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THE THEORETICAL ASPECTS OF LEGAL MORALISM

1. INTRODUCTION

The relationship of law and morals is perhaps the most enduring controversial issue in legal theory. It is obvious that legal and moral norms mutually influence each other, but the boundaries of interference are vague and rapidly changing. Legal moralism – the possibility of states to interfere with a person's liberty and prohibit certain conducts on the sole ground that they are inherently immoral – has always been one of the most important elements of this discussion. The debate over the legal enforcement of morals became especially harsh during the nineteenth century. The emerging concept of fundamental rights and liberal ideology questioned the necessity of criminalizing immoral but otherwise harmless activities. Liberal philosophers, such as John Stuart Mill, considered the rights of other people as the only purpose for which power can be rightfully exercised over any member of the community[1]. This extreme form of liberalism is untenable in modern societies and several twentieth century scholars – such as Herbert Hart, Patrick Devlin, Ronald Dworkin or Joel Feinberg, just to mention the most influential ones – attempted to reconcile moralistic state intervention with fundamental freedoms.[2]

The conflict of legal moralism and individual liberties is not merely a philosophical dilemma, but also a practical legal problem which poses a challenge both to domestic and international courts occupied with the protection of fundamental rights. The contradictory character of legal moralism, that the protection of morals is an inherent part of legal systems, but it can also violate fundamental rights, becomes evident when freedom of expression or privacy rights are restricted for moral reasons. These cases mostly involve the issues of homosexuality, sexual morality, obscenity and blasphemy. The European Court of Human Rights repeatedly had to deal with these issues but the cornerstone cases reflect a largely inconsistent approach.[3]

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[1] This is the so-called harm principle. See John Stuart Mill, *On Liberty* (1985) at 12.

[2] The most important works are: John Stuart Mill, *On Liberty,* (1985); Patrick Devlin, *The Enforcement of Morals,* (1965); H. L. A. Hart, *Law, Liberty and Morality*, (1962); Joel Feinberg, *The moral limits of the criminal law – Harmless Wrongdoing* (*vol. 4)* (1986).

[3] The leading cases are Handyside v United Kingdom, Judgment of 7 December 1976; Dudgeon v United Kingdom, Judgment of 22 October 1981; Norris v Ireland, Judgment of 26 October 1988; Laskey, Jaggard and Brown v United Kingdom, Judgment of 19 February 1997; Müller v Switzerland, Judgment of 24 May 1988; Otto Preminger Institut v Austria, Judgment of 20 September 1994.

2. THE HARM PRINCIPLE OF JOHN STUART MILL

One of the greatest representatives of modern liberalism, John Stuart Mill designated the limits of state intervention by the famous harm principle:

[That] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right.[4]

The harm principle in its pure form radically limits the boundaries of state coercion, legitimizing the limitation of individual liberty only if it is necessary to prevent harm to other individuals, for example in the cases of homicide or robbery. All measures of legal paternalism and moralism are excluded from the sphere of acceptable state interventions.

It is obvious that a criminal code fashioned in Mill's concept would not prohibit a large number of conducts commonly regarded as criminal acts. The lack of the "harm to others" element would remove for example drug use, euthanasia or moral crimes from the scope of criminal law. It is hard to imagine such a permissive penal code. Mill tries to soften his radical harm principle in two ways. First, he accepts a soft form of paternalism. He acknowledges, that people lacking the ability to make voluntary choices (minors, drunken, mentally ill or simply uninformed persons) can be restricted in their decisions, if that would bring them to unacceptable danger. As Joel Feinberg concludes "[s]tate has the right to prevent self-regarding harmful conduct only when it is substantially non-voluntary or when temporary intervention is necessary to establish whether it is voluntary or not".[5] Second, it was only coercion and criminal law that Mill ruled out in such absolute terms. He did not think that the state should not care about its citizens' character, but thought that "[…] benevolence can find other instruments to persuade people to their good, than whips and scourges".[6] There are other means to protect people from self-harm or to improve morals within a society, such as education or cultural policy.

Apart from the previous two considerations, Mill is adamant that the enforcement of morals should not be the subject of criminal law. Critics of Mill usually have four arguments against the harm principle.[7] First, they criticize the exclusivity of the principle: for Mill, the prevention of harm to others is the only purpose for coercion. No other liberty limiting principle can be justified in liberal democracies.[8] However, in modern societies moderate forms of paternalism and moralism may be necessary. Second, the definition of harm is not clear in Mill's theory. He intended harm to include physical harm, but what about mental, moral or emotional harm? Third, it is also unclear who comes under the term "others". This question is at the centre

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[4] John Stuart Mill, *On Liberty,* (1985) at 12.

[5] Joel Feinberg, *Legal Paternalism*, 1 Canadian Journal of Philosophy 113 (1971) and Joel Feinberg, *Jogi paternalizmus*, in Zsolt Krokovay (ed.) *Társadalomfilozófia* (1999).

[6] Supra n 4 at 15.

[7] Simon Lee, *Law and Morals: Warnock, Gillick, and beyond*, (1986) at 23.

[8] Antony Duff, *Harms and Wrongs,* 5 Buffalo Criminal Law Review 13 (2001).

of disputes over abortion and embryo experiments. Finally, Mill claims that the prevention of harm to others can be the reason for legal restrictions, but does not designate the level of harm when the state should intervene. In certain cases the level of harm is not sufficient for criminalization and the state's intervention will cause more problems than benefits.

The extension of the concept of harm offers a solution for the narrow possibilities of state intervention, which may lead to grave injustices in certain cases.[9] The censorship of pornography under the classical form of the harm principle is unacceptable, since it does not directly cause harm to anyone. It does, however, advocate gender inequality and indirectly harms people's fundamental interest in an autonomous life, achievable only under the conditions of equality.[10] It is possible for liberals to support the censorship of pornography to eliminate inequality. Conservatives will also support censorship, but not with the intention to eliminate inequality, but merely to protect the moral rules of the majority from corruption. This is the main difference between this theory and Devlin's theory of indirect harm or Stephens's pure legal moralism.

James Fitzjames Stephen challenges Mill in his essay "Liberty, Equality, Fraternity" published in 1873.[11] For Stephen, some immoral acts are so outrageous, that they must be prevented at any cost. Feinberg categorizes Stephen as a "pure legal moralist in the strict sense".[12] Pure, because he, unlike Devlin, does not reject immoral acts on the ground that they cause some kind of indirect harm to society; he does not invoke the harm principle to justify moralism. It is strict, because the evil it cites is inherently immoral. He asserts that the prevention of immorality is a proper end in itself and it justifies state action. The morality should be determined by reference to the majority opinion of society. If there is a unanimous condemnation of a conduct, then it should be criminalized. Stephen considered morality as the moral code observed by the ruling section of present society, ignoring the possibility of temporal or geographical differences. His theory has some autocratic implications: if the conduct of a minority group is labeled as immoral by the majority, even if it is private and does not harm or offend others, the state can legitimately criminalize it.

3. THE HART – DEVLIN DEBATE

3.1. THE WOLFENDEN REPORT

The issue of legal moralism came into the forefront of public attention in 1957 with the publication of the so-called Wolfenden Report examining, inter alia, the law and practice relating to homosexual offences.[13] The Report moved away from the traditional moralist approach of criminal law, when concluding that "[u]nless […]

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[9] See David Dyzenhaus, *John Stuart Mill and the Harm of Pornography,* in Gerald Dworkin (ed.), *Mill's On Liberty*, (1997) at 31.

[10] Ibid 48.

[11] James Fitzjames Stephen, *Law, Equality, Fraternity*, (1993).

[12] Joel Feinberg*, The moral limits of the criminal law – Harmless Wrongdoing (vol. 4.)* (1986) at 9.

[13] Report of the Committee on Homosexual Offences and Prostitution (London: HMSO) Cmnd 247 (1957).

the sphere of crime [can be equated] with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[14] The committee accordingly recommended that homosexual behavior between consenting adults in private and prostitution itself should not be a criminal offence, though related harmful or offensive public acts (soliciting in the street for the purposes of prostitution, brothel – keeping, homosexual contact with under aged person) must remain criminalized. The Wolfenden Report was a clear step towards the abandonment of Stephen's strict moralism and showed signs to accept a more moderate version of the harm principle. No wonder that the recommendation of the Report (the decriminalization of homosexual behavior between persons over 21) was only implemented ten years later, in the 1967 Sexual Offences Act.[15]

3.2. DEVLIN'S ARGUMENTS

Shortly after the publication of the Wolfenden Report, Sir Patrick Devlin delivered the British Academy's second Maccabean Lecture in Jurisprudence, which was published in 1965 as "The Enforcement of Morals".[16] In his book, Devlin disagreed with the conclusions of the Wolfenden Report and argued that society has the right to enforce public morals by legal means. His theory represents a softer form of legal moralism compared to Stephen's strict moralism.

Devlin examines three questions. The first question is whether society has the right to pass judgment on moral matters. Is there a public morality or are morals always a matter for private judgment? For Devlin, morality is necessarily public morality. What makes a number of individuals into a society is precisely a shared morality. As he concludes, "society is not something that is kept together physically; it is held by the invisible bonds of common thought".[17] Therefore, society does have the right to pass judgment on all moral issues.[18] The second question is connected to the first one: If society has the right to pass judgment has it also the right to use the weapon of the law to enforce it? Devlin's answer here is that society does have such a right since "a recognized morality is as necessary to society as, say, a recognized government" and "society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential for its existence".[19] He likens private immorality to treason, both being capable of destroying the fabric of society. This is Devlin's famous social disintegration thesis, which is significantly different from Stephen's strict moralism and might be compatible with the harm principle, since it focuses on the indirect harm caused by immoral acts through the weakening of social cohesion. The third question deals with the scope of enforcement, whether the weapon of law should be used in all cases or only in some. Devlin's moderate mor-

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[14] Ibid para. 61.

[15] J. G. Riddall, *Jurisprudence*, (1999) at 305.

[16] Patrick Devlin, *The Enforcement of Morals,* (1965).

[17] Ibid 10.

[18] According to some critics, Devlin's first question is badly formulated and misleading. No one, not even liberal theorists deny that society has the right to pass judgment on some moral matters, but Devlin draws a wrong conclusion from this, namely that individuals must share all moral beliefs to constitute a functioning society. Supra n. 12 at 135.

[19] Supra n. 16 at 11.

alism does not demand that every immorality should be punished by law. A balance must be struck between the interests of the society and the individuals, but there are no hard and fast rules as to how this should be done. Nevertheless, there are certain principles, which might help the legislature to decide on the enactment of laws that enforce morals. One is that there must be toleration of "the maximum individual freedom that is consistent with the integrity of society".[20] Devlin accepts that the limits of tolerance will shift from generation to generation and the privacy of individuals should be respected. For these reasons, the law – although it clearly has such task – must be cautious, when intervening in the sphere of morality.

3.3. HART'S CRITIQUE

Lord Devlin's views had their supporters and critics. The most coherent and influential critique was given by Professor Hart in his book entitled "Law, Liberty and Morality" published in 1962.[21] Hart, both as a legal positivist and liberal thinker, supports the separation of law and morals and criticizes legal moralism – with certain exceptions – as an unjustifiable method to limit personal freedom.

Before examining Hart's critique in details, it is important to discuss his separation of "positive" and "critical" morality.[22] For Hart, the question of legal moralism is not merely a question *about* morality. It is a question *of* morality, whether it is morally permissible to enforce morality as such. To decide this issue, Hart distinguishes between positive morality, the moral rules actually accepted and shared by a given social group and critical morality, the general principles and ideals used in the critique of actual social institutions including positive morality. As he explains it in the Concept of Law:

> It is always possible when we come to examine the accepted morality either of our own or some other society, that we shall find much to criticize; it may, in the light of the currently available knowledge, appear unnecessarily repressive, cruel, superstitious, or unenlightened.[23]

It is the point of critical morality, from where the legal enforcement of the currently accepted moral standards can be criticized. These critical ideals are central to all morality and to all societies, such as the principles, that human misery and the restriction of freedom are evils.[24] Therefore, there are two arguments against legal

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[20] Ibid 16.

[21] H. L. A. Hart, *Law, Liberty and Morality*, (1962).

[22] This distinction is by no means new. As Hart admits, it is rooted in the utilitarian thinking of the 19th century. Fuller similarly distinguishes between the morality of duty (the minimum rules which are necessary to preserve an ordered society) and the morality of aspiration (the morality of Good Life and excellence, the fullest realization of human powers, which every man strives for, as it appears in Greek philosophy). Moral and legal judgments depend on which aspect is applied. Gambling, for example, would be condemned and legally forbidden by the morality of duty, but not by the morality of aspiration, which may perceive it as a lack of excellence, a form of conduct unbefitting a being with human capacities, but there is no way by which law could compel a man to live up to the excellences of which he is capable. Lon L. Fuller, *The Morality of Law* (1964) at 7.

[23] H. L. A. Hart, *The Concept of Law,* (1997) at 183.

[24] This brings Hart's position dangerously close to natural law arguments. See Neil MacCormick, *H. L. A. Hart*, (1981) at 149.

moralism by critical morality. First, legal coercion always calls for a good justification, because it limits individual liberties, which goes against the fundamental principles of critical morality. The "burden of proof" is always on the person, who argues for limitation. Second, the positive morals protected by legal coercion must be assessed in the light of the above mentioned fundamental principles. If an existing moral standard goes against higher principles (let us just think of ancient or medieval moral standards, excluding certain classes from society), it should not be reinforced by the legal system. Hart, by introducing the distinction between positive and critical morality, legitimizes the rejection of legal moralism.

Hart's critique of Devlin is based on the separation of public and private immoral acts. He raises no objection to the law prohibiting immoral acts on the ground that the act, committed in public, causes an offence to others of a degree that turns the matter into a public nuisance. Public immorality which offends other people is within the law's proper scope. This is the so-called offense principle, which can be interpreted as an expansion of the harm principle; it is not merely the prevention of physical harm, but also morally offensive behavior, which can justify legal coercion.[25] Hart comes up with the example of bigamy. In most common law jurisdictions it is a criminal offence for a married person to go through a ceremony of marriage with another person.[26] On the other hand, if a married man starts to cohabit with another woman, he may do so without any criminal charges. Why does the law interfere at the point of the second marriage but leaves the immorality of sexual cohabitation unpunished? According to Hart, in the case of bigamy, the law intervenes in order to protect religious sensibilities from outrage caused by a public act and it is punished as an offense or nuisance to public morality.

After examining the public sphere, Hart turns to consider immoral private acts such as homosexual activity between consenting adults. He develops four arguments against criminalization. First, he rejects that such acts could cause harm to others, the harm in this case being the distress caused by the thought of what is being done behind closed doors. The bare knowledge of immoral acts is simply not offensive enough to justify the limitation of individual liberty. According to Hart, "to punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do".[27] It is unacceptable in a pluralistic society which recognizes individual liberty as a value to prohibit certain conducts just because they are different from the general behavior.

Hart's second argument challenges Devlin's view that offences against the moral code indirectly weaken the society. It is only an assumption and there is no evidence that deviation from a particular moral standard necessarily threatens the social order, as it happens in the case of "traditional" crimes, like treason or homicide. Devlin tends to regard morality as a single seamless web of interconnected rules, so that those who deviate from any part are likely to deviate from the whole. This is not true. For example, there is no evidence that those who deviate from conventional sexual

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[25] Joel Feinberg defines the offense principle as "it is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted". Supra n 12 at xix.

[26] Supra n 21 at 39.

[27] Ibid 47.

morality (e.g. homosexuals) are in other ways hostile to society. If there is any connection between the violations of different social rules, it is caused by the repressive regime that discriminates and stigmatizes those, who happen not to conform to every single moral standard. It is not surprising that those whom the law places outside the community will react in an antisocial manner.

Turning to Hart's third point, he criticizes Devlin for moving from the acceptable proposition that some shared morality is "essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history".[28] This is exactly the critique of Devlin's first point described earlier. Hart thinks that society cannot pass judgments on all moral questions, since it is not identical with its presently valid, positive moral rules. The source of Devlin's mistake is that he does not distinguish between positive and critical morality. This omission makes his theory absurd: strictly taken, it would "prevent us saying that the morality of a given society has changed, and would compel us instead to say that one society had disappeared and another one taken its place".[29] If we do not introduce the concept of critical morality, it is impossible to explain the evolution of moral rules.

Hart's last argument is directed against Devlin's third point, the legal enforcement of moral rules. While Devlin does not claim that all moral standards should be regulated by criminal law, he does believe in legal coercion in certain cases. Hart rejects this idea. He does not dispute that individuals should be encouraged to abide by the moral standards, but this should be achieved by public discussion and advice, not by legal coercion. If certain moral rules are taught and enforced by criminal law, there is a chance that the fear of punishment may remain the sole motive for conformity. If moral standards are not accepted (to use Hart's terminology from the Concept of Law, "internalized") by the members of society, external compulsion is useless in the long run. There is no real *preventive* character of the punishment of immoral acts. Hart also rejects that justification could be sought in the *retributive* theory of punishment. This theory is based on the natural human feeling of revenge that it is just to cause suffering to someone who has intentionally inflicted suffering on others. It is only plausible if the crime has harmed others and there is both a wrongdoer and a victim. There is no victim in the case of an immoral private act; the retributive justification is therefore not applicable. Hart also refutes Stephen's idea that the punishment of immorality is justifiable on the ground that it has a *denunciatory* function by expressing the moral condemnation of the offender in an "emphatic" form and ratifying the morality which he has violated.[30] Applying physical coercion not for retribution or prevention, but merely for expressing moral condemnation is close to human sacrifice as an expression of religious worship.[31] It is also quite ironic to claim that criminal sanctions are the most emphatic means of condemnation, since normally moral condemnation is expressed by words and not by criminal sanctions.

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[28] Ibid 51.
[29] Ibid 51.
[30] Ibid 63.
[31] Ibid 66.

4. OTHER THEORIES CONCERNING LEGAL MORALISM

The debate between Lord Devlin and Professor Hart generated widespread public discussion from academic journals to the popular press.[32] I do not intend to cover everyone who has contributed to the topic of legal moralism in the past few decades, but I will try to give a brief overview of the most interesting and influential contemporary theories.

4.1. RONALD DWORKIN

Ronald Dworkin discussed the validity of Devlin's theory in 1966.[33] He criticizes the majority's right to follow its own moral convictions in defending its social environment from change it opposes. The weakness of this idea lies in the uncertainty of the legislator, who is not always able to satisfactorily assess whether a moral consensus exists in the society. Even if such consensus is found to exist, the opinion must be based on moral arguments. Dworkin thinks that Devlin misidentifies what a moral argument is. When people prejudge, rationalize or emote they do not argue morally. However, the majority's moral convictions are largely founded on such arguments, which are – especially emotions, like disgust or hatred – susceptible to distortion.[34] Dworkin thinks that one should be very careful when assessing the majority's morality and distinguish between the real moral arguments supporting the majority opinion and the unreliable non-moral arguments.

4.2. JOEL FEINBERG

Joel Feinberg in his book Harmless Wrongdoing tries to defend the moderate liberal position which he defines as the view that "[t]he harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions".[35] Despite all his efforts, he does not manage to convince himself fully that the harm and offense principles are the exclusive reasons for legal coercion. Some "stubborn counterexamples" prevent him to reach his original goal. Feinberg cites, as an especially difficult case for liberal opponents of legal moralism, Irving Kristol's hypothetical example of a "gladiatorial contest in Yankee Stadium before a consenting adult audience […] between well-paid gladiators who are willing to risk life or limb for huge stakes".[36] This case involves a "free-floating evil" which neither harms (except for the consenting gladiators, but this is already an issue of paternalism) or offends other individuals. These evils are independent of the condition of anyone's interests, but Feinberg can't help but think that such evils – hundred thousand adults deriving great pleasure from bloodshed, human suffering and the sight

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[32] Lord Devlin includes references to these comments in the bibliography of The Enforcement of Morals. Supra n 15 at xiii.

[33] Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 Yale Law Journal 986 (1966).

[34] See Stanford Encyclopedia of Philosophy, the "Limits of Law" entry. Available at http://plato.stanford.edu/ entries/law-limits (11. 02. 2006).

[35] Supra n. 12 at xix.

[36] Ibid 128.

of savage cruelty – are objectively regrettable and should not be allowed. Although he tries to justify legal prohibition on the ground that the gladiatorial spectacle will brutalize the audience and indirectly lead to an increase in violent crimes, it might be very difficult to establish – just as in the case of pornography and the crimes against women – that such contests would lead to more violence.[37] Also, as in Devlin's case, the introduction of the concept of indirect harm may open a large door to conservativism.[38] Therefore, it is necessary to include legal moralism as a possible justification of coercion in cases concerning "free-floating" evils. Feinberg seems to accept, that "it can be morally legitimate for the state to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that such actions constitute evils of other (free-floating) kinds".[39]

I would like to point out one more characteristic of Feinberg's theory. His reasoning against moralism is essentially moralistic. He warns fellow liberals not to fall into the trap of ethical relativism.[40] The typical reasoning of relativists is the following:

i. All moral views are relative.
ii. Thus, nobody has the right to impose his view of morality on anyone else.
iii. Therefore, laws forbidding allegedly immoral activities on the ground of their immorality are wrong.

The problem of this logic is that propositions (ii) and (iii) also express moral judgments. There are two possibilities. If they are relative, as the first statement claims, then there is no reason for someone who does not share them to revise his view in favor of the liberal position. If they are non-relative, then the first proposition is false and cannot provide a valid basis for the two other propositions. All in all, ethical relativism is not a good way to criticize the legal enforcement of morals.

4.3. JEFFRIE G. MURPHY

Jeffrie G. Murphy gives an unusual critique of legal moralism.[41] Although he agrees with the general conclusions of Mill, Hart and the other utilitarian liberals, he disputes their methods. These authors all regard the enforcement of private immorality as an essentially moral issue, which could be decided by the direct application of the principle of utility. Murphy argues that the illegitimacy of legal moralism is not established primarily by moral argument but by a conceptual inquiry into the nature of criminal law. His reasoning is the following. First, he argues that crimes always have a victim.[42] Second, he considers that acts of private immorality are acts which have no victims. From these, it logically follows that private immoral acts are not crimes. To verify the first statement, the author refers to the legal philosophy of Kant. On Kant's view, the primary function of law is to protect the rights of individ-

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[37] Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 Michigan Law Review 1415 (1990).

[38] Joel J. Kupperman, *The Moral Limits of the Criminal Law: Volume 4: Harmless Wrongdoing, by Joel Feinberg (Review),* 101 Mind 160 (1992).

[39] Supra n 12 at xx.

[40] Supra n 12 at 1419.

[41] Jeffrie G. Murphy, *Another Look at Legal Moralism*, 77 Ethics 50 (1966).

[42] Except, of course, for crimes of attempt, which do not by definition have actual victims.

uals.[43] This is doubtless an oversimplification, but, as Murphy argues, if we limit the application of Kant's account to the criminal law it seems much more plausible.[44] Crimes are offenses with victims. The second statement of Murphy is that private immoral acts do not have victims, neither in the case of consenting participants nor in the case of third parties. Although Murphy acknowledges that there are rights which cannot be surrendered by willing consent (for example in the case of murder, it is no defense that the murdered gave his consent), he does not think that any such rights are involved in the immoral acts of sin and vice. Again, third parties cannot be regarded as victims, since the mere knowledge that something immoral goes on in private is not offensive and does not interfere with the rights of others. Murphy's theory seems plausible, but I think his first statement, that crimes always have victims, is not necessarily true. Victimless crimes are possible in relation to paternalism, when the legislator criminalizes a conduct in order to protect the actor from his own self-harming behavior, for example in the case of drug consumption. If paternalism is combined with a moralist reasoning, it is possible to have private immoral acts criminalized, even if they have no actual victims.

Finally, I would like to mention some practical reasons against the enforcement of morals. According to Arthur Kuflik, there are strong common-sense arguments against strict legal moralism, the legal protection of every positive moral standard. It is impossible to coerce people to conform to less important moral demands and "unrealistic to suppose that legal restrictions and punishments can increase the number of people who genuinely love their neighbors as themselves".[45] Furthermore, as the number of laws that cannot be realistically enforced increases, more and more people will lose their respect for the rule of law, making the enforcement of the crucially important criminal regulations harder. Even if it would be possible to change the moral behavior of people by criminal law, the costs incurred in carrying out the legal enforcement scheme would most likely overshadow the prospective benefits. It is also problematic that most moral rules resist clear and precise formulation, which would be the precondition of criminalization. Moreover, an expansive authority, regulating every segment of life would be in conflict with human rights and democracy, because it would enable oppressive regimes to unlawfully gather information, suppress citizens and silence their critics. Kuflik's last argument against strict legal moralism is based on the previously mentioned distinction of morality of duty and morality of aspiration.[46] Aspirations and ideals are not mandatory. A person who performs a supererogatory deed is worthy of moral admiration but someone who fails to do so is not to be penalized. If the two forms of morality are not separated, it might be that criminal law punishes someone for not complying with moral aspirations.

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[43] Kant thinks that the primary purpose and the *conditio sine qua non* of the civil union (state) is "the realization of the rights of men under public compulsory laws, by which every individual can have what is his own assigned to him, and secured against the encroachments or assaults of others". Supra n 41 at 52.

[44] Civil or administrative offences, such as parking violations do not necessarily interfere with the rights of others.

[45] Arthur Kuflik, *Liberalism, Legal Moralism and Moral Disagreement*, 22 Journal of Applied Philosophy 186 (2005).

[46] Supra n. 22.

5. THE PRACTICAL APPLICATION OF THE OFFENSE PRINCIPLE

I have tried to give a brief overview of the different theories concerning legal moralism. The theories, however, are not always reflected in the judicial reasoning. I argue that the adoption of the offense and the harm principles (and their consequent application) could lead to less incoherent judgments, which restrict fundamental rights in the name of public morality. The next cases are from the case law of the European Court of Human Rights.

In *Müller v Switzerland* the Swiss cantonal authorities had prosecuted an artist and the promoters of an art show for display of obscene materials.[47] The paintings at issue depicted an orgy of unnatural sexual practices and were found to violate Article 204 of the Swiss Criminal Code which prohibited obscene publications. The applicants were sentenced to a fine of 300 Swiss francs and the paintings were confiscated. The general public had free access to the exhibition, as the organizers had not imposed any admission charge or any age limit. This case can be regarded as an example of the application of the offense principle. Society definitely has the right to regulate immoral public activities that may offend the feelings of others. However, the punishment must be proportionate to the offense suffered. The organizers should have ensured that only those, who are genuinely interested, attend the exhibition. This could have been accomplished by providing prior information on the content of the exhibition and imposing an age limit on visitors. Such regulations are acceptable to protect individuals from unnecessary moral offences, but the confiscation of the paintings was clearly disproportionate. As Judge Spielmann points it out in his dissenting opinion, the notion of obscenity is relative and subject to quick change. Flaubert was prosecuted for his novel "Madame Bovary" and Baudelaire for the "Les Fleurs du Mal". Both works are considered today as fine pieces of art. By confiscating the paintings of Mr. Müller, the authorities deprived those who had different notions about obscenity of the possibility to visit the exhibition.

Consensual homosexual conduct is the main field where the Strasbourg Court takes firm position against domestic legal moralism and exercises strict scrutiny of any legislation criminalizing these activities. The *Dudgeon case* is a landmark case in this respect.[48] Private homosexual acts between consenting males over 21 were decriminalized in England and Wales by the Sexual Offences Act in 1967 (ten years after the Wolfenden Report) and in Scotland in 1980. The government of the United Kingdom proposed similar legislation for Northern Ireland, but – due to its unpopularity – the draft was withdrawn. The applicant, a homosexual activist appealed to the European Court, which found that the legislation and threat of prosecution violated his privacy rights as protected by Article 8(1) of the Convention. The reasoning of the majority decision follows the usual scheme. As the Court declares it in paragraph 41, the maintenance of the contested legislation constitutes an interference with the applicant's right to privacy; "[t]he very existence of this legislation continu-

[47] Müller v Switzerland, 24 May 1988, Series A No 132; (1991) 13 EHRR 212

[48] Dudgeon v United Kingdom, 22 October 1981, Series A No 45; (1982) 4 EHRR 149. See also: Norris v Ireland, 26 October 1988, Series A No 142; (1991) 13 EHRR 186; Modinos v Cyprus, 22 April 1993, Series A No 259; (1994) 16 EHRR 485.

ously and directly affects his private life". The Court is convinced that the applicant is a victim under Article 25 of the Convention.[49] Concerning the justification of the interference, the judges are satisfied that it was both prescribed by law (by two Acts of 1861 and 1885) and served a legitimate aim (the protection of morals). The term "necessary in a democratic society" implies the existence of a pressing social need, which is left to the Member States with a certain margin of appreciation to assess. However, the Court narrows this margin by two means. First, the nature of the activity in the present case involves the most intimate aspects of private life; therefore only particularly serious reasons may justify criminalization. Second, the restriction must be proportionate to the legitimate aim pursued. To prove the disproportionality of the legislation, the Court starts a lengthy evolutive and comparative interpretation, looking at the development of morals within Northern Ireland and the relevant practice of other Member States.[50] There seems to be a better understanding, and in consequence an increased tolerance, of homosexual behavior in Europe. This consensus narrows the discretion of nation states, leaving the decision to the Court, which finally finds a violation of the applicant's privacy rights. Although the outcome of the case is correct, the reasoning can be criticized for relying too heavily on the consensus of other Member States. Merely because most states opt for decriminalization, it does not necessarily mean it is the right thing to do. While overemphasizing the existence of a common European moral, the Court – although refers to it in paragraphs 17 and 49 – neglects to examine the reasoning of the Wolfenden Report or the main arguments presented by Hart. The lack of harm or offense to others is a strong argument against the legal prohibition of consensual homosexual behavior.

Ironically enough, it is one of the dissenting judges, Judge Walsh, who makes a reference to the Hart-Devlin debate.[51] The Irish judge takes a conservative moralist position. He thinks that private and consensual homosexual activities can be harmful to some homosexuals:

A distinction must be drawn between homosexuals who are such because of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable. […] Even assuming one of the two persons involved has the incurable tendency, the other may not.[52]

The criminalization of homosexuality is therefore acceptable in order to protect "curable" homosexuals from harm caused by their "incurable" partners. The absurdity of this reasoning is obvious. Besides direct harm, Judge Walsh is also concerned with the "damaging effects of decriminalization on moral attitudes". It is a purely moralistic argument, advocating legal coercion on the basis that the involved activity is inherently immoral. Judge Zekia, the Cypriot judge, adopts a similar view. He com-

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[49] Judge Walsh challenges this view in his dissenting opinion. Although Mr. Dudgeon was questioned by the police after the house search, the Director of Public Prosecutions did not start proceedings against him. Since the applicant himself has suffered no harm, he is not a victim under Article 25 and may not ask the Court to strike down a legislative provision of a Member State.

[50] Supra n. 49 at 69.

[51] Partially dissenting opinion of Judge Walsh, para. 9.

[52] Ibid para. 13.

pares the privacy rights of homosexuals with the majority's right to respect for their religious and moral beliefs under Articles 8, 9 and 10 of the Convention. He implies that the mere knowledge of homosexuality is so offensive for the majority, that criminalization is justifiable. However, according to Hart, this is not sufficient to apply the offense principle.

6. CONCLUSION

I have examined several theories relating to the issue of enforcement of morals. Most authors, except for Stephen and Devlin, oppose legal moralism and devise powerful arguments against it. The question is whose theory is the most suitable to be applied in practice, in the legislative and decision-making process. I found Hart's theory the most convincing, since it is simple, coherent and easily applicable. By separating the sphere of public and private morality, he introduces the offense principle and abandons the radical liberal position claiming exclusivity for the harm principle. It is obvious that society has the right to protect its members from morally offensive public acts which violate positive moral obligations. It seems that the harm and offense principles are sufficient in most cases to preserve the order of the society. The criminalization of private non-offensive and harmless acts based merely on the fact that they do not conform to the moral standards of the majority, is morally unacceptable, because it violates higher critical moral standards.