increasingly—utilized to perform a more or less evident function that goes beyond reinforcing already established values, interests, and norms.

Criminal law and social change thus represent an odd couple. On the one hand, it is frequently claimed that criminal law should not shape or direct social change; on the other one, this position is seemingly contradicted when it comes to justify resorting to criminalization and punishment with a transformational purpose in a whole number of contested domains. Telling examples include: (1) the promotion of gender equality by making the criminal law address gender-related violence more harshly,[83] (2) the promotion of an official historical truth via the criminalization of historical denialism,[84] (3) the promotion of certain moral values and ideologies through the use of criminal law in the regulation of assisted reproductive technology,[85] (4) the promotion of business ethics in organizations by means of the threat of criminal penalties[86]—and counting. As these

identifying, at lesser or greater length, the legal good(s) that the norm seeks to *protect*.") (emphasis added).

83. *See*, *e.g.*, Aya Gruber, *Rape, Feminism, and the War on Crime,* 84 WASH. L. REV. 581, 585 (2009) ("Feminists hoped enlisting state prosecutorial power would improve the lives of individual women and change norms about female sexual agency, male dominance, and courtship behavior."); Monica Burman, *The Ability of Criminal Law to Produce Gender Equality: Judicial Discourses in the Swedish Criminal Legal System*, 16 VIOLENCE AGAINST WOMEN 173, 173–74 (2010) ("Enhancing criminal legal protection for women against gender-related violence and promoting gender equality were specified as the main purposes of the [1998 Swedish Women's Peace] reform.").

84. *See*, *e.g.*, EMANUELA FRONZA, MEMORY AND PUNISHMENT: HISTORICAL DENIALISM, FREE SPEECH AND THE LIMITS OF CRIMINAL LAW 30 (2018) (observing that, through criminalization of holocaust denial, the criminal law "plays a crucial role in establishing and imposing a collective memory. The criminal trial becomes a place for affirming historical truths considered significant to counteract revisionism and historical denialism").

85. *See*, *e.g.*, John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUMAN REPRODUCTION 1693 (2004) (noting how the 2004 reform passed in Italy imposed strict conditions on assisted reproduction, backed by harsh criminal law provisions, to promote conservative moral values at a time when Italian society as well as many other countries had become more accepting of techniques of assisted reproduction).

86. *See*, *e.g.*, Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 3 (1997) ("In recent years, federal and state laws have sought to promote good corporate citizenship by encouraging business entities to establish internal compliance programs designed to avoid—or at least

examples indicate, although the idea of resorting to penal provisions to achieve social change is often rejected on principled grounds of criminal law doctrine, the very same idea is then more and more frequently embraced in contemporary penal policy making and even supported in academic writings across the political spectrum.[87]

Drawing a bright line identifying when it is permissible and legitimate to use the criminal law to foster social change appears as an increasingly challenging task. Policymakers are by no means free from substantial constraints in the decision to resort to criminalization and punishment to promote new values, norms, and attitudes. It thus becomes important to discuss what conditions must be satisfied for using the criminal law with a transformative aim. In what follows, I argue that a transformational use of the criminal law as previously defined is legitimate when it satisfies the following four conditions:

(A) It is not purely symbolic, but rather outcome-oriented.
(B) It does not constitute an unwarranted form of social dirigisme/interventionism.
(C) It does not translate into a use of the defendant merely as a means to an end.
(D) It does not impose partisan moral views going against fundamental rights and principles of democratic pluralistic societies.

One important caveat is needed: the examples used in the sections below do not have the purpose of contending that the presented transformational feature of the criminal law always, and by definition, aims at liberal/progressive objectives and goals. Although this article does argue that the criminal law serves not only to sanction for harm but also has a system function capable of fostering social and cultural change, no general claim is

---

detect—illicit conduct. The most significant impetus toward effective internal corporate policing occurred in 1991, when the United States Sentencing Guidelines . . . made the existence of an 'effective' internal compliance program the *sine qua non* for receiving leniency upon conviction."); David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV, 1781, 1782–83 (2007) (discussing how, through threat of detection and punishment for violations of the law or codes of conduct, the 2002 Sarbanes-Oxley Act represented an attempt to promote honest conduct and legislate ethical behavior).

87. For example, think of #MeToo supporting academics calling for a tighter criminal regulation of sexual relationships. *See supra* note 22 and accompanying text.

made that any output of a transformational use of the criminal legal technology systematically enhances modernity's commitment to certain values. The opposite may also be true. The adjectives "transformational" and "promotional"—meaning-wise neutral—are thus not meant to suggest they always and necessarily point in a certain direction. System actors have their own interests, and those interests may, or may not, comport with more or less progressive values and goals.[88] The operational boundaries identified and discussed below aspire to act as effective constraints serving the purpose of preventing unacceptable and illegitimate uses of the criminal law in its role as one of the possible drivers of social change. That said, although it is important to be non-ideological and to not commit oneself to any contested political morality, undoubtedly some of the examples that will satisfy the four conditions set out in what follows would seem to be approved by liberals and progressives rather than by conservatives. This should come as no surprise: conservatives are, by definition, less prone to change. Furthermore, in many instances, transformational proposals coming from the conservative field argue for somewhat paternalistic policies that today are more and more seen as being in tension with important tenets of pluralistic democracies.[89]

A. A Non-Purely Symbolic Use of the Criminal Law

Advocates of the "expressive" function of law maintain that, regardless of any coercive dimension, legal norms can shape social norms and influence behaviors simply by what they say, that is by their public meaning,[90]

88. Outcomes will be based upon the confluence of political, economic, and cultural variables. And even from the binary perspective of "negative" and "positive" outcomes, there is no absolute certainty whatsoever about how a particular statute or case, irrespective of their original intent, might affect behaviors and activities.

89. Think, e.g., of reproductive rights of women and religious beliefs in tension with the secularism of the state. *See* HUSAK, *supra* note 3, at 135, 206 (arguing that very often paternalistic laws concern private, rather than public, wrongs that, as such, should not be candidates for criminalization and punishment).

90. Scholarship on the expressive function of law is part of the so-called law-and-norms school that emerged in the mid-1990s. On this function of the law, see generally, among many others, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law,* 144 U. PA. L. REV. 2021 (1996); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement,* 148 U. PA. L. REV. 1503 (2000); RICHARD H. MCADAMS, THE EXPRESSIVE POWER OF

"encouraging social norms to move in particular directions."[91] Although this may be true in certain specific contexts, it must be noted that most of law's communicative impact is closely "bound up with whether and how the legislation is enforced."[92] Joel Feinberg authoritatively contended that criminal law possesses a distinctive "*symbolic significance*"[93] within the legal system. The account presented in this article acknowledges that the criminal law carries a unique symbolic component as the branch of the law expressing the largest "reservoir of emotionally important social symbols."[94] That being said, for the criminal law to succeed in performing the role of "instrument of social change," enforcement is crucially important because it operates as "an active reorientation of the values and behaviors" of the people who previously embraced or tolerated a certain conduct.[95] In other words, "coercion still occupies center stage in explaining how law affects behavior."[96]

As noted by Alexandra Natapoff, in the criminal law context underenforcement too carries "expressive effects": it can validate preexisting arrangements and "send an official message of dismissal and devaluation" of the new policy declared on paper.[97] Absent systematic enforcement,

---

Law: Theories and Limits (2015). For a brief genealogy, see Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 39–41 (2001).

91. Cass R. Sunstein, *Social Norms and Social Roles*, 93 Colum. L. Rev. 903, 953 (1996); *see also* Sunstein, *supra* note 90, at 2024–25 (defining the expressive function of law as "the function of law in 'making statements' as opposed to controlling behavior directly." The author refers, in particular, to the issue of "how legal 'statements' might be designed to change social norms.").

92. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. 858, 860 (2014).

93. Feinberg, *supra* note 42, at 400 (emphasis in original). Feinberg is widely recognized as the inaugurator of the "expressivist turn" in crime and punishment theory and beyond. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1369–70 (2000).

94. Thurman W. Arnold, The Symbols of Government 34 (1935).

95. Franklin E. Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social Change*, 27 J. Soc. Issues 33, 36 (1971).

96. Frederick Schauer, The Force of Law 148 (2015). *See also* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 Stan. L. Rev. 786, 790 (1967) ("Laws on paper are meaningless; they must be enforced or applied. . . . [T]he statutory rule is . . . in part or in whole unreal. The policeman, the district attorney, the judge—these govern, not the rule.").

97. Alexandra Natapoff, *Underenforcement*, 75 Fordham L. Rev. 1715, 1749 (2006) (noting that, for example, "[d]omestic violence activists have long pointed out that inattention to battered women validates male violence."); *see also* Peter C. Yeager, *Law, Crime,*

critics of a transformational use of the criminal law might be tempted to dismiss it as nothing more than just a different nuance of the much-deprecated *merely* symbolic function of penal instruments, "designed as a means of legislative catharsis but without any bite."[98] A purely symbolic criminal law is exclusively deemed to reassure and calm the public, "with an implicit presumption that the . . . government will not actively enforce such a law."[99] This scenario is therefore significantly different from the case of the enactment of new criminal prohibitions in relation to which there was an original desire to enforce the legislation, even if this eventually became impossible in practice. In the case of purely symbolic penal provisions, the criminal law is not interested from the get-go in producing any real-life impact. This use of penality is instead exclusively concerned with "the statement, promulgation, or announcement of law unrelated to its function in influencing behavior through enforcement."[100] This type of penal provisions serves no function besides attaching the label of criminality to a certain conduct, and the desire to enforce the legislation is lacking in the first place. Proclamations notwithstanding, legislatures know and are fully

---

and Inequality: The Regulatory State, *in* CRIME AND INEQUALITY 247, 268 (John Hagan & Ruth D. Peterson eds., 1995) ("To the public mind, enforcement is the centerpiece of legal regulation. . . . Both symbolically and practically, enforcement is the capstone, a final indicator of the state's seriousness of purpose. . . . "); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 854 (2018) ("Suspicion of underenforcement is itself a cost, because it reflects a loss of legitimacy for criminal justice institutions. That loss in turn undermines the system's efficacy if citizens decline to report victimization or otherwise decline to cooperate with law enforcement officials.").

98. Eisenberg, *supra* note 92, at 879, n. 95. *See also* LAWRENCE M. FRIEDMAN, IMPACT: HOW LAW AFFECTS BEHAVIOR 52 (2016) (defining "toothless" legislation as "purely symbolic law").

99. Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1867 (2012).

100. Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 177 (1967). The focus here is on newly enacted penal statutes that go systematically and willfully unenforced. As previously noted, in specific cases criminal statutes that remain unenforced can still produce tangible outcomes, for example stigmatizing certain groups with ensuing consequences. *See supra* note 34 and accompanying text (discussing the de facto enforcement of sodomy laws in the United States). On the significance of criminal trials independent of the implementation of punishment, see *supra* note 31.

aware of the fact that these provisions are essentially concerned with seeming to be doing something rather than with actually doing something.

A purely symbolic use of penal power is rightly condemned as one of the main causes of the inflation in the number of criminal statutes, especially over the past few decades.[101] Criminalization often appears as a relatively effortless, low-cost exercise for the government, being significantly more convenient than designing and implementing comprehensive action plans aimed at tackling complex phenomena. In sum, therefore, purely symbolic criminal statutes represent an attempt to gain political consensus by simply sending out a message while being indifferent to any practical outcome. This type of criminal legislation has been harshly criticized chiefly because of the detrimental consequences it entails for the legitimacy of the criminal law in society and within the legal system.[102] Furthermore, whereas "enactment-enforcement gaps" are, admittedly, not infrequent in the criminal law field,[103] such discrepancies are especially significant and problematic in the case of penal laws aimed at operating as part of a broader social structuring mechanism.

Unlike a purely symbolic use of the criminal law—not supported by any concrete form of state action aimed at achieving the goal stated on paper—a legitimate and permissible transformational employment of this branch of the law must be inherently outcome-oriented and directed at achieving tangible effects. Under this account, the criminal law must operate as an integral component of a comprehensive plan involving a broad range of policy-making tools besides penal ones. Put differently, the criminal law must not be utilized in a vacuum. This is because it is intrinsically unequipped to act as a "lone wolf" in public policy. Dan Kahan is right when he argues that penal legislation cannot successfully promote social change acting as a solitary trailblazer and should not be delegated tasks beyond its abilities.[104] The criminal law can reveal its unique potential "to inform" and "shape . . . social and moral norms on a society-wide level"[105] only

101. *See supra* note 14.

102. *See* Winfried Hassemer, *Symbolisches Strafrecht und Rechtsgüterschutz*, 9 NEUE ZEITSCHRIFT FÜR STRAFRECHT 552 (1989).

103. Eisenberg, *supra* note 92, at 918.

104. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

105. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 28 (2007).

when properly deployed. This means that it cannot and should not be resorted to as "an independent player," but rather as "a contributing mechanism"[106] within a broader context in which different actors and strategies are involved. Accordingly, a transformational use of the criminal law can serve a useful and legitimate purpose so long as it is accompanied by other policy and cultural actions and initiatives aimed at tackling the social roots of certain phenomena and promoting at the societal level new norms, values, beliefs, or attitudes.[107]

The enactment of penal provisions tackling violence against women is an illustrative example. In this case, criminal law has been used as part of a strategy aimed at addressing and correcting present discriminations rooted in policies, attitudes, and practices of the past, with the ultimate goal of promoting substantive equality.[108] Feminist scholars have compellingly argued that legal institutions—including the criminal law—have

106. Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1868 (2000).

107. It is important to note that penal statutes enacted with such a goal as part of a broader effort do not simply target the general public, but also those in charge of their enforcement and application. For instance, if prosecutors ignore certain laws or the police trivialize, or even blame, certain victims, the rest of the general public will be less likely to change its attitude toward targeted phenomena or behaviors.

108. In the affirmative action context, this is what is often referred to as the "present discrimination" or "equal opportunity" rationale. *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 UNI. COLO. L. REV. 841, 850–51 (1997). The literature on affirmative actions is massive. For an overview, *cf.* Robert K. Fullinwider, *Affirmative Action*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/archives/sum2018/entries/affirmative-action (last accessed June 22, 2020). *See also* UN INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, GENERAL COMMENT NO. 18, para. 10 (1966), where the Human Rights Committee highlights the need to go beyond formal equality in certain cases: "[T]he principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant." The enactment of hate crime laws, at least on paper, is another example. Unsurprisingly, the Civil Rights Movement is often seen as a precursor of modern forms of hate crime legislation. *See* VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT CONCEPT TO LAW ENFORCEMENT PRACTICE 21–32 (2001). The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act 2009, now codified as 18 U.S.C. § 249, was the first statute passed at the federal level providing for higher sentences for violent crimes motivated by the victim's actual or perceived sexual orientation or gender identity. The Act amended the 1969 federal hate-crime law by expanding the categories of protected statuses, precisely as it happened for affirmative action plans.

long actively perpetuated and reinforced gender inequality and, sadly, condoned physical and sexual violence against women, both within and outside the domestic sphere.[109] For instance, historically, marital rape in the United States was not a crime since the wife was considered as part of the husband's own property. Notably, the influential Model Penal Code explicitly excluded the applicability of the rape offense to forced sexual intercourses between a man and his wife.[110] In 1976, Nebraska became the first state to abolish the marital rape exemption, but the provision survived in the U.S. and other common law jurisdictions well into the 1990s.[111] In the United Kingdom, the House of Lords only as late as the early 1990s ruled that consent to sex within marriage was no longer always assumed.[112] Prior to this case, women were deemed to have irrevocably consented upon marriage. Meaningful examples can also be drawn from the experience of other jurisdictions. Until 1981, the Italian Penal Code included a provision punishing with milder sentences the perpetrator—invariably represented by a husband, father, or brother—of the crimes of murder and personal injury committed against spouses, daughters, or sisters "upon discovering them to be having illicit carnal relations, and in a state of rage caused by the affront to [the perpetrator's] own honor or that of his family."[113] Far from being a relic of a remote past, at the time of its repeal the provision was still

---

109. *See generally* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW-MAKING (2000).

110. MODEL PENAL CODE § 213 (1962): "A male who has sexual intercourse with a female *not his wife* is guilty of rape if: . . . " (emphasis added). *See generally* Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941 (1995).

111. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 577 (2000).

112. *R v R* [1992] 1 AC 599, 611 (abolishing the legal fiction of a marital rape exemption and holding that the concept of irrevocable consent of a wife to her husband is to be classed as an unacceptable concept in modern times. The House of Lords concluded as follows: "This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.").

113. Art. 587, CODICE PENALE [COD. PEN.] [PENAL CODE], enacted in 1930, "Homicide or Personal Injury for Reasons of Honor." This article was repealed by Law No. 442 of August 5, 1981.

largely favorably viewed, especially in the more conservative regions of the country.[114]

These instances represent, using the words of the 1993 United Nations Declaration on the Elimination of Violence against Women, "a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of [their] full advancement."[115] Mere formal equality in the eyes of the law reached through the repealing of certain statutory provisions was clearly not enough to eradicate this state of things and produce social change. A transformative intervention was (and still is) needed not only at the educational and, broadly speaking, social policy level, but also as far as penal policies are concerned.

The 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the so-called Istanbul Convention),[116] for instance, encourages signing parties to pass legislation criminalizing certain conducts statistically overwhelmingly perpetrated by men against female victims and to make the gender of female victims an aggravating factor at sentencing.[117] The Explanatory Report to the Convention unambiguously notes that "[t]he primary aim of criminal law measures is to guide Parties in putting into place *effective policies* to rein in violence against women and domestic violence—both of which are still, unfortunately, widespread crimes in Europe and beyond."[118] In this effort,

---

114. *See* Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism*, 10 INT'L J. CONST. LAW 411, 428 (2012).

115. United Nations, General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104 (December 20, 1993), available at undocs.org/A/RES/48/104.

116. Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, CETS No. 210, available at https://rm.coe.int/168008482e. Art. 1(1)(b) reads as follows: "The purposes of this Convention are to: . . . contribute to the elimination of all forms of discrimination against women and *promote substantive equality* between women and men, including by empowering women." (emphasis added).

117. *See* RONAGH MCQUIGG, THE ISTANBUL CONVENTION, DOMESTIC VIOLENCE AND HUMAN RIGHTS 101–07 (2017).

118. Council of Europe, *supra* note 116, Explanatory Report § 152 (2011) (emphasis added). § 153 reads as follow: "The drafters agreed that, in principle, all criminal law provisions of the convention should be presented in a gender-neutral manner; the sex of the victim or perpetrator should thus, in principle, not be a constitutive element of the crime. However, this should not prevent parties from introducing gender-specific provisions."

the role assigned to the criminal law is anything but redundant and inessential. As stated in art. 45(1), "Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness." At the same time, criminal law does not stand alone in pursuing social change. The range of measures to be adopted and implemented is much broader. The Istanbul Convention directly addresses the need for states to "promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."[119] The Convention calls for *integrated policies* offering a holistic response to the problem of violence against women, including awareness-raising and education campaigns aimed at addressing the root causes of such violence and to protect and support victims.[120]

In the U.S. context, the Violence Against Women Act (VAWA) of 1994[121] not only created new offenses and introduced tougher penalties. It also created an enforcement system that previously was non-existent and, most importantly, brought together, for the first time, the criminal justice system, the social services system, and private non-profit organizations in what was designed as a coordinated effort to respond to domestic violence and sexual assault. Since its inception, and following reauthorizations and amendments, "more than $7 billion in federal grants has been given to programs that prevent domestic violence, sexual assault, dating violence and stalking. [The Act] has also funded shelters, community programs and studies tracking violence against women."[122]

---

119. Art. 12(1).

120. *See* McQuigg, *supra* note 117, at 84–101.

121. The Act was enacted as Title IV of the Violent Crime Control and Law Enforcement Act (Pub. L. 103–322).

122. Emily S. Rueb & Niraj Chokshi, *The Violence Against Women Act Is Turning 25. Here's How It Has Ignited Debate*, N.Y. Times (April 4, 2019), https://www.nytimes.com/2019/04/04/us/violence-against-women-act-reauthorization.html (last accessed June 22, 2020). *See also* Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & Pol'y 463, 464 (1996) ("The enactment of the Violence Against Women Act . . . was, ostensibly, a success of historic proportions on various political and social fronts. It has significantly furthered efforts to legitimize a feminist anti-violence agenda within the political mainstream by providing federal criminal and civil legal remedies for female survivors of violence. Indeed,

From this angle, the use of the criminal law for transformational purposes thus achieves operational legitimacy so long as it is accompanied by other coordinated legal and cultural actions aimed at efficaciously fostering social change, and forms part of a broader effort "that seeks to challenge the norms and moral boundaries."[123]

B. A Criminal Law Not Representing an Unwarranted Form of Social Dirigisme/Interventionism

When utilized with transformative goals, the criminal law plays an anticipatory function with respect to certain rules of conduct not yet generally accepted and embraced by the community.[124] At this initial stage, transformational penal laws—and related enforcement practices—can be contested and perceived as the manifestation of an overbearing government attempting to inculcate its views in a more or less silent majority. From this perspective, the presented account of a transformational function of the criminal law might appear as a means of social direction out of touch with the majority will and free of any significant constraint.[125] Using the criminal law this way, therefore, could be seen as tantamount to authorizing

---

significant portions of the VAWA were originally viewed as highly controversial, in part because of their feminist origin.").

123. Gail Mason, *The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion*, 18 THEORETICAL CRIMINOLOGY 75, 76 (2014). *See also* Walker, *supra* note 37, at 218 ("[T]he criminal law is unlikely to be an effective instrument of policy if it is used in isolation, without a background of other influences").

124. For the notion of "community" adopted in this article, see *supra* note 26 and accompanying text.

125. *Cf.* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. CONST. LAW 13, 14 (2013) ("The literal understanding of the [counter-majoritarian] difficulty emphasizes the majoritarian component of democracy, i.e., the correspondence with the aggregated preferences of the populace."). The term is mostly used in legal and political science scholarship to refer to the role of the courts. *See*, *e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW xi (2009) ("The countermajoritarian difficulty refers to the supposedly anti-democratic nature of judicial review, since it allows courts to overturn the handiwork of elected officials."); on the countermajoritarian debate and the rise of the term "judicial activism," see Tanya Josev, *The Nursery Years of 'Judicial Activism': From A Historian's Shorthand to Media Catchphrase 1947–1962*, 72 STUD. L. POL. & SOC'Y 53 (2017). *See also* Allison M. Martens, *Reconsidering Judicial Supremacy: From the Counter-Majoritarian Difficulty to Constitutional Transformations*, 5 PERSPECT. POLITICS 447, 449–50 (2007) (summarizing and discussing the countermajoritarian debate from the political science angle).

boundary-less interventionist policies with the goal of correcting societal development paths or even substantially steering society as a whole.[126]

To counter this claim, it can be argued that, just like it happens in many other areas of legislation,[127] penal policies and strategies "rarely reflect 'democracy at work.'"[128] Even adopting a less cynical perspective, at a closer look speaking of counter-majoritarian penal legislation seems, in many ways, like an inherent contradiction. Since in representative democracies legislative deliberations require the majority of the votes cast by elected representatives, national elections would sufficiently legitimize the passing of even the most transformative legislation. Lawmakers possess the democratic legitimacy to act as trailblazers, and legislation can be passed to build, rather than merely reflect, consensus around certain issues or favor the stabilization of emerging values, norms, or attitudes deemed highly relevant to the polity.

Furthermore, waiting for the whole society to reach a full agreement on a certain issue before legislation on that matter can be considered fully legitimate would nearly systematically "generate insurmountable roadblocks to policy making."[129] Penal policy making is no exception. The lack of an already established consensus cannot aprioristically preclude resorting to the criminal law as a policy-making tool.[130] Criminal law (new

126. Interestingly, the term "interventionist law" is usually utilized not only to define aggressive and pervasive regulatory regimes, but also to identify those pieces of legislation that confer protection on parties assumed to be disadvantaged by processes of free bargaining—e.g., consumers, employees, tenants, and (in some contexts) shareholders. *See, e.g.*, Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEG. STUD. 339, 341 (2006). On the use of the criminal law and the criminal justice apparatus as an interventionist mode of governance, see generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2006).

127. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1514 (1990) (contending that democratic systems rarely accurately reflect the will of the majority).

128. HARCOURT, *supra* note 15, at 206 (noting that oftentimes are political initiatives that drive public opinion on crime and punishment policy issues, and not the other way around).

129. Leigh Turner, *Time to Drop the Language of "Consensus"*, 21 NAT. BIOTECHNOL. 1433, 1433 (2003).

130. Furthermore, viewing the degree of consensus and popularity with the public as an essential precondition of the state's power to criminalize and punish would run the risk of degenerating into much decried penal populism, providing simple and overly punitive responses to social issues. The origins of the term "penal populism" lie in the work of Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, *in* THE POLITICS OF

criminalization or enhanced penalties) and its enforcement can be used to "signal to citizens that they ought to think of [certain] conduct as being more condemnable than they had previously thought it."[131] In Hartian terms, the law's *critical morality* may well challenge or integrate certain aspects of society's current and accepted *positive morality* with the goal of producing a shift.[132] It is thus possible, in principle, for democratically elected bodies to decide to act contrary to (currently) prevailing norms.

However, the unique stigma and burdensome consequences triggered by the criminal law suggest some caution. Although the criminal law does not have to just reflect prior social change, its involvement for transformational purposes should depend on some prior social/political/non-penal action (e.g., campaigns of public education/persuasion) aimed at setting a certain cultural shift into motion, and this for strategic reasons. If criminal law is resorted to too soon and as a lone agent of change with the goal of directing cultural shifts, the risk is to lead to counterproductive outcomes and create polarization and division instead of helping build support for a new norm or value. For example, James Jacobs and Kimberly Potter have argued that trailblazing hate crime legislation constitutes a highly questionable style of policy making, which tends to frustrate the goal officially pursued by fueling identity politics and polarizing the political discourse rather than promoting actual social and cultural transformations.[133] Aya Gruber has documented the failure of combating sexual and

---

Sentencing Reform 17, 47–48 (Christopher M.V. Clarkson & Rodney Morgan eds., 1995), where the term "populist punitiveness" is used to discuss one of the main influences on contemporary penal policy. This polysemic expression also indicates harsh penal policies that are popular with the public, in contrast to what happened for most of the second half of the twentieth century, a period when "the general public were largely excluded from any involvement in penal affairs" and these matters were "addressed and managed behind the scenes by civil servants working in conjunction with governments and drawing on advice from academic experts and similar elites." John Pratt, Penal Populism 24 (2007).

131 Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 Nw. U. L. Rev. 1565, 1591 (2017).

132. *See* H.L.A. Hart, Law, Liberty and Morality 20 (1963) (for whom positive morality refers to the "morals accepted by the society" while critical morality refers to a set of "moral principles used in criticism of actual social institutions including positive morality.").

133. *See* James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics (1998). *Contra see* Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 Boston C. L. Rev. 739, 742 (1999) (noting that "hate crimes legislation promotes inter-group harmony by relying on political

domestic violence primarily by means of criminalization, punishment, and law enforcement. In her analysis, she questions the conventional wisdom about a distinctive facet of the feminist war on violence and sexual assault, challenging the idea that the criminal law represents the best option to address these issues and promote real change in social norms and attitudes.[134]

Having said that, while the criminal law should not be the first step toward social change, it does not have to wait on the (complete) success of a certain campaign. As part of a concerted effort, it can serve as one of the primary drivers of change and one of the main forces aimed at transforming societal attitudes, either when it comes to promoting a new social norm or to extending already appreciated norms to contexts where these are still largely unrecognized.[135] In other cases, the criminal law can have an important role in assisting a transformation that has already begun, and whose primary or main drivers do not include penal policy measures. Here, the criminal law nurtures and expresses support for an "incipient norm."[136] Put differently, it is utilized as an *additional* vector of change, accelerating and favoring a process of social transformation that has already achieved a certain degree of recognition within the societal body, albeit limited and not yet coagulated.

---

and emotional themes that should be common to all American subcultures, rather than promoting a divisive identity politics.").

134. *See* Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration (2020).

135. With regard to the latter scenario, the case of violence in professional hockey provides a good example. Both in the United States and Canada, violence has been, for a long time, largely condoned and "tolerated as part of the game or side-stepped by the authorities altogether." *See* Kevin Young, Sport, Violence, and Society 20 (2012). After decades of acquiescence and inaction, as of the early 1970s Canadian authorities began to prosecute hockey players for violent behaviors on the hockey ring not covered by the consent defense. *See* Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 13 Cornell J. L. & Pub. Pol'y 145 (2002). This represented part of a broader strategy aimed at changing people's attitude toward any condoned form of violence. Players started to be charged with aggravated assault with a weapon (the hokey stick) or with assault causing bodily harm. *See* Angela Baxter, *Hockey Violence: The Canadian Criminal Code and Professional Hockey*, 31 Manitoba L.J. 281 (2005). Interestingly, at first the reaction of a large part of the public was of surprise: while assaults in the streets caused widespread outrage, the same behavior on a hockey ring was to a great extent disregarded or even accepted as normal.

136. Robinson, *supra* note 106.

Although a conceptual distinction between the two described scenarios—criminal law as a primary driver of change and criminal law nurturing an incipient norm—seems possible, in practice it is not always easy to identify a clear dividing line to distinguish between them. To begin with, in both cases we generally witness a momentous pressure from social movements aimed at promoting a certain shift in norms or attitudes,[137] although this can follow different patterns. Undoubtedly, advocacy groups will struggle against other interest groups for influence over criminal law as a mechanism to achieve social change.[138] It is important to note that this article does not necessarily assume benevolent actors in lawmaking.[139]

---

137. Obviously, organized groups of individuals can also *resist* social change through collective action. *See generally* JOEL F. HANDLER. SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. LAW & SOC. SCI. 17 (2006). *See also* Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 182 (1993) (observing that, when we talk about "law and social change," "law" "includes judicial, legislative and regulatory action, but also their inaction, and the contrasting activities of private groups and individuals who pursue law enforcement or otherwise seek to alter the way the society is governed."). Scholars of legal mobilization have also showed how litigation is used by social movements as a tool to foster social and political change. *See* Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 364, 383 (2018) (arguing that "social movement activism from below can redeem progressive politics," at the same time "reassert[ing] the court as a vehicle for progressive reform while simultaneously rescuing it from the charge of judicial activism"). For a systematic conceptualization of legal mobilization, see Emilio Lehoucq & Whitney K. Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 LAW & SOC. INQUIRY 166 (2020).

138. For example, Mothers Against Drunk Driving (MADD), initially advocating from a minority position within society, was eventually successful in persuading lawmakers across the country to enact stricter laws, which also started to be methodically enforced. In this battle, the organization faced the strong opposition of alcohol industry lobby groups. *See* JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA xv–xvi (1989). *See also* PAUL H. ROBINSON & SARAH M. ROBINSON, CRIMES THAT CHANGED OUR WORLD: TRAGEDY, OUTRAGE, AND REFORM 183 (2018) (discussing how Cari Lightner's tragic death caused by a drunk driver in 1980 compelled her mother Candy to found MADD, which would grow into one of the country's most influential advocacy group campaigning for harsher laws for drunk drivers).

139. From a normative perspective, the outcomes of those struggles should be viewed as legitimate as far as democratic legislative processes are not significantly undermined, especially with regard to the transparency with which lobbies and interest groups struggle to attain the utmost realization of their interests. *See*, *e.g.*, GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 25 (1966) (discussing lobbying by interest groups as

Policy and lawmaking are indeed contested terrains. This means that conflict inextricably lies at the core of the conceptual matrix concerning penal policy adoption processes. The perspective is that of a vision of government decision- and policy making that is fluid, amenable to changing circumstances, and inherently conflictual.[140]

The protection of the environment and animal cruelty laws provide meaningful examples that help illustrate the complexity of the described dynamics.

1. Environmental Criminal Law

As recently as sixty years ago, the concern for a healthy environment was nearly overlooked and, to some extent, even regarded as a radical idea.[141] In Western post-war industrial societies no or very little protection was granted to the environment against pollution by means of regulatory measures in general, not to mention criminal law specifically. The environment was primarily viewed as a source of raw materials and energy and a place to dispose of industrial waste. Notably, at the international level, the right to a healthy environment is not found in pioneering human rights documents,[142] and prior to the late 1960s/early 1970s, environmental law did

---

"the most serious and worrisome problem of American democracy"); Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL'Y REV. 265, 266 (2011) ("Empirical research shows that the lion's share of lobbying occurs in niches characterized by no involvement of the public and almost no rivalry.").

140. On these themes, see generally BOB JESSOP, THE STATE: PAST, PRESENT, FUTURE (2016).

141. Unlike first-generation civil-political rights and second-generation socio-economic rights, third-generation rights entered into an early phase of development only during the 1960s. The terminology was introduced by Karel Vasak, *A 30-Year Struggle. The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 29, 29 (1977), who identified "the right to a healthy and ecologically balanced environment" as a paradigmatic example of a "third-generation" human right.

142. The Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social, and Cultural Rights (1966) do not mention the environment. The first formulation in human rights terms can be found in 1972. *See* United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972). The first principle of the Stockholm Declaration asserts that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

not even exist as a discrete legal category.[143] The understanding and sensibility of society toward the magnitude, pace, and consequences of environmental degradation was contested, particularly when environmental concerns were confronted by the reasons of economic growth and industrial development. In the United States and many other Western jurisdictions, serious forms of dumping were merely punishable as misdemeanors. With the notion of sustainable development far from being fully embraced by legislatures and policymakers, environmental protection laws were almost nonexistent and largely toothless. In this scenario, "[a]ll too often, these crimes were handled with about the same level of seriousness as a traffic ticket."[144]

Initially, the low visibility of the effects of cumulative pollution did not spark widespread support for the environmentalist cause at the societal level.[145] However, a completely new public awareness came following severe trigger cases, which made the need to protect the environment an apparent and particularly pressing issue. Disasters such as Love Canal and Three Mile Island in the U.S., the Seveso accident in Italy, and the disaster in Bhopal, India, caught the public's attention and led to the creation of an environmental justice movement in the late 1970s/early 1980s.[146] Although with evident contradictions between sympathy for businesses and concerns for environmental protection,[147] policymakers in the U.S. and beyond

143. The term "environmental law" was first used in the U.S. at a conference held in West Virginia in 1969. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47–48 (2004) (also noting, at 253, that environmental law "has evolved from a radical intruder into an essential element of a mature legal system in a democratic society.").

144. Robert Abrams, *The Maturing Discipline of Environmental Prosecution*, 16 COLUM. J. ENVTL. L. 279, 279 (1991).

145. *See, e.g.*, Thomas H. Koenig & Michael L. Rustad, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*, 26 LAW & POL'Y 189, 199 (2004) ("The inhabitants of Love Canal, for example, had no knowledge that their residential subdivision had been built in close proximity to a chemical dump site.").

146. *See* Sherry Cable & Thomas Shriver, *Production and Extrapolation of Meaning in the Environmental Justice Movement*, 15 SOCIOL SPECTR. 419 (1995). *Cf. also* ROBERT E. HERNAN, THIS BORROWED EARTH: LESSONS FROM THE FIFTEEN WORST ENVIRONMENTAL DISASTERS AROUND THE WORLD (2010).

147. For a discussion of the ambivalent approach to environmental law and its enforcement from the 1970s through the 1990s in the United States, see LAZARUS, *supra* note 143, at 75–84 (discussing Nixon's role in creating and then weakening pro-environment regulations); Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125 (1991) (discussing the growing enforcement of criminal

embraced the fight also by means of the criminal law,[148] which "serve[d] as a stimulus to creating a new consensus regarding the bounds of moral conduct."[149]

The novelty was significant as, "by making violations of those laws subject to criminal prosecution, Congress criminalized conduct that previously had been legal and accepted practice in most states."[150] The inclusion of criminal provisions in environmental laws and the subsequent elevation of many of those offenses to felony status during the 1980s "highlighted the seismic shift in pollution control law."[151] This undoubtedly played a role in the struggle for raising public sensibility and establishing the wrongfulness and blameworthiness of willful and reckless environmental damages as a shared norm within society at large.[152] Despite aggressive corporate lobbying in presenting alternative constructions of what it means to "be green" and to take a "'green' position,"[153] environmentalist values have constantly and increasingly gained importance in our societies. The environmentalist movement was established and has grown almost in parallel to the governmental response and, over time, has become a very important force in mobilizing society and promoting a "greater ecological conscience."[154] With that being said, the change of community's

---

environmental law provisions in the second half of the 1980s, also thanks to the creation of an *ad hoc* Environmental Crimes unit within the Department of Justice); Rena Steinzor, *How Criminal Law Can Help Save the Environment*, 46 ENVTL. L. 209, 215 (2016) (discussing the ambivalent approach toward the environment during the Reagan and George H.W. Bush administrations).

148. *See* LAZARUS, *supra* note 143, at 84 (defining the 1970s as "the formative decade of modern environmental law" in the U.S.; the Clean Air Act became law in 1970, followed by the Clean Water Act and the Ocean Dumping Act in 1972. All these statutes included criminal law provisions).

149. Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L. REV. 861, 865 (1996).

150. David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1228.

151. *Id.*

152. *See* LAZARUS, *supra* note 143, at 165–66, 196.

153. Michael J. Lynch & Paul B. Stretsky, *The Meaning of Green: Contrasting Criminological Perspectives*, 7 THEORETICAL CRIMINOLOGY 217, 220 (2003).

154. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 443 (1981). *See also* Riley E. Dunlap & Angela G. Mertig, *The Evolution of the U.S. Environmental Movement from 1970 to 1990: An Overview*, *in* AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970–1990 1, 4

views on this matter is ongoing to this day, and policies and practices, including penal ones, are still characterized by a certain degree of ambiguity and uncertainty.[155]

2. Animal Cruelty Laws

With regard to criminalization and punishment of cruelty against animals, until the nineteenth century non-human sentient beings were out of the sight of the criminal justice system.[156] This was due to the common law doctrine for which animals were regarded as property belonging to their human owners and could be disposed as such without limitations of any sort. Cruelty against animals did not represent a crime under either English or American common law. Rather, it originated as a statutory crime.[157] For a long time, the main goal of anti-cruelty statutes was to punish abusive conduct toward commercially valuable animals, this way denouncing the anthropocentric perspective of such laws. These behaviors were generally punished as misdemeanors, and the rare defendants were let off with comparatively light sentences.[158]

(Riley E. Dunlap & Angela G. Mertig eds., 1992) ("The environmental movement was clearly institutionalized in the late 1960s and early 1970s, as signified by a flood of new groups at the national and especially the local levels, formalized media attention, and far-reaching legislation.").

155. *See* David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005–2014*, 8 MICH. J. ENVTL. & ADMIN. L. 297, 300 (2019) ("If we lack widespread agreement about how much we should regulate business activity in the environmental context—which clearly is the case—it should be no surprise that we also would lack consensus about which environmental violations should be criminalized.").

156. As potential victims, but, rather surprisingly, not as perpetrators. *See* Matt Simon, *Fantastically Wrong: Europe's Insane History of Putting Animals on Trial and Executing Them*, WIRED (Sept. 24, 2014), https://www.wired.com/2014/09/fantastically-wrong-europes-insane-history-putting-animals-trial-executing/ (last accessed June 22, 2020).

157. *See* Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine after the Civil War*, 44 LAW & SOC. INQUIRY 136, 146 (2019) ("In 1828, New York became the first state to enact an anticruelty law applying to animals. . . . Nineteen other states enacted similar statutes by 1865.").

158. *See* Luis E. Chiesa, *Why is it a Crime to Stomp on a Goldfish? Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 8 (2008); David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 DETROIT C. L. REV. 1, 6–12 (1993).

In the U.S, in 2014, South Dakota became the fiftieth state to enact a felony provision for animal cruelty.[159] As late as 1995, only nine states had made such conduct a felony.[160] The animal rights movement played a central role in the process that made concerns for animal welfare more and more visible.[161] As part of their advocacy plan, besides campaigning for harsher sentences, the movement also pushed for more aggressive enforcement of already enacted statutes by prosecuting authorities. This proved important "in the move to mainstream animal law in the legal community" and to make violations of anti-cruelty laws "higher profile and media-worthy."[162] The movement for animal rights at the societal level preceded and eventually became instrumental for the expansion of penal strategies and responses in the field.[163] The same cannot be said, as noted above, of environmental protection, where enhanced social sensibility as well as a more robust penal intervention by the government were triggered by major disasters and developed by and large simultaneously. Although contemporary anti-cruelty laws are still "fraught with contradictions"[164]—reflected in the adoption of the

159. *See* JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 59 (2019).

160 SONIA S. WAISMAN, BRUCE A. WAGMAN, & PAMELA D. FRASCH, ANIMAL LAW: CASES AND MATERIALS 401 (2nd ed. 2002).

161. *See* Mahalley D. Allen, *Laying Down the Law? Interest Group Influence on State Adoption of Animal Cruelty Felony Laws*, 33 POL'Y STUD. J. 443 (2005). For a historical perspective, see LAWRENCE FINSEN & SUSAN FINSEN, THE ANIMAL RIGHTS MOVEMENT IN AMERICA: FROM COMPASSION TO RESPECT (1994) (the idea of animals as beings possessing their own rights was presented to the public for the first time in the 1970s and 1980s in the form of demonstrations, raids on laboratories, and civil disobedience).

162. Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 59 (2012). The greater attention on part of law enforcement agencies on animal cruelty offenses is also expressed by the inclusion, as of January 1, 2016, of detailed data on acts of animal cruelty, including gross neglect, torture, organized abuse, and sexual abuse, in the FBI National Incident-Based Reporting System (NIBRS). In the past, crimes that involved animals were lumped into an "All Other Offenses" category in the FBI's Uniform Crime Reporting (UCR) Program annual report. *See Tracking Animal Cruelty: FBI Collecting Data on Crimes against Animals* (Feb. 1, 2016), https://www.fbi.gov/news/stories/-tracking-animal-cruelty (last accessed June 22, 2020).

163. *But see* MARCEAU, *supra* note 159, at 6 (criticizing the near-consensus support within the animal protection movement for more punishment: "The punitive war on animal cruelty is a dead-end. The seeming victories of the animal protection movement in the realm of individual criminal punishment are a mirage. . . . Propagating the dehumanizing violence of incarceration is not a viable solution to the inhumane treatment of animals.").

164. Chiesa, *supra* note 158, at 10.

animal welfare approach characterized by the existence of significant safe harbors from prosecution[165]—over time, more severe statutory provisions and their more frequent enforcement[166] have played an important role in raising general public awareness and sensibility against animal abuse.

C. A Criminal Law Not Using the Defendant Merely as a Means to an End

Using the criminal law for transformational purposes must also not translate into using the defendant to achieve consequentialist ends, that is, to treat offenders "*merely* as a means" to an end.[167] Deservedness must remain at center stage as a crucial constraining factor. This is because punishing individuals in pursuit of goals that are disconnected from their blameworthiness clashes with basic principles authorizing the imposition of penal

165. The animal welfare approach does not seek to prevent animal exploitation itself, but rather to prevent animal cruelty only. Current anticruelty statutes thus punish acts inflicting gratuitous suffering on animals. *See* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House. Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 209 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (noting that current anticruelty laws "are intended to prohibit 'unjustifiable' and 'unnecessary' suffering to animals," thus creating room for legalized suffering when justifiable and unavoidable). Furthermore, many state laws provide for broad exceptions, sometimes considered as examples of "legislative capture." *See* Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175, 184 (2006); Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 17, 121 (2007). In contrast to the animal welfare approach, the animal rights approach does not seek incremental improvements in the lives of exploited animals and maintains that animal exploitation should be abolished and banned altogether rather than regulated. *See* Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397 (1996).

166. *But see Investigating & Prosecuting Animal Abuse: A Guidebook on Safer Communities, Safer Families & Being an Effective Voice for Animal Victims*, NAT'L DISTRICT ATT'YS ASS'N 14 (2013), https://ndaa.org/wp-content/uploads/NDAA-Animal-Abuse-monograph-150dpi-complete-1.pdf (last accessed June 22, 2020); Leslie & Sunstein, *supra* note 165, at 121–22 (lamenting enforcement gaps).

167. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (trans. John Ladd, 2nd ed. 1999) (1797) (emphasis added) ("Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being ought never to be manipulated merely as a means to the purposes of someone else. . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.").

sanctions. However, a transformational use of the criminal law does not automatically violate this imperative, as one might think at first glance.

For example, in the case of harsher penalties for hate crimes against members of the LGBTQ+ community, the punitive premium imposed is by no means unjustified from the perspective of retributive proportionality. In this case, the criminal law is part of a comprehensive strategy aimed at promoting substantive equality in face of past discriminations and persisting biases and prejudices. Crimes against persons who belong to historically discriminated and targeted groups do not simply affect the individual victim but also produce a wider behavioral impact on other members of the same group.[168] This is because, through the specific victim—who often experiences increased sense of vulnerability, as these crimes tend to be more severe in terms of physical brutality and emotional trauma[169]—a message is conveyed to all members of the group sharing the same characteristics or attributes. As a result, the entire group feels threatened and more vulnerable to victimization.[170] Accordingly, the enhanced punishment imposed appears to be justified due to the greater harm caused, thus making the offender more blameworthy.[171]

Still, a critic may argue that, from a retributivist perspective, legitimation of the deserved punishment imposed depends on the claim that the defendant could and should have realized both that his conduct was wrong and how serious the wrong was. This, again, highlights the importance of the kind of process of public persuasion/education that must precede criminalization and punishment, which will be deployed later on as an element of a wider and concerted transformational effort. I concede that some degree of inevitable friction may well occur in the initial phase of transition. Such a temporary friction—particularly in the above described scenario, where criminal law is utilized as one of the main drivers of change—is a cost that systems in which consequentialist considerations

168. *See* Monique Noelle, *The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group*, 46 AM. BEHAV. SCI. 27 (2002); Barbara Perry & Shahid Alvi, "*We Are All Vulnerable": The* In Terrorem *Effects of Hate Crimes*, 18 INT'L. REV. VICTIMOLOGY 57 (2012).

169. *See* Paul Iganski, *Hate Crimes Hurt More*, 45 AM. BEHAV. SCI. 626 (2001).

170. *See* Robert J. Boeckmann & Carolyn Turpin-Petrosino, *Understanding the Harm of Hate Crime*, 58 J. SOC. ISSUES 207, 208–09 (2002).

171. One might also argue that prejudice-motivated crimes also carry an amplified moral culpability because the conduct threatens democratic values and fundamental human rights.

play a relevant role in the social and penal fields can bear, especially "in a world where offenders have varying capacities for moral agency."[172] Furthermore, it must be noted that the Kantian formulation of the *means principle* "does not forbid treating others as means, but as *mere* means,"[173] in a way that makes it "permissible to pursue the good where this will have, as one of its side effects, some lesser harm to others."[174]

One of the possible risks of using the criminal law for transformational purposes is the stereotyping of certain victims as inherently fragile, powerless, and in need of special protection. However true or not this may be, the benefits in such cases seem to outweigh the costs. The intervention of the criminal law is important not only to acknowledge the peculiar harm produced by certain discriminatory conduct, but also to enhance the social and political visibility of a given issue within society and encourage victims to come forward and report. Moreover, I concur with those who believe that, generally speaking, more punishment in traditional forms (especially incarceration) is hardly likely to contribute to a more tolerant and inclusive society.[175] This leads to a topic—reform of criminal penalties—that is beyond the scope of this article. However, it could be useful to reflect on the application to certain adult offenses of schemes that have been deployed in regard to hate crimes in the juvenile justice context with the specific goal of changing both attitudes and behavior of youth offenders. (For example, combining restorative justice, community service, and follow-up work).[176]

---

172. Richard L. Lippke, *Mixed Theories of Punishment and Mixed Offenders: Some Unresolved Tensions*, 44 SOUTH. J. PHILOS. 273, 292 (2006) (stressing that mixed theories of punishment are inherently characterized by tensions not easily resolved).

173. Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO STATE J. CRIM. LAW 369, 370 (2011).

174. VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 114 (2011).

175. *See*, *e.g.*, Alex Press, "#MeToo Must Avoid 'Carceral Feminism,'" VOX (Feb. 1, 2018), https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism (last accessed June 22, 2020) (defining "carceral feminism" as the "reliance on policing, prosecution, and imprisonment to resolve gendered or sexual violence.").

176. In France, for example, Law No. 2004-204 of March 9, 2004, modified art. 131-5-1 of the Penal Code by introducing a new penalty, the *stage de citoyenneté* (a form of community service), in the case of hate crimes. The goal of this new penalty is "to remind the

In the different scenario previously discussed, where the criminal law acts as an additional vector to help consolidate emerging norms, values, or attitudes, the government deploys its punitive power to nurture an incipient norm. This contributes to increase the appreciation of the public toward norms that are not yet fully entrenched in society. As the emerging norm is not created *ex novo*, since a well-defined social referent pre-exists criminalization and punishment, the criminal law pursues a promotional aim that does not amount to using defendants to merely achieve an ulterior goal. In such cases, consequentialist considerations cannot be said to weigh in so heavily as to obliterate blaming the actor for his wrongful act. Drunk driving is a good example to illustrate how legislatures can resort to the criminal law as an attitude-shaping force to signal, communicate, and help appreciate within the societal body a shared consciousness about what is *already* emerging as a serious wrong in its own terms (the incipient norm).[177] Over time, as part of a complex strategy at the policy level, the criminal law has been used to further shape public attitudes and habits with the goal of helping make people fully understand drinking and driving for what it actually is—a serious public health and safety issue that was gradually becoming more and more discernible in society.[178]

---

perpetrator of Republican values of tolerance and respect for human dignity on which society is based."

177. For a useful discussion, see Anthony Bottoms, *Civil Peace and Criminalization*, *in* CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 232, 261–62 (R.A. Duff, Lindsay Farmer, Sandra E. Marshall, Massimo Renzo, & Victor Tadros eds., 2014). In the United States, like practically all Western societies, alcoholic beverages represent a central component of many leisure activities. However, the history of the offense of drunk driving and its enforcement in America are relatively recent. This is not simply because cars became widespread only in the post-1945 period; the practice of drinking and driving has been largely accepted by society for a long time. Drunk-driving offenses were generally enacted as misdemeanors punishable with relatively low fines and/or a short term of imprisonment to be served in a county jail. At least until the 1970s, such behavior was largely condoned and not given precedence by law enforcers. DUI convictions were rare, even for recidivists, generally plea bargained, and often seen as "accidents." *See* BARRON H. LERNER, ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900, 4–5 (2011); JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER 124–25, 139–40 (1981).

178. *See* Weisberg, *supra* note 77, at 527 (discussing studies "credit[ing] formal legal changes, including increased penalties and lowered blood-alcohol limits (not to mention the advent of drunk-driving second-degree murder convictions in several states) with at least substantial part credit for the reduction [in drunk driving].").

D. A Criminal Law Not Imposing Partisan Moral Values and Worldviews Going Against Fundamental Rights and Principles

Criminal law is closely intertwined with non-negotiable values assuring the peaceful coexistence of people with different worldviews in today's liberal democratic societies.[179] Thus, last but certainly not least, another limit to the legitimate use of the criminal law for transformational purposes lies in the fact that no legislature should ever resort to it to foist on society particular worldviews or lifestyles. In other words, the criminal law should not be utilized to impose the partisan moral values of specific groups to the entire political community subject to a body of common criminal law rules. Doing so would be in stark contrast with the foundational principle of pluralism that informs democratic societies.

Some critics might be tempted to argue that, for example, hate crime legislation is about promoting one version of community rather than another, so it amounts to imposing a certain worldview on others. Yet, at a closer look, this argument does not hold. If, for example, the legislature succeeded in criminalizing homosexuality or abortion *tout court*, it would be indeed imposing a given worldview on a community. In contrast, hate crime legislation does not impose any worldviews limiting rights and freedoms of members of a given community at all. Rather, it does exactly the opposite: alongside other policy initiatives, it promotes actual pluralism—that is, the ability of certain historically discriminated groups to fully exercise their freedoms and rights in the context of secular, pluralistic, and democratic societies like Western ones are. Put differently, this type of legislation helps multiply worldviews rather than promoting one version of community over another.[180]

At the same time, however, especially outside of the U.S.,[181] offenses dealing with conduct involving the stirring up of hatred, sometimes referred to as "incitement" offenses, while well-intentioned, could

---

179. *See generally* Richard E. Flathman, Pluralism and Liberal Democracy (2005).

180. For example, to argue that legislation concerning hate crimes against LGBTQ+ people "promotes" homosexual lifestyle rather than a straight one would sound dangerously close to a notoriously mischaracterizing far/alt-right talking point against the passing of such provisions protecting members of historically discriminated groups.

181. The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech," with no ifs or buts.

potentially run the risk of infringing upon the described operational limit to a legitimate use of the criminal law for transformative purposes unless a clear and material definition of what constitutes hate speech is provided. Concerns for pluralism and free speech are, once again, at center stage here. As Peter Tatchell observes, "Different people have different interpretations of hatred. Is causing offence, or even distress, an incitement to hatred? What about ridiculing and mocking someone's beliefs? Is that hateful? Where do you draw the line between legitimate robust criticism and satire, and illegitimate, criminal incitement of hatred?"[182]

The mandate to preserve pluralism of views and ideas as a limit to a transformational use of the criminal law also means that not *any* value or norm may come to represent a valid social referent for the legislature. Although the list of values to be regarded as non-negotiable and essential to peaceful co-existence of individuals is itself a matter of controversy that cannot be resolved in this article, the reference here is in particular to core values of democratic societies such as respect for human dignity, equality, self-determination, and freedom of expression. These values have acquired a status of "meta-normative" commitments, especially in Western

182. Peter Tatchell, *Hate speech v Free Speech*, THE GUARDIAN (Oct. 10, 2007), https://www.theguardian.com/commentisfree/2007/oct/10/hatespeechvfreespeech (last accessed June 22, 2020) (discussing the proposal put forward at the time in the UK to introduce an incitement offense outlawing words or behavior which are threatening and intended to stir up hatred on grounds of sexual orientation. In 2008, the offense of "hatred on the grounds of sexual orientation" was eventually introduced as part of the Criminal Justice and Immigration Bill, amending Part 3A of the Public Order Act 1986, but with the addition of a saving provision, narrowing the statute's operation, that reads as follows: "[F]or the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred." On the troubled legislative history of this provision, see PAUL JOHNSON & ROBERT M. VANDERBECK, LAW, RELIGION AND HOMOSEXUALITY 154–58 (2014). The European Court of Human Rights has developed a clear jurisprudence balancing free speech and hate speech. In particular, the Court tends to make freedom of expression prevail unless the speech is serious, severely hurtful and prejudicial, and does not contribute to any public debate. *See also* Erbakan v. Turkey, App. No. 59405/00, Eur. Ct. H.R. § 56 (2006) ("[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance . . . provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.").

countries, and clear boundaries to the use of criminal law can be inferred from them.

I am obviously fully aware, as previously observed, of the interstices of the conflicts that define our society, public discourse, statutes, and case law. That being said, and despite the fact that all human beings hold partisan moral views and certain values and beliefs that from time to time come under attack by those with a dialectically different set of values, the commitment to pluralism in democratic societies is more than merely suggestive of a value orientation.[183] As Cristina de Maglie explains, "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.'"[184] Operationally, this means that "[t]he secularism of criminal law must be understood as an absolute and unreachable barrier to ethically oriented actions of the legislature" aimed at imposing certain beliefs or values.[185] The premise and goal of a liberal, pluralistic, and democratic state are to not promote a particular vision of morality.[186] Accordingly, this must rule out the option of using the criminal law—alone or combined with other policy-making tools—to impose partisan moral views affecting fundamental rights.[187]

---

183. Many contemporary studies rank the quality of democracy based on principles that relate to the notion of pluralism. *See, e.g.*, Leonardo Morlino, *What Is a "Good" Democracy?*, 11 Democratization 10 (2004); Assessing the Quality of Democracy (Larry Diamond & Leonardo Morlino eds., 2005); Paul H. Conn, *Social Pluralism and Democracy*, 17 Am. J. Pol. Sci. 237 (1973). More generally, see Steven Levitsky & Daniel Ziblatt, How Democracies Die: What History Reveals about Our Future (2018); David F. J. Campbell, *The Basic Concept for the Democracy Ranking of the Quality of Democracy* (Democracy Ranking, 2008), http://www.democracyranking.org/downloads/basic_concept_democracy_ranking_2008_A4.pdf (last accessed June 22, 2020).

184. Cristina de Maglie, *Punishing Mere Immorality? Skeptical Thoughts from a Comparative Perspective*, 23 Berkeley J. Crim. L. 323, 337 (2018).

185. *Id.*

186. *Id.*

187. Think, for examples, of issues such as medically assisted procreation, sexual orientation, and abortion. On legal moralism, see David Skeel & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. Pa. J. Const. L. 809, 832 (2006) ("The heart of the problem is a tendency to confuse God's law with man's. Those of us who believe in a divine moral law are regularly tempted to try to write that law into our much-less-than-divine code books. Among American evangelicals, this tendency was reinforced by the judicially mandated legalization of abortion in 1973, which galvanized theologically

To be clear, this is a point that transcends considerations revolving around the majority-minority debate. Suppose, for instance, that *Roe v. Wade*[188] in the United States is overturned and the power to regulate abortions is fully returned to the states. Now, imagine a state in which a majority of the electorate believes abortions are immoral; through democratic processes, its legislature enacts an anti-abortion statute that punishes providers of abortion services and/or the women who have abortions. Those who are liable may not share the moral views and values of the majority in their state. In such a case, using criminal law to help transform the opinions of this dissenting public would not be an acceptable and justifiable application of the transformational function thesis. This is because the passing and enforcement of penal statutes would impose partisan moral values and, ultimately, invade the personal sovereignty of the individual. Such a use of the criminal law would be in contrast with the quintessentially pluralistic morality of contemporary secular legal systems.[189] In such systems, a certain behavior pertaining to fundamental personal freedoms, rights, and prerogatives "may be celebrated, tolerated or censured, depending on context,"[190] but the criminal law should have no say about it.

CONCLUSION

The transformational potential of the criminal law represents a partially neglected manifestation of the punitive power that requires more adequate conceptualization. This article has argued that, while criminalization and punishment usually tend to be instruments of preservation of widely shared beliefs and societal norms, at the same time they can also exercise, from a normative standpoint, a function of innovation—either by promoting

---

conservative Catholics and Protestants alike and spurred a long, still-ongoing campaign to flip the legal switch back.").

188. 410 U.S. 113 (1973) (affirming that access to safe and legal abortion is a fundamental constitutional right).

189. Assuming freedom of expression and secularism as well as respect for human dignity (with corollaries such as the protection of individual agency) to be fundamental tenets of contemporary liberal democracies.

190. Andrew Millie, *Value Judgments and Criminalization*, 51 BRIT. J. CRIMINOLOGY 278, 279 (2011).

the establishment of brand new norms or by nurturing norms, attitudes, values, and beliefs that have already emerged but are not yet fully entrenched within the societal body.

Using the criminal law for transformational purposes, however, cannot be devoid of firm operational boundaries. This article has outlined and discussed four conditions that must be met for the criminal law to legitimately perform a transformative function as one of several interplaying norm-shaping forces in society. These can be summarized as follows: the criminal law must be outcome-oriented, non-interventionist, non-exploitative of the defendant as a mere means to an end, and must not impose partisan moral views of specific groups that would limit individual rights, liberties, and prerogatives.

As I have sought to show, the most invasive of the state's tools can be open to strategic actions in order to foster social change and be utilized to favor the emergence or stabilization of certain norms, values, and attitudes in the context of broader policy-making efforts. The limited ability of the criminal law to address and resolve, as a lone agent, struggles of what are increasingly complex and stratified societies has been acknowledged. It is thus important to further stress that the criminal law offers no easy solutions or answers for explaining or understanding the complex dynamics of the relationship between law and social change. Having said that, its role should not be denied or overlooked, either. Far from supporting a further unnecessary (and harmful) expansion of the criminal law, the goal of this article has been to pinpoint limits against its indiscriminate growth in often-contested domains. While the criminal law reveals itself as part of the culture we live in, it can also be reified into something autonomous that is not necessarily always animated and shaped *from the outside* by changing norms and conventions. In fact, it may well represent one of the forces actively contributing to rethink the status quo in the ways that have been described and discussed.