How Crimes should be Created: a Practical Theory of Criminalization

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Introduction
Possession of illicit drugs, consumption of cigarettes, exhibitionism, wearing a burqa, hate speech, selling fur, infringing copyrighted material, prostitution, professional striptease, possessing child pornography, incest, abortion, unprotected intercourse, homosexual sodomy, false advertising, gladiator fights, boxing, gambling, car racing; all are types of conduct that have somewhere, at some time been either criminalized or called on for criminalization or for legalization.

Criminalization is one of the most significant issues in criminal law. Actus reus, mens rea, defenses; these issues receive massive academic attention, as well they should, for they are all important and necessary constructs to making criminal law both just and logical. However, criminalization necessarily precedes any of these constructs. We must criminalize before analyzing how offenses are constructed. Prior to phrasing the precise actus reus we must choose what sort of conduct we wish to prevent. Before realizing when defenses are in order, we must decide what offenses we are to establish.

Criminalization is critical. What does it matter if criminal law constructs such as the actus reus are well drafted in specific offenses, if those same offenses should not have been created at all? What does it matter if mens rea is well understood in general if criminalization is overwhelmingly vague? For criminal law to be just, criminalization must be just. Criminalization charts human freedom, determining what people are not allowed to do. It affects justice, equality, legitimacy and monetary resources.

Criminalization is extremely important. It is therefore surprising that it receives such little if not scarce scholarly attention. Can legislators criminalize any sort of conduct, without limitations? Most criminal law scholars provide no clear answer to this question. Too few have addressed the matter theoretically, analyzing its most abstract layer, thus enriching the philosophical discourse. Rather, they have settled for very general guidelines which leave so many questions unanswered that they effectively provide no real help in the practical realm. On the other hand, analysis of concrete questions (conducts) of criminalization is more common, but this only contributes to narrow practical issues. The philosophy of criminalization is rare; concrete
discussions have no method. There is an enormous gap between the philosophical and the concrete.

In order to bridge that gap, an analytical examination of criminalization is required, a metaphorical ladder of criminalization that conceptualizes, formulates and distinguishes general considerations of criminalization and offers the method and coherency usually absent from concrete discussions of criminalization. Such a ladder will allow the analysis of any type of conduct and minimize the need for creative non-systematical efforts characterizing concrete criminalization discussions. It will also illuminate the proximity between various offenses and rationales and promote transparency.

This article begins with a review of the criminalization discourse, briefly addressing the current leading principle of criminalization, the harm principle, and summarizing analytical literature on criminalization. Part 2, the heart of the article, presents the criminalization ladder, a construct which conceptualizes and formulates various general considerations regarding the criminalization of any conduct: a step-by-step normative criminalization. Part 3 presents the various benefits that the criminalization ladder can provide for future analysis. Part 4 briefly illustrates how the ladder works, using online gambling as an example. Conclusions are then presented in the final section.

**Part One: Toward a Ladder of Criminalization**

(1) The Paucity of the Criminalization Discourse

Criminalization is a core criminal law issue. It is important to distinguish between its descriptive and normative aspects. The descriptive aspect addresses either the existing offenses in a given legal system or the way in which they were formed politically, historically or otherwise. How are prohibitions created? The simple

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1 HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 17 (1969) (suggesting criminalization is one of three key problems of substantive criminal law).


3 The term “offense” changes according to the discussion. See JEREMY BENTHAM, THEORY OF LEGISLATION 147 (reprinted, 1975) (Bentham’s normative answer was based upon utilitarianism).

4 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 23, 52 (5th ed. 2006); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001) (suggesting criminalization is mainly determined by political opportunity and power); William J. Stuntz, Reply: Criminal Law’s Pathology, 101 Mich. L. Rev. 828, 836 (2002) (providing a thorough analysis of the political aspects of criminalization). For claims that over-criminalization seems costless to the legislator see Erik Luna,
answer is that the legislator declares that anyone acting in certain manners shall be punished in other manners.\textsuperscript{7} More thorough answers consider legal and constitutional limitations. Obviously, the descriptive aspect of crime is not enough.\textsuperscript{8} Justification requires a normative aspect.\textsuperscript{9} Criminalizing specific types of behavior requires proclaiming that they are forbidden under threat of punishment, providing practical reasons to avoid such conduct and allowing for punishment and condemnation of those who disobey.\textsuperscript{10} Such use of power calls for justification,\textsuperscript{11} otherwise over-criminalization occurs.\textsuperscript{12} Even those who do not demand moral justifications for criminalization might still support economical ones.\textsuperscript{13}

The normative aspect is not as broad as one might expect when addressing such a critical issue. What types of behavior should be criminalized and which should not? Analytical attempts to answer this question have traditionally focused on specific
types of conduct, suggesting that they should/not be criminalized. However, the question of how the law should decide whether to criminalize any type of behavior has not yet received sufficient theoretical attention. Criminal law textbooks shed little light on this issue. Even constitutional instruments, if such exist, may not necessarily suffice, having not being specifically tailored to the needs of criminal law. The American Constitution imposes few (if any) limitations on criminalization, leaving legislators with (overly) wide discretion. Analysis of criminalization is often conducted either at concrete levels (regarding specific behaviors) or at a highly general one (as demonstrated below).

(2) The First Step toward Criminalization: the Harm Principle

The harm principle is a well-known (but perhaps not very well-understood) principle of the Anglo-American legal system for limiting criminalization. This principle, first articulated by John Stewart Mill in his renowned On Liberty, rejects the use of society's power (not necessarily criminal law) for any purpose other than that of preventing harm to others. It is forbidden to interfere with one's action for one's own sake; one has sovereignty over oneself, one's body and thoughts. The only objective

14 The outcome is incoherence, in light of a case by case examination. See Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, Predictably Incoherent Judgments, 54 STAN. L. REV. 1153, 1194 (2002). That which is incoherent is also incomprehensible, segmented and self-contradictory. See Joseph Raz, The Relevance of Coherence, 72 B.U.L. REV. 273, 276 (1992). Incoherence relates to lack of justification: see J. M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 YALE L.J. 105, 115-7 (1993). Lack of justification relates to lack of legitimacy: see William A. Edmundson, The Antimony of Coherence and Determinacy, 82 IOWA L. REV. 1, 11 (1996). Analytical examination of specific types of behavior might focus on relatively broad areas of conduct, such as "regulative offenses"; however, it remains one single type of conduct. See, for example, Stuart P. Green, Why it's a Crime to Tear the Tag If a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1563-1615 (1997).

15 This point is far from novel: See Lacey, supra note 6, at 2 (claiming the phenomenon of criminalization is under-analyzed); Finkelstein, supra note 11, at 336 (pointing out that the question "what is crime?" should have been first in line among the questions to be analyzed by theoreticians, but only little effort had been invested therein); PIRŠAK, supra note 4, at 5 (claiming that the literature regarding criminalization is scarce); HUSAK, supra note 10, at 58-63 (maintaining that the phenomenon of over-criminalization has not received adequate analysis among criminal law theoreticians); Alfonso Donoso M., Book Review: Douglas Husak, Overcriminalization. The Limits of the Criminal Law, 3 CRIM LAW AND PHILOS 99 (2010) (claiming that philosophers have not said much about criminalization); BAKER, supra note 4, at X (preface) (same). However, the criminalization literature has certainly increased in recent years.

16 See Lacey, supra note 6, at 18 (claiming criminal courses do not refer to the manner in which offenses are created); Douglas Husak, Is the Criminal Law Important?, 1 OHIO ST. J. CRIM. L. 261, 261 (2003); Douglas Husak, Crimes outside the Core, 39 TULSA L. REV. 755, 765 (2004) (suggesting criminal law textbooks focus on the general part of criminal law while skipping the scant parts discussing criminalization); CARL CONSTANTIN LAUTERWEIN, THE LIMITS OF CRIMINAL LAW – A COMPARATIVE ANALYSIS OF APPROACHES TO LEGAL THEORIZING 1, 117 (2010) (describing the lack of normative legal analysis of criminalization in Australia); Nuotio, supra note 7, at 238 (claiming that theories of criminalization are marginal in comparison to other criminal law theories).


for which the state is authorized to interfere with one's freedom to act is that of preventing harm to others.\textsuperscript{19} Granted, people are not usually completely isolated beings: inflicting self-harm without affecting at least some others is unlikely.\textsuperscript{20} Still, this discomfort is a fitting price to pay for human freedom.\textsuperscript{21} The harm principle was supported by prominent scholars, including Hart and Dworkin,\textsuperscript{22} and was later thoroughly analyzed by American legal philosopher Joel Feinberg\textsuperscript{23} in a four book series on possible criminalization principles: the harm principle, the offense principle, legal paternalism and legal moralism.\textsuperscript{24} Among these, the most prominent is the harm principle, also said to be the most acceptable in modern society.\textsuperscript{25} What sort of limitation does it impose on criminalization? As stated, according to this principle, criminalization is legitimate only if it serves the purpose of preventing types of behavior that cause harm to others.

(3) The Harm Principle: an Insufficient Condition

The various problems arising from the harm principle (vagueness being an obvious example)\textsuperscript{26} are beyond the scope of this article. My objective here is not to denounce fundamental principles of criminal law, but rather to extract insight there from.\textsuperscript{27} But

\textsuperscript{19} JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 63 (1984) (explaining the various meanings that may be attributed to the expression "harm to others").

\textsuperscript{20} See MILL, supra note 18, at 80-1 (maintaining that no person is an island).

\textsuperscript{21} Ibid, at 108-9 (specifying three reasons against governmental interference, besides enabling freedom).

\textsuperscript{22} H.L.A. HART, LAW, LIBERTY AND MORALITY 4-5 (1963); Ronald Dworkin, Lord Devlin and the Enforcement of Morals, 75 YALE L.J. 986, 992 (1966).


\textsuperscript{24} See FEINBERG, supra note 19; JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986); THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1990). Unlike the general discussion of the state's limitations (as expressed by Mill), Feinberg discussed the harm principle solely in the context of criminalization. Feinberg's writings are considered to be "the best defense for the harm principle": Husak, Limitations on Criminalization, supra note 10 (supra note 20 to his text).

\textsuperscript{25} See PACKER, supra note 1, at 266 (saying that ever since Mill's essay, the dispute between law and morality has been forged upon the formula of "Harm to Others"). Also see Shlomit Wallerstein, Criminalising Remote Harm and the case of Anti-democratic Activity 28 CARDozo L. REV. 2607, 2699 (2007); Darryl Brown, History's Challenge to Criminal Law Theory, 3 CRIM LAW AND PHILOS 271, 278-82 (2009); RA Duff et al., supra note 8, at 15; Lindsay Farmer, Criminal Wrongs in Historical Perspective, in THE BOUNDARIES OF THE CRIMINAL LAW 214, 214 (RA Duff et al., eds, 2010).

\textsuperscript{26} See ASHWORTH, supra note 4, at 32 (emphasizing the need to be aware of the fact that the term "harm" is morally charged); Ofseyer, supra note 18, at 408 (claiming that the decision to address something as social harm is based on moral judgment, as is the decision to tolerate it); PERSAK, supra note 4, at 14, 60-61, 71, 77-91 ("harm" is a vague term which changes through space and time); RA Duff et al., supra note 8, at 21 (suggesting that an alternative to the harm principle may perhaps be called for, or alternately the realization that there is no master principle of criminalization); also see Gerald Dworkin, Devlin Was Right: Law and the Enforcement of Morality, 40 WM. & MARY L. REV. 927, 930 (1999); James Boyle, Foucault in Cyberspace, 2 YALE SYMP. L. & TECH. 2 (2000); BAKER, supra note 4, at 1-2, 8, 30.

\textsuperscript{27} I must note, however, that I agree with Hart, asserting that the claim that criminal law does not revolve around one single principle [a claim that Hart referred to in LIVINGSTON HALL AND SHELDON GLUECK, CASES ON THE CRIMINAL LAW AND ITS ENFORCEMENT 15 (3rd ed., 1958)], is a fact and not a misfortune. See supra note 8, at 404 (claiming that a criminal code reflecting one single basic principle would be a poor one).
even assuming the harm principle's soundness, this principle does not presume to set a sufficient condition for criminalization, but rather a necessary one, i.e. a filter, a negative limitation: without harm to others, the state has no moral right to interfere.\textsuperscript{28} However, harm does not constitute a sufficient basis for state interference rather this may only be concluded after considering additional factors.\textsuperscript{29} In the absence of such, criminalization debates are often drawn to processes of balancing differently-layered considerations: all considerations supporting criminalization on the one hand and all those against it on the other. Nevertheless, such balancing entails difficulties.\textsuperscript{30} The absence of a clear distinction between different kinds of considerations suggests the absence of method, organization and coherence within approaches toward criminalization. Schonsheck and (later on) Husak tried to restore order in this context.

\textbf{(4) Theorizing Criminalization: Systematic Literature}

\textbf{(4)(A) Schonsheck’s three filters of criminalization}

In his book \textit{On Criminalization} Jonathan Schonsheck suggested three filters through which criminalization must pass: the Principle Filter, the Presumptions Filter and the Pragmatics Filter. The Principle Filter comes first: criminalization must align with the principles in a given regime, such as the harm principle, the offense principle and so forth (Feinberg's principles). Once an interest in regulating a certain type of conduct is established, it is time for the Presumptions Filter. This is essentially a matter of alternatives, of whether there are less restrictive measures than criminal law that can provide solutions. Finally, the Pragmatics Filter examines the consequences of criminalization, some of which are clear and immediate, whereas others are vague and remote. Finally, a cost-benefit analysis is in order, serving as a filter which also has a moral aspect.\textsuperscript{31}

\textbf{(4)(B) Husak’s seven limitations}

\textsuperscript{28} See FEINBERG, supra note 19, at 9-10 (explaining that even when the harm principle is satisfied, other reasons may prevent criminalization). Also See Bernard E. Harcourt, Criminal Law: the Collapse of the Harm Principle, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999) (claiming that the harm principle is a necessary yet insufficient condition for criminalization). Also see Wallerstein, supra note 25, at 2703; PERŠAK, supra note 4, at 66, 71, 86, 91, 130; Hamish Stewart, The Limits of the Harm principle, CRIM LAW AND PHILOS. 17 (2010); BAKER, supra note 4, at 38; RA Duff et al., supra note 8, at 16.

\textsuperscript{29} SIMESTER & SULLIVAN, supra note 9, at 9.

\textsuperscript{30} See SCHONSHECK, supra note 11, at 7, 23, 30-35 (identifying that arguments in favor of or against criminalization often include a shopping list of pros and cons, and that there are no criteria of sufficiency. Also see PERŠAK, supra note 4, at 10-12, 139.

\textsuperscript{31} See SCHONSHECK, supra note 11, at 64-70; and also PERŠAK, supra note 4, at 92-93.
The most elaborate (and recent) general theoretical analysis of criminalization was presented in *Overcriminalization*, an essay by Douglas Husak, who had previously addressed this issue on more than one occasion, though not as extensively. Assuming that American criminal law is overly broad, Husak aspired to formulate a theory of criminalization that would allow distinction between right proscriptions and wrong ones. He discussed seven limitations of criminalization, including internal and external limitations. Husak's internal limitations are: nontrivial harm or evil constraint; wrongfulness; desert; and placing the burden of proof upon those who support criminalization. Husak's external limitations, borrowed from American constitutional law, include substantial interest supporting the law's goal; direct advancement of that interest; and a law that is not overly broad.

(4)(C) Toward a ladder of criminalization

Schonsheck emphasized important issues. He clarified that the harm principle does not involve the search for alternative courses of regulation, nor does it analyze the consequences of criminalization. Schonsheck identified the general balance approach and suggested differentiating among various criminalization considerations, thus making an important contribution to the criminalization discourse. Husak's work (including, but not limited to his book) has also greatly enriched this discourse,

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32 See Husak, supra note 10; Is the Criminal Law Important?, and Crimes outside the Core, supra note 16; Applying Ultima Ratio, supra note 17.

33 Husak elaborated this assumption in his essay Overcriminalization (supra note 10, at 3-5).

34 Chapter 2 (of four) revolved around the four internal limitations and chapter 3 discussed the three external limitations. Internal and the external limitations overlap considerably and the distinction between them is somewhat artificial: ibid, at 58.

35 Ibid, at 66, 69-72 (maintaining that it is difficult to identify the harm forbidden by law because legislators need not specify the law's rationale). Husak's analysis, in his own words, did not focus upon the concept of harm.

36 Ibid, at 66, 73-76 (explaining that conduct must be wrong in some sense, even if vague).

37 Ibid, at 82-83 (claiming that punishments are justified only when deserved).

38 Ibid, at 82, 92-100 (establishing a theoretical right not to be punished, a right the state may violate only when punishment is justified).

39 Ibid, at 120-1 (claiming that any self-respecting theory of criminalization must include the four internal limitations, but not necessarily the three external ones, derived from a political theory).

40 Id, at 125-30 (emphasizing that the popular theory of criminalization regarding constitutional law is flawed, due to its failure to comprehend the proper significance of criminal law).

41 Ibid, at 133-42 (maintaining that a substantial state interest in confronting this harm is needed for criminalization).

42 Ibid, at 145-53 (suggesting that all criminal laws, including those bearing expressive goals, must pass an empirical test).

43 Ibid, at 151-158 (claiming that legislators must look for alternatives to obtain the goal to its fullest through less restrictive manners).
mostly in relation to the most abstract level thereof, emphasizing important issues such as requiring the law's ability to achieve its goal.

However, the search for alternatives to restrictive legislation, attempts at assessing consequences, requiring the ability to achieve goals and so forth, seem important for any kind of legislation. Adhering to a highly conceptual level of criminalization analysis does not bring us any closer to clear considerations of criminalization than does sticking to general constitutional doctrines for reviewing legislation. In contrast, it is also inadvisable to adhere to overly concrete levels of analysis, as this does not provide clear insights regarding other forms of conduct. Therefore, the main contribution I wish to offer to the criminalization discourse refers to an intermediate level of abstraction. This level infuses criminalization with substance that is simultaneously general and criminal, while clearly distinguishing between different steps of criminalization, understanding the differences and relations among them, and allowing a systematical look at criminalization. Without such an intermediate step between the abstract-philosophical level and the concrete level, it is difficult to distinguish clearly and systematically between the different stages of criminalization. The term “Causation”, about which criminalization scholars have yet to elaborate, shall prove helpful in doing so.

**Part Two: A Ladder of Criminalization**

The following section of this article introduces a clear, extensive and systematical metaphorical ladder describing the stages and considerations of criminalization. The ladder is divided into four basic parts (steps): identifying a specific type of offensive conduct; examining the ability of criminal law to successfully confront that conduct; examining alternatives to criminalization; and finally assessing the social costs entailed in the solutions to the offensive conduct, attempting to reduce them and striking a balance accordingly. I will discuss each step separately.

**A. Identifying a Type of Offensive Conduct**

44 Husak himself noted that over-focusing on the American Constitution has prevented a systematical discourse of the matter of criminalization: Ibid, at 62. For a later attempt at reading the harm principle into the American Constitution see BAKER, supra note 4, at 41, 76.

45 In this sense, I am not necessarily suggesting an opposing concept to those suggested by Schonsheck and Husak, but rather a complementary one. Husak presented limitations and defended them, but explicitly noted that filling each of them with substance is a task yet to be undertaken, and one that may require several lifetimes. See Ibid, at 177.
(1) How does the harm principle work?

This article does not purport to undermine the harm principle. Despite its problems, this principle shall serve as a point of departure regarding criminalization. Simplistically speaking, the harm principle justifies criminalization only for the prevention of harm. It identifies undesired consequential events (not necessarily materialistic), or in other words: certain types of conduct result in harm, therefore confronting them is allegedly justifiable. The starting point is the identification of a specific type of offensive conduct. Thus the basic version of the question is simple, focusing on a type of conduct which is the object of potential criminalization: does this type of conduct result in harm?

(2) The relevant variables: harm, a given type of conduct, causation

The answer to the above question is often far from simple. Nearly anything creates some risk of harm and a wide variety of acts may lead to harm. The question of remote harm is difficult; in most instances, the law is interested mainly in proximate causes. But even when harm is clear, its pathway might not necessarily be so. And from there, the road to controversy surrounding the harm related to certain types of conduct is short. Solution is anything but easy.

It appears that in any specific instance the path to harm includes three variables: the first is a given type of conduct; the second is harm; and the third is the linkage

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46 SIMESTER & SULLIVAN, supra note 9, at 7 (asserting that determining whether a certain form of conduct is harmful enough to justify criminalization always entails difficult legislative judgment, taking into account the social structure and society's political values).

47 PACKER, supra note 1, at 266 (arguing that Mill's formula does not solve much). Also See FEINBERG, HARM TO SELF, supra note 24, at 101 (saying that there is no form of action or inaction that does not involve some amount of risk); Andrew von Hirsch, Extending the Harm Principle: 'Remote' Harms and Fair Imputation, in HARM AND CULPABILITY 259, 260 (A.P. Simester and A.T.H. Smith, eds., 1996) (claiming that one can go far to protect people from the risk of harm). Also see Harcourt, supra note 28, at 120; Husak, Crimes outside the Core, supra note 16, at 771; HUSAK, supra note 10, at 37; Wallerstein, supra note 25, at 2704.

48 See PACKER, supra note 1, at 271-2, 365 (suggesting that one of the problems entailed in forming criminal prohibitions is detecting the farthest point from ultimate harm at which that harm can be prevented). Also see von Hirsch, supra note 47, at 263-4; and also Wallerstein, supra note 25, at 2712-16; BAKER, supra note 4, at 101.


50 See HART, supra note 22, at 50 (claiming that Devlin's conclusion was the same as Emperor Justinian's hypothesis that homosexuality is the cause of earthquakes); Harcourt, supra note 28, at 126 (maintaining that Devlin reiterated social crumbling, but failed to clarify the pathway of harm).

51 See DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW 233-4 (1987) (emphasizing that harm is not an empiric trait to be discovered by scientific instruments; unlike obscenity, one cannot say "I know it when I see it"); Harcourt, supra note 28, at 110-115, 122 (concluding that the harm principle had collapsed under its own success: claims regarding nontrivial harm had spread everywhere, rendering the harm principle meaningless and no longer a decisive principle). Also see Wallerstein, supra note 25, at 2704; PERSAK, supra note 4, at 88.

52 See von Hirsch, supra note 47, at 260, 268-270, 276 (suggesting the integration of "Imputability" as an important factor of criminalization theory: regarding remote harm, one must examine how and why harm might be attributed to an agent).
between the first two. This linkage is causation (to be addressed below as behavioral causation).53 These three variables, soon to be explored here, allow us to roughly formulate the harm principle:

A type of conduct $\Rightarrow$ (causation) $\Rightarrow$ harm

Harm: Although it is not my intention to undermine the harm principle, I cannot overlook the incompleteness thereof. The question "what is harm?" is difficult and requires thorough analysis of core terms.54 Asserting that a certain outcome is harmful involves making a moral judgment which is substantially dependent upon the nature of society, place, time and other variables. Debates regarding whether certain outcomes constitute harm are lengthy and complex. For the purposes of this article, suffice it to say that harm is the consequential part of the harm principle equation.

A type of conduct: Once analyzed, a given type of conduct is a relatively clear factor in the equation: the beginning. Upon dissection, at least at first glance, conduct appears to be a matter of description, rather than something complex and as morally charged as harm. However, a more thorough look reveals that conduct too may bear moral weight.55 I refer to factors that usually arise in retributive theories,56 regarding the labeling of actions (moral wrongfulness requirement)57 or actors (culpability requirement, including moral58 and instrumental59 components). As aforementioned,

53 GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 61 (1998) (defining "causation" as the complexities that can break the link between cause and effect). The issue of causation is also studied outside the legal sphere, receiving different interpretations (and much attention) in various areas of research, such as philosophy, economics, sociology and more.

54 Even Feinberg, who extensively analyzed the harm principle, did not provide a definition that completely answers the question "what is harm?", but instead defined harm as a substantial and illegitimate violation of rights or legitimate interests that cannot be easily avoided. See FEINBERG, supra note 19, at 12. But perceiving harm as violating an interest requires an explanation of what an "interest" is: see HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 114-117 (1979). Also See PERŠAK, supra note 4, at 58; BAKER, supra note 4, at 41-68; Farmer, supra note 25, at 215; Markus D Dubber, Criminal Law between Public and Private Law, in THE BOUNDARIES OF THE CRIMINAL LAW 191, 206 (RA Duff et al., eds, 2010) (emphasizing the vagueness of "harm" or "public interests").

55 See Green, supra note 14, at 1553 (analyzing three different, yet somewhat overlapping concepts: culpability, wrongdoing and harmfulness).

56 See MICHAEL MOORE, PLACING BLAME 153 (1997) (explaining that retributivism is the conception calling for punishing offenders because, and only because, they deserve to be punished).

57 See Green, supra note 14, at 1551-1552 (defining moral wrongfulness as referring to conducts violating moral standards of norms). Also see HUSAK, supra note 10, at 73-76; BAKER, supra note 4, at 21-22, 72. On the other hand See Glanville Williams, The Definition of Crime, 8 CLP 107, 117 (1955) (finding that morally speaking, there is not necessary a difference between criminal and civil). It should be noted that the moral wrongfulness discourse is not unrelated to the harm discourse: the conception of wrongfulness might relate to the tendency of a conduct to produce harm. Nevertheless, I will adhere to the harm discourse.

58 See Green, supra note 14, at 1547-1549, 1556-1561 (suggesting that one may argue against the criminalization of harmful conduct when it is not morally wrong); HUSAK, supra note 10, at 174-175 (writing about the culpability requirement, according to which it is forbidden to punish people for preliminary harmless acts unless they are, at the very least, negligent with regard to being led to perform another subsequent act which might produce the ultimate harm).
this article will not elaborate on questions regarding independent moral issues. One of my reasons for choosing to adhere to the harm discourse was its ability to allow analysis without debating whether certain states constitute harm. Even if it may often be debated whether X state constitutes harm, it is more difficult to debate whether it constitutes an X state. The harm discourse allows for (relatively) neutral components. Harm is a vital component, in light of which another component, causation, may be examined. For example, when discussing the criminalization of drug abuse, one may debate whether the ultimate harm, the loss of personal control for instance, is indeed harm, and afterward examine causation. In contrast, in the moral wrongfulness discourse, the moral debate begins sooner, examining whether the act itself is (im)moral. When discussing the criminalization of drug abuse, one may simply argue that drug abuse is morally wrong, thus leading to deep independent moral debates (however, my choice to adhere to the harm discourse does not preclude considering the issue of moral wrongfulness, for those who choose to do so).

I will also not elaborate on questions of mens rea, or on questions of excuses. For now I will avoid addressing questions of linguistic phrasing as related to the definition of conduct as well, although they carry significant meaning regarding the inclusiveness of proscriptions, their vagueness, and their ability to guide conduct.

This article is not a complete guide for legislators. However, we must bear in mind


60 Although it is certainly a possible consideration against criminalization (both morally and instrumentally), it is very easily identified, while identifying mens rea, as opposed to the abstract discussion regarding the need for mens rea, is conducted mainly through the literal definition of the conduct, the lingual phrasing thereof, and does not necessitate any abstract examination.

61 Like Husak’s essay, mine too shall proceed under the assumption that the matter of excuses need not be addressed within the frame of criminalization, but rather in concrete cases. But also see RA Duff et al., supra note 8, at 11 (suggesting that criminalization may also consider questions of defining offenses).

62 See Husak, supra note 10, at 154 (clarifying that proscriptions are over-inclusive when the rationale thereof applies only to some of the proscribed conduct and that violating them is possible even without causing harm). See Thornhill v. Alabama 310 U.S. 88 (1940) (applying the Overbreadth Doctrine to proscriptions regarding freedom of speech); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 859-866, 877-880, 884-886 (1991) (explaining when the doctrine applies).

63 Vague proscriptions might cover more actions than necessary. See United States v. Reese 92 U.S. 214, 219-221 (1875) (ruling that it would be dangerous to legitimize a law that is broad enough to cover all offenders, leaving the courts to say who could be prosecuted and who could not; for it would mean substituting the department of justice with the judicial authority). The vagueness doctrine applies to criminal proscriptions in general and relates to the requirement of fair notice (at least formally, people should be able to know with certainty that they are committing crimes), as well as to the separation of powers and the prevention of selective enforcement and other rationales. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196-197 (1985); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284-294 (2003).

64 See Simester & Sullivan, supra note 9, at 37, 40, 42 (claiming that legal systems should provide as much guidance and predictability as possible); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. P.A. L. REV. 335, 361, 365 (2005) (suggesting that if we wish to utilize criminal law to regulate conduct, we must ensure that people know what is expected of them). The ability to guide also relates to the law’s ability to execute its work methods.
that conduct (and sometimes other variables which are reliant there upon) is a variable that depends, sometimes significantly, on matters of linguistic phrasing.

Beyond that which has been mentioned thus far, it should be noted that the choice to put certain types of conduct, and not others, on the dissecting table, is sometimes far from obvious, mainly for those not focused on the issue of moral wrongfulness.\textsuperscript{65}

**Causation:** One may debate whether an outcome indeed constitutes "harm"; but still, there is something clear about a consequential state which is often quite easy to perceive. One may also wonder why certain types of conduct are selected for the dissecting table; nevertheless, once chosen, understanding them is usually not complex. In contrast, the third variable in the harm principle equation, causation, is complicated and vague. The term "causation" is intricate\textsuperscript{66} and may vary in accordance with the perspective: philosophy, science, law and history; one may explore causation as related to specific events or regarding types of occurrences.\textsuperscript{67} This last causation is the one relevant to criminalization.\textsuperscript{68} However, the harm principle does not assign causation with numeral probability estimations.\textsuperscript{69} Quantifying causation is far from simple. Even if we were to reject intuitive causation\textsuperscript{70} or baseless risk conceptions,\textsuperscript{71} we would still be left with no more than vague formulas, such as "real and immediate danger". It is possible to say that

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\textsuperscript{65} This relates to the question of remote harm. How does one know when to stop? Here is one causal sequence: A (a form of conduct) $\Rightarrow$ B (probability: causation) $\Rightarrow$ C (harmful outcome). Do we now need to examine the behavioral causal sequence leading to A (which might lead to a claim that D, a certain form of conduct resulting in A, should also be criminalized)? I believe we do (although this does not necessarily mean criminalization is in order; that conclusion depends on all the steps of the ladder). This also relates to the exclusivity of "behavioral causation" (see the second step) and to the issue of alternatives to criminalization (see the third step). Matsuda suggested a causation principle stating that if the party most proximate to harm is not expected to be deterred by imposing liability, in relation to other and less proximate causal actors, then those others shall be considered to be the proximate cause of harm. The person best positioned to prevent the harm is the logical choice upon whom liability should be imposed. The presence of another potentially responsible person need not exclude all those who can prevent harm. Each effect has many causal factors and a responsible society must identify those who can make a difference as liable. See Mari Matsuda, On Causation, 100 COLUM. L. REV. 2195, 2211 (2000).

\textsuperscript{66} See Smith, supra note 49, at 72, 96-97 (emphasizing the difficulty entailed in defining, describing and evaluating causal judgment: any number of causes, positive and negative, might be relevant or necessary for a given outcome).

\textsuperscript{67} H.L.A. HART AND A.M. HONORE, CAUSATION IN THE LAW 8-9, 31 (1959) (explaining that the conception of causation changes among disciplines). See also PERŠAK, supra note 4, at 43-45 (suggesting that any causal theory reflects values).

\textsuperscript{68} It is a main reason why I have chosen the harm discourse, which appears to be clearer and more transparent than the moral wrongfulness discourse. See PACKER, supra note 1, at 266-267, 270-271 (claiming the "harm to others" formulation comes to ensure that immorality alone will not lead to punishment; an inquiry into the negative consequences of conduct is required); SIMESTER & SULLIVAN, supra note 9, at 9 (emphasizing that a claim of immorality is insufficient; specific harmful consequences must be identified).


\textsuperscript{70} See Smith, supra note 49, at 81, 102 (claiming that everyone has basic intuition regarding causality; however, we all mix too many factors when forming causal claims).

\textsuperscript{71} Douglas Husak, What Moral Philosophers might learn from Criminal Theorists, 36 RUTGERS L. J. 191, 192-193 (2004) (asserting that people tend to overestimate small risks such as tornados and floods, while underestimating great dangers like heart disease and cancer).
causation is the demand for specific, direct and tangible linkage between behavior and undesired outcome.\textsuperscript{72} However, it must be noted regarding the level of specification, directness and tangibility of that linkage, causation is not a unified term.\textsuperscript{73}

Despite the vagueness of the causation requirement and the complexity thereof, it is still a less subjective term than "harm". Given a certain type of conduct and a moral conception of harm, a linkage between them either exists or not. It is possible to morally debate the magnitude needed (in terms of frequency or probability). However, the existence of linkage is generally an objective matter (although somewhat more complex regarding omissions: the directness of the level of harm and who is supposed to prevent it). Morality is needed to determine whether certain states are considered to constitute harm; which conducts should be laid on the dissecting table; and which causation is needed. Although the linkage between a certain conduct and its alleged harm (causation) is an objective matter, translating the linkage to the needs of criminal law is subjective and moral. While causation can be influenced, such influence does not abolish the objectivity thereof. Allegedly, there is an objective way to confirm the existence of causation. And so, though I have not offered a way in which to decide whether certain states pass as harm, I do emphasize that given a certain type of conduct and alleged harm, the linkage between them (causation) must be examined.

(3) The relevant variables: formulating

The initial step of criminalization, as seen, involves three variables. The first is harm (what we wish to avoid); the second is a type of conduct (what we wish to prevent in the name of that objective, as an instrumental matter; except for those who perceive it as an independent moral issue); and the third is the linkage between the first and the second: causation (the justification for aspiring to prevent that type of conduct). Since the latter is not the only type of causation among the steps of criminalization, and in order to distinguish it from the causation that examines other links, I will designate

\textsuperscript{72} See CHARLES FRIED, RIGHT AND WRONG 39 (1978) (suggesting that the demand for directness is meant to limit the norm of "do not harm" and make it practical); HUSAK, supra note 10, at 161 (setting the substantial risk requirement regarding risk prevention offenses).

\textsuperscript{73} See FEINBERG, supra note 19, at 190-191 (claiming that when the possible harm resulting from conduct is extremely harsh, lesser probability is sufficient). See also PERŠAK, supra note 4, at 43-47.
this as "behavioral causation", emphasizing its focus on the linkage between conduct (behavior) and harm. Simply stated, the harm principle works as follows:

A given type of conduct ⇒ (behavioral causation) ⇒ harm

A claim against criminalization regarding this first step might be aimed at conduct ("it is not morally wrong") or at the linguistic phrasing thereof ("too broad/vague"); at behavioral causation ("there is no sufficient linkage between conduct and harm"); or at harm ("this is not harm"). Each of these claims belongs to the step of identifying a certain type of offensive conduct.

B. Examining the Ability to Achieve Goals: How Criminal Law Confronts Harmful Conduct

(1) Identifying types of offensive conduct: insufficient for criminalization

The identification of types of offensive conduct is derived from the harm principle, setting a type of conduct in the sights of criminal law; it does not allow squeezing the trigger. The harm principle does not set a sufficient condition for criminalization, but only identifies suspected types of conduct, providing an alleged justification to discuss their criminalization. To a certain extent, the principle points out problems, rather than solutions. Even if it contributes to establishing a legitimacy\(^{74}\) of some kind (legal, social or moral)\(^{75}\), for using power, it does not actually provide it. On its own, it provides neither justification nor explanation for applying criminal law. It identifies types of offensive conduct; but does that mean criminal law is suitable or even capable of dealing with, preventing or at least reducing them?

(2) After identifying a type of offensive conduct

Once we determine that a type of conduct causes harm, it becomes a candidate for criminalization. Its offensiveness sets an initial moral justification for criminalization. Nevertheless, an instrumental justification is also in order: a reason to apply criminal

\(^{74}\) TOM R. TYLER, WHY DO PEOPLE OBEY THE LAW – WITH A NEW AFTERWORD BY THE AUTHOR 4, 57, 52, 281-2 (2006) (emphasizing the importance of legitimacy in relation to criminalization, claiming that legitimacy creates obedience). Also See Dubber, supra note 17, at 530 (finding that criminalization is sets a fundamental problem of legitimacy); Erik Luna, Principled Enforcement of Penal Codes, 4 BUFF. CRIM. L. R. 515, 579-582 (2000); Erik Luna, Transparent Policing, 85 IOWA L. REV. 1107, 1108, 1120, 1162 (2000); Shiner, supra note 2, at 180-1 (analyzing legitimacy with regard to the enforcement of criminal law).

Criminal law has popular work methods, and as long as they exist, we must examine whether they can prevent or reduce the offensive type of conduct. The issue at hand is the ability of criminal law to meet the challenge with which it is faced. The necessary examination is once again that of causation, this time from a different perspective. Previously, when discussing the harm principle, causation was behavioral; in this instance it is broader and relates to the linkage between criminal prohibition of conduct and attaining the profound purpose of the proscription: reducing harm. I assume (keeping the moral aspect of this assumption in mind) that the instrumental or preliminary purpose of criminal law is to reduce the criminalized type of conduct (in contrast, those who adhere to the moral wrongfulness discourse might conceive conduct reduction to be the profound purpose of criminal law); this reduction, in turn, is meant to achieve the secondary purpose, which I perceive to be the profound purpose of criminal law: the reduction of harm resulting from this type of conduct. The above causation is comprised of two components.

(3) Causation of reducing types of conduct: Enforceability
The first component to arise when considering the criminalization of a specific type of offensive conduct is the ability of criminal law to effectively execute its work methods. We must consider the manner in which criminalization might reduce the offensive conduct. To do that, we must first (very briefly) attend to the criminal law work methods.

(3)(a) Criminal law work methods
It is well-known that criminal law operates in a number of manners, revolving mainly (but not exclusively) around punishment. Convicting people and sending them to

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76 See RA Duff et al., supra note 8, at 2-3, 12-13 (claiming that a normative theory of criminalization must consider practical matters of cost, emphasizing that these matters are not technical, but normative).

77 See RA Duff, Perversions and Subversions of Criminal Law, in THE BOUNDARIES OF THE CRIMINAL LAW 88, 105 (RA Duff et al., eds, 2010) (claiming a normative theory does not have to abide with practice, but also cannot ignore it).

78 In contrast, retributionist views do not aspire to reduce harmful conduct through punishment, but rather perceive punishment as an independent purpose. Retributionists may ascribe little importance to the matter of the exclusivity of behavioral causation, soon to be addressed, but will certainly ascribe great importance to the matter of enforceability, as addressed earlier.

79 Husak, supra note 10, at 162 (accentuating that criminal law should be able to further its goal).

prison might embody a work method of **incapacitation**, a behavioral prevention. Another work method aims at choice formation: **deterrence**. Unlike incapacitation, which is an objective limitation (in that the offender's cooperation is not required, at least regarding incarceration), deterrence is subjective. On a general level, the threat of punishment creates awareness among the people that whoever commits certain acts will be punished if caught. On a concrete level, offenders who have served their sentence are supposed to remember the incarceration experience (or any other penalty) as the social reaction to their crime, thus choosing to avoid further crime. If that is not enough, conditioned incarceration (a form of promised punishment) may yet convince them to avoid crime. Another work method is **rehabilitation**: changing offenders' personality to modify behavior in accordance with the law; focus is on the offender, not on the offense. **Retribution** may (but does not have to) seem like another work method: the prevention of private acts of punishment. In the absence of proper legal responses to crime, the chances of private responses rise. Victims of crime or their families pose an obvious example: if a murderer is not properly punished by law, private punishment may arrive in the form of another murder or harm. Retribution may indicate the existence of a social order, producing incentives not to deviate there from. Another work method of criminal law is **condemnation**.

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81 See BENTHAM, supra note 3, at 167; PACKER, supra note 1, at 48. This work method has been criticized: Ibid, at 49, 53, 269; Robinson and Darley, supra note 59, at 462-464; GROSS, supra note 54, at 35, 386.


83 Deterrence has its limits; it does not work, for example, on those whose lives are miserable to begin with. See PACKER, supra note 1, at 45, 48-49, 268. Also See Neal Kumar Katyal, Deterrence's Difficulty, 95 MICH. L. REV. 2385, 2386, 2389-2492 (1997) (economical analysis of problems of deterrence); PACKER, supra note 1, at 40; TYLER, supra note 74, at 21, 269-270; Robinson and Darley, supra note 59, at 458-462 (showing problems from a social sciences point of view); Richard H. McAdams, A Focal Point Theory of Expressive Law, 86 VA. L. REV. 1649, 1650 (2000) (expressive law approach); Dan M. Kahan, Between Economics and Sociology: The New Path of Deterrence, 95 MICH. L. REV. 2477, 2489-2490, 2496 (1997) (a multi-directional criticism).

84 The criticism regarding rehabilitation is infinite. For the loss of credibility of the rehabilitative approach See PACKER, supra note 1, at 53-54; Robinson and Darley, supra note 59, at 456, 462; GROSS, supra note 54, at 387-389.

85 GEORGE FLETCHER, RETHINKING CRIMINAL LAW 414-415 (1978) (dividing the punishment rationale into two groups, social protection and retribution, suggesting both theories suffer from major flaws).

86 See DANIEL W. SHUMAN AND ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES 101 (2000) (claiming that punishment provides the victim with relief, closure). Also See FLETCHER, supra note 53, at 37-38 (perceiving offenders' suffering as a mechanism equating them to their victims). The existence of a legal system and the maintaining thereof signals citizens not to take the law into their own hands.

87 But also See Hugo Adam Bedau, Feinberg's Liberal Theory of Punishment, 5 BUFF CRIM. L. R. 103, 128 (2001) (insisting that according to a view that justifies the penal system as social protection, retribution has no part whatsoever).

The law may condemn unwanted conducts and reaffirm desired values.99 Condemnation is about conviction as well as punishment.90 According to expressive theories of law, condemnation may be established even by unenforced legislation.91 An expressive argument regarding criminal law would be that criminalization of certain types of conduct might reduce them even without accompanying enforcement.92 Looking at concrete cases, these various work methods sometimes clash.93 From a general perspective, criminal law, while aimed at the public at large, operates mainly through choice formation.94 Criminal law does not nullify unwanted options; rather, it attempts to make them appear less appealing and thus influence public preferences.95

(3)(b) Executing criminal law work methods

Those who believe written prohibitions provide obedience on their own, and no action other than legislation is required (it is plausible to assume those would be supporters of expressive approaches to law; however, others may also think that on some occasions, criminal law merely ought to speak, with no accompanying enforcement), will settle for criminalization and nothing more.96 Those who believe otherwise, who

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90 Bedau, supra note 87, at 117 (supposing one may claim that "guilty" sentences, rather than punishments, are the common instrument for publicly expressing moral condemnation of offenders for their crimes).

91 See Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 391, 397-407 (1997) (claiming that creating the law, and not its enforcement, plays a significant role in the affirmation of the relevant social norm); Luna, Principled Enforcement of Penal Codes, supra note 74, at 537-538 (writing that for better or for worse, the law also serves symbolic functions).

92 See Richard H. McAdams, An Attitudinal Theory of Expressive Law, 79 OR. L. REV. 339, 358-359, 373 (2000) (suggesting that law matters for what it says, in addition to what it does); McAdams, supra note 83, at 1651, 1728 (claiming that not only legal sanctions can solve problems, but also well-published declarations); Luna, Principled Enforcement of Penal Codes, supra note 74, at 539, 546 (suggesting, without supporting, that sometimes the purpose of prohibitions is merely expressive). For criticism on the merely expressive criminalization argument See Beale, supra note 89, at 1267-1269; Schonsheck, supra note 11, at 74-75; Duff, supra note 88, at 52.


96 See SCHONSHECK, supra note 11, at 19 (referring to "the assumption of compliance"); Packer, supra note 1, at 19 (suggesting that crime without punishment, or at least the threat of punishment, might be impractical, but not illogical).
think that if punishment has meaning, so does the absence thereof, those who share the view that obedience does not result from legislation alone, and it seems that many do, would examine enforceability.

Enforceability regards the authorities' ability to enforce written law. It assumes that an offensive type of conduct will subsequently become the object of criminal law and examines whether criminal law, if drafted, would be able to implement its work methods on that type of conduct. This does not mean that reasons to avoid criminalization will not rise later (for instance, in light of appealing alternatives to criminalization). Enforceability examines ability alone, not morality. Morality is not neglected; it is discussed in other steps.

Enforceability is divided into four sub-components (disregarding matters of resource allocation), paving the road to enforcing any proscription.

(3)(b)(1) Ability to detect types of conduct and those who practice them

The police and the prosecution cannot arrest and prosecute and the courts cannot sentence people for conduct unknown to the authorities, nor can they do so when they do not know who the agents in charge are. Enforcement normally commences with police investigation (based on complaints or at police initiative); continues with the apprehension of a suspect (see subsection (3)(b)(2)); proceeds with prosecutorial

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97 See Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 598-601 (1996) (claiming that as for punishment, actions speak louder than words); also see Kahan, supra note 83, at 2483; Stuntz, supra note 4, at 520-523 (claiming that criminal law cannot send clear messages due to its breadth and complexities).

98 See PACKER, supra note 1, at 272 (saying it is best to avoid criminal proscriptions if legislators are indifferent regarding the enforcement thereof); Duff, supra note 88, at 52 (suggesting that few, if any, are bound to obey out of respect for the authority of law); Katyal, supra note 83, at 2455-2457 (thinking that punishment, and not books of law, becomes a mechanism for encouraging dialogue between subjects and the government, revealing the government's power and the law's content); GROSS, supra note 54, at 394-398 (claiming that criminal law must include consequences for breaking its rules); 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, 1866 (2000) (explaining that the publicity accompanying verdicts might teach people of the consequences of certain conducts and why they must be avoided); Beale, supra note 89, at 1267-1269 (doubting the law's ability to convey messages without enforcement); Christopher E. Smith, Law and Symbolism, 1997 DET. C.L. REV. 935, 936, 943-944, 953 (1997) (pointing out problems of declarations made by law which are not implemented).

99 See SIMESTER & SULLIVAN, supra note 9, at 24 (suggesting that offenses must be enforceable). Obviously, no absolute enforceability is needed. See TYLER, supra note 74, at 3, 19 (criminal law is never totally efficient); Douglas N. Husak, Limitations on Criminalization and the General Part of Criminal Law, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 13, 34 (Stephen Shute and A.P. Simister, eds., 2002); Husak, Crimes outside the Core, supra note 16, at 773; HUSAK, supra note 10, at 78 (making an empirical claim that there will always be those who commit crimes, no matter what the law says).

100 See PACKER, supra note 1, at 259-260 (demonstrating that we cannot attain the prevention of every crime we would like); SCHONHIECK, supra note 11, at 76 (emphasizing that resources are limited and the larger the number of criminalized conducts, the harder it is to enforce criminal law); SIMESTER & SULLIVAN, supra note 9, at 24 (suggesting that the expensiveness of detection poses a reason against criminalization); Luna, Principled Enforcement of Penal Codes, supra note 74, at 547-552; Transparent Policing, supra note 74, at 1108 (pointing out that our world is of limited resources, and not all criminals are culpable on the same normative level). Indeed, the issue of prioritizing enforcement is of great significance. Nevertheless, I will avoid addressing the (morally charged) matters of priorities and economical ability, even though the monetary cost of enforcement's is a legitimate consideration.
deliberation regarding the evidence gathered, toward the decision to prosecute or alternatively avoid prosecution or instruct the police to further the investigation (subsection (3)(b)(3)); and ends with the court (subsection (3)(b)(4)). Complaints may be aimed solely at harm (for instance, when victims are aware of the harm but not of the perpetrator) or both at harm and perpetrator. But no matter where it began, investigations are supposed to end with identification of the alleged harm and perpetrator. Harm is the object of the criminal charge; the perpetrator is the object of the criminal trial.

(3)(b)(2) Ability to apprehend and detain the perpetrator

Even when perpetrators' identities are known, it does not mean the state holds or is capable of holding them for prosecution. Criminal law, generally speaking, requires physical custody of defendants (especially if the prosecution might subsequently ask to incarcerate them), in the form of their presence during criminal procedures.

(3)(b)(3) Ability to gather evidence sufficient for prosecution

The existence of guilt does not necessarily mean there is sufficient evidence for prosecution. In democratic regimes, guilt is not enough for enforcement; admissible evidence is required.  

(3)(b)(4) Ability to reduce given types of conduct through punishment

After discovering harm and identifying perpetrators, apprehending perpetrators and detaining them, as well as gathering evidence sufficient for prosecution come conviction and punishment, allowing for criminal law to execute its work methods and fulfill the purpose its proscriptions are meant to achieve.

The first three sub-components of enforceability, if properly modified, might also relate to alternatives to criminalization: detecting harm is an important step toward

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101 See Fletcher, supra note 53, at 7 (being guilty is one thing and standing on trial and being punished is another).

102 The law executes its work methods through pointed actions against people (physical enforcement), alongside messages sent (communicative role). The role of punishment in reducing forbidden conducts is a complicated issue, swarming with problems, mostly related to the various penal considerations (deterrence and so forth). See William J. Stuntz, Self-Defeating Crimes, 86 VA. L. REV. 1871, 1897 (2000) (claiming that the easier and more attractive conduct is, the harder it will be for punishment to obtain its goal on the general level, rather than in concrete cases); Katyal, supra note 83, at 2394-2395, 2442 (pointing out that increasing punishment would not necessarily help, if we focus not on specific proscription but rather on the sum of proscriptions and their purpose); See also HUSAK, supra note 10, at 147-148. Apart from that, once conduct is interrupted, it is often difficult to accurately identify the reason for its reduction and to attribute it to criminal law because subjects do not explain why they do not break the law, and it might result from other reasons and other forms of regulation.
addressing it, not necessarily through criminalization; the ability to detect perpetrators and impose their presence in legal procedures might prove relevant to alternatives such as tort law, as is the ability to gather evidence. But as far as criminalization goes, the first three sub-components eventually converge into the issue of punishment. In spite of problems regarding the work methods of punishment, it is difficult to doubt the importance of punishment. In order to implement criminal law work methods (personal and general deterrence, incapacitation and so on) and prevent harm, criminal law must enforce its rules, thus validating, supporting and giving life to criminal proscriptions (and also achieving expressive goals). Enforceability, one should note, relates to fields outside what is traditionally regarded as substantive criminal law: procedural law, evidence law and sentencing, all dynamic changeable fields.

A problem in each of the four sub-components may facilitate arguments against criminalization, due to the legal system's difficulty in validating its criminal proscription and preventing the harm resulting from offensive types of conduct. Issues of resource allocation are also not irrelevant.

103 See ASHWORTH, supra note 4, at 15-16 (claiming that as long as rules are enforced to a certain extent, criminal law creates negative incentives to crime and reaffirms social conventions and inhibitions); GROSS, supra note 54, at 9, 394, 397-398 (thinking that threats of punishment for crime, if not fulfilled once crimes are committed, will be perceived as empty); PACKER, supra note 1, at 42, 44 (asserting that once the threat of punishment is removed or decreased, either through the changing of the law or through the authorities' failure to act, a conduct which was oppressed will tend to increase); Bedau, supra note 87, at 106-108 (maintaining that the obvious way to prevent harmful acts is by proscribing them and by backing up threats of punishment for violations in the appropriate places).

104 See SCHONSHECK, supra note 11, at 74-75 (believing that the law makes a poor educator and that non-enforcement produces disrespect for the law and creates opportunities for selective enforcement). Also See JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98 (1970); Luna, Principled Enforcement of Penal Codes, supra note 74, at 561; HUSAK, supra note 10, at 12-13.

105 There is a clear connection between criminalization and punishment (and what precedes it: procedural law and evidence law), at least for whoever is not satisfied with mere expressive proscriptions; however, I do not presume to offer an answer regarding the proper relation between criminalization and punishment: what comes from what. In this context See (briefly) HART, supra note 8, at 8 (claiming criminalization comes first); HUSAK, supra note 10, at 77 (claiming an overlapping); for elaboration See Bernard E. Harcourt, Joel Feinberg on Crime and Punishment: Exploring the Relationship between the Moral Limits of the Criminal Law and the Expressive Function of Punishment, 5 BUFF. CRIM. L. REV. 145, 149-156 (2001) (analysis of the relations and presentation of four possible answers).

106 One might argue that any behavioral prohibition is enforceable: that any form of conduct is detectable, any perpetrator detainable, and any conduct traceable (evidence-wise) and punishable by sufficiently deterring sanctions that would significantly reduce conduct. But things are not that simple. Types of conduct that are easy to practice in private, mainly indoors (for example, consensual intercourse) or even alone (meaning it has no communicative aspect; possession, for instance) are hard to detect, and retrieving evidence might prove even harder (though a perpetrator's admission of guilt might be extracted). The ability of punishment to reduce conduct is also quite complex.

107 See Alexandra Natapoff, Underenforcement, 75 FORDHAM L. REV. 1715, 1717, 1722, 1745-8, 1773 (2006) (defining "underenforcement" as a weak response by the state to law-violation and victimization and suggesting that broad criminal codes guarantee underenforcement by offering the police and the prosecution too many possibilities).
criminalization and punishment increase crime rather than reducing it, due to selective enforcement, inelastic demand of conduct or the forbidden fruit phenomenon. Enforcing proscriptions always goes through those sub-components. That is how criminal law works in this day and age. Criminal law does not prevent a certain behavior before another, proscribed by law, has already occurred. Proscribing behaviors signals the subjects not to act in certain manners from then on; validating that proclamation through enforcement reaffirms the written proscription. It takes a trial, rather than the existence of law alone, so that we could speak of "criminal law" enforcement. Without an act occurring beyond the realm of mind and preparation, criminal law does that allow denying conduct not yet executed. Detaining suspects for trial and punishment (as opposed to purposes of warning) relates only to offenses already committed; this is criminal law's sole behavioral prevention. Other preventions do not constitute criminal law, even if executed by the police or another governmental entity, and even if important and worthy. We must not disguise preventive measures as criminal law, and must not confuse various forms of crime prevention. Substantive criminal law does not allow the prevention of one offense

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108 See Stuntz, supra note 102, at 1877-80 (claiming that the differences between written law and enforced law are expected to undermine the norms against forbidden conduct); Luna, Principled Enforcement of Penal Codes, supra note 74, at 523-5 (asserting that in some, mainly poor, communities the gap between the criminal code and the applications thereof tends to undermine legal legitimacy).

109 See PACKER, supra note 1, at 277-82 (explaining economical aspects of criminal sanction and mainly a "crime tariff": when demand is inelastic, criminalizing products guarantees a monopoly for law breakers).

110 See Husak, supra note 17, at 148 (suggesting that criminalization does not help fight drugs because of the forbidden fruit phenomenon: an appeal experienced by many (mainly adolescents) in relation to certain types of conduct, precisely because they are forbidden). The problem with this sort of argument is that if criminalization is responsible for making conducts appealing, then allegedly we cannot criminalize any sort of conduct; however, perhaps it is possible to accurately characterize those types of conduct that would be made more appealing for certain groups if criminalized, thus making the above argument more convincing.

111 Criminal law makes an early intervention only when an offense has already been (allegedly) committed; otherwise it is not authorized to intervene. One might suggest that criminal law intervenes preemptively through the creation of inchoate offenses: Husak, Crimes outside the Core, supra note 16, at 771; HUSAK, supra note 10, at 37. However, without existing offenses, criminal law is powerless. Also see Mireille Hildebrandt, Proactive Forensic Profiling: Proactive Criminalization?, in THE BOUNDARIES OF THE CRIMINAL LAW 113, 113 (RA Duff et al., eds, 2010) (emphasizing the difference between punishment and prevention measures).


114 See WILLIAMS, supra note 6, at 283. General crime prevention is discussed in the field of criminology and deals with all the preemptive interventions in the social and physical world, the purpose of which is to change conduct or sequences of events in manners that reduce the probability of crime or the harmful consequences thereof. See Paul J. Brantingham and Frederic L. Faust, A conceptual model of crime prevention, 22 CRIME AND DELINQUENCY 284, 287-296 (1976) (drawing upon the public health model to suggest a crime prevention paradigm).
without the occurrence of another, even "inchoate" such as attempt or conspiracy.\textsuperscript{115} Other important police work, such as preventive patrolling, administrative revocation of license and suspected stolen property apprehension might prevent harm, but this is not "criminal law" enforcement.

\textit{(4) Causation of harm reduction: behavioral causation exclusivity}

At this step, criminalizing a specific type of conduct may reduce it and therefore also reduce harm. Anyone focused on moral wrongfulness, thinking that the purpose of criminal law is only to prevent certain types of conduct, will stop here. Those who hold that the object of criminal law is the prevention of harm or at least significant reduction thereof must examine whether criminalization can indeed accomplish that goal. Preventing an offensive behavior does not necessarily equal a meaningful prevention of harm. Why?

As stated, a type of offensive conduct is identified through behavioral causation, the linkage between conduct and harm. This link, on its own, does not preclude other links (= different behavioral causations), between \textbf{other} types of conduct and the \textbf{same} harm. If the core object of the harm principle is denying harm, rather than just legitimizing the criminalization of conduct X, then the existence of conduct Y, which also results in the same harm, constitutes a reason against criminalizing X. That is, of course, provided that conduct Y is not criminalized; and in accordance with the probability of harm due to Y, as well as the commonness and frequency of Y (in light of non-criminal limitations upon it). Indeed, if criminalizing conduct X aims to deny harm Z, and if Z also results from conduct Y (which is not criminalized), then a reason against criminalizing X is set. This reason is mainly instrumental, though it may also have a moral aspect, aimed at legislative choice to criminalize only a part of the problem, especially if the causal move is similar to that of the conduct which is the object of criminalization. It is important to emphasize that this consideration also depends on practical issues, empirical and quantitative:\textsuperscript{116} if criminalizing X is expected to significantly reduce harm, because conduct Y is rare, then the argument against criminalization is weakened. And vice versa: if criminalizing X, quantitatively

\textsuperscript{115} See ASHWORTH, supra note 4, at 444, 470 (describing three inchoate offenses: attempts, conspiracies, and incitement); SIMESTER & SULLIVAN, supra note 9, at 263 (explaining the prominent character of inchoate offenses: criminalization prior to any concrete harm).

\textsuperscript{116} Empirical or predictive issues are fundamental for arguments regarding criminalization and legalization. See ASHWORTH, supra note 4, at 53.
or qualitatively, is (metaphorically speaking) setting locks on a gate while there is no fence around and access is easy (and perhaps inviting), then criminalization seems less useful.

I will illustrate. X is a type of conduct to be considered for criminalization; Y is a type of conduct which is not criminalized; Z is the harm to be prevented. The first sequence is: X(50%)⇒Z. The second sequence is: Y(30%)⇒Z. Under these circumstances, is there a reason (without reaching a determinative conclusion) against criminalizing X? The answer also depends on the commonness of as the behaviors in question: if Y is substantially more common than X, then it is doubtful that criminalizing X alone would help prevent harm Z. It is also possible that important differences between X and Y provide reasons to avoid criminalizing Y, perhaps because it is not morally wrong or because criminalization has significant social costs. In this example, the social costs involved in criminalizing conduct Y might entail social values related to 70% of the cases in which Y occurs, leading to something other than Z. Whatever the reason Y is not criminalized, the instrumental argument against criminalizing X stands. The undisturbed existence of conduct Y, which leads to the same harm Z as conduct X, makes it hard to achieve the objective (presuming it exists) of reducing harm. The matter of behavioral causation exclusivity is important to those who posit that the purpose of criminal law is preventing harm (and not necessarily moral wrongfulness). Behavioral causation exclusivity is needed in order to create a profound connection between proscriptions and their goal. This issue might also be of significance with regard to an aspect that the ladder mostly does not focus on: harmonization with existing legislation. I do not refer to harmonization with local legal values; those, as will be emphasized at the end of this article, are well-expressed while analyzing concrete types of conduct. I refer to harmonization as coherence. Those who believe that, generally speaking, the state must act coherently with regard to criminal law or at least matters of normative criminalization (which, as stated,  

117 See HUSAK, supra note 10, at 42 (maintaining that offenses of risk prevention should not rise without offenses regarding the risk itself).

118 See Balkin, supra note 14, at 114 (explaining that an assortment of factual beliefs is logically coherent if beliefs support each other); Sunstein et al., supra note 14, at 1154 (saying the test is whether decisions made separately correlate with each other once the bigger picture is explored).

119 See Raz, supra note 14, at 276 (claiming there is something good about coherency, which has an undeniable value); Sunstein et al., supra note 14, at 1154, 1156, 1162 (saying that in modern economical thinking, coherence is the cornerstone of rationality); Edmundson, supra note 14, at 1 (explaining that requiring the law to be coherent expresses the aspiration that the law makes sense at a general level, not only at concrete levels).

120 See Raz, supra note 14, at 310, 314 (emphasizing the local nature of coherence in law).
requires justification,\textsuperscript{121} which in turn also relates to legitimacy\textsuperscript{122}), and this belief hardly seems far-fetched,\textsuperscript{123} might need to discuss the matter of behavioral causation exclusivity beyond the discussion of the linkage between proscriptions and their goal.\textsuperscript{124} For example, one might suggest that criminalizing conduct $X$ and not $Y$ is flawed, at least expressively speaking. If in fact there is no non-criminal limitation on $Y$, and thus $Y$ is common, then the flaw is instrumental; however, if some sort of limitation exists (not necessarily legal), then the flaw one may find in $X$ being criminalized while $Y$ is not is expressive.

(5) The relevant variables: formulating

The second step of criminalization, achieving its purpose, involves two components. The first is related to enforceability: the ability of criminal law to implement its work methods indicates that criminalizing a certain type of conduct is justified in the sense of an established link between criminalization and prevention:

\textbf{Criminalizing a certain type of conduct $\Rightarrow$ (enforceability) $\Rightarrow$ preventing this type of conduct}

Enforceability examines conduct from the standpoint of criminal law. Reasons against criminalization may arise if proscribing certain types of offensive conduct would be difficult to enforce, in light of the sub-components enforceability, and of course based upon issues of quantity and quality, ("criminalizing conduct $X$ is pointless, because enforcing the proscription and thus reducing $X$ is impossible or very unlikely").

The second component addresses the exclusivity of behavioral causation. Such exclusivity suggests "sufficient criminalization": examination of other types of conduct reveals that criminalizing conduct $X$ is well-justified, in the sense of not leaving loose ends of non-criminalized harmful conducts. This viewpoint focuses not on $X$, the type of conduct being considered for criminalization, but on $Z$, the resultant harm, and whether that harm may result from other types of conduct. Therefore it is an important consideration for the harm discourse and less so for the moral

\textsuperscript{121} See Sunstein et al., supra note 14, at 1164; Balkin, supra note 14, at 115-117 (maintaining that coherence is important because justification is important).

\textsuperscript{122} The idea of justification relates to legitimacy. See Edmundson, supra note 14, at 11. The matter of coherence in criminalization relates, I think, to all three of the forms of legitimacy that Fallon described. See supra note 75, at 1794-1796.

\textsuperscript{123} As emphasized at the beginning of this article, criminalization requires justification; and if there is a connection between coherence and justification, as many seem to hold, then it would be difficult to suggest that coherence is not important to the issue of criminalization.

\textsuperscript{124} Coherency arguments might also arise farther up the ladder.
wrongfulness discourse. However, it may perhaps be modified to the moral wrongfulness discourse, which might allow for coherency arguments, like the one presented above. Following enforceability, which suggests a causal link between criminalizing a type of conduct and conduct prevention, sufficient criminalization establishes a causal link between preventing a type of conduct and preventing harm:

**Preventing a certain type of conduct**  \(\Rightarrow\) (sufficient criminalization)  \(\Rightarrow\) preventing harm

Reasons against criminalization may arise if there is a lack of sufficient criminalization and based upon issues of quantity and quality ("criminalizing conduct X is useless to the prevention of harm Z, because conducts Y and W produce it anyway"), an "underbreadth" argument.\(^{125}\) This argument may refer to identical harm caused by a different conduct or alternatively to identical harm caused by the same conduct but through a different medium. However, as the basis of this argument is coherency, rather than the prevention of harm, it would be better to designate it "selective criminalization" rather than "sufficient criminalization".

The existence of both enforceability and sufficient criminalization produces "Purposiveness": criminal law can indeed reduce a certain type of conduct as well as reduce harm by criminalizing that conduct. Arguments against criminalization, addressing either enforceability or sufficient criminalization, would be attributed to the step of "purposiveness". Such arguments regard criminal law actions and although they do not stand up against labeling types of conduct as offensive, they suggest, either way, that criminalization is pointless, because it cannot achieve the goal of reducing either these types of conduct or harm. In contrast, when there is no problem regarding enforceability and when behavioral causation is exclusive, then a criminal proscription can allegedly achieve its goal, seemingly justifying criminalization. In other words, there is purposiveness, a direct link between criminalization and achieving its purpose. Simply put, criminalization that is able to achieve its goal works thus:

**Criminalizing a certain type of conduct**  \(\Rightarrow\) (purposiveness)  \(\Rightarrow\) reducing harm

(6) The ability to achieve goals: summation

\(^{125}\) The underbreadth test may allow refining the harm in question (a sort of opposite argument to the Overbreadth argument. See also Husak, supra note 10, at 154 (writing that offenses are underinclusive when their rationale also applies to conducts which are not forbidden, meaning that harm is possible without breaking the law).
Criminalization begins with identifying a problem: a certain type of offensive conduct, a "suspect", making it a candidate for criminalization. The optional solution comes later: the ability of criminal law to handle the "suspect" is examined only after it has become a suspect, not before. This involves various factors. The considerations set for and against criminalization are different than those set by the harm principle itself. First a target is defined and then it is determined whether or not we are able to obtain it. However, perhaps criminal law is not the right bow to fire our arrow. This must be viewed from a different vantage point.

C. Achieving Goals through Alternatives to Criminalization

(1) Background

The idea that criminal law should be applied as a last resort is far from novel.  

It is customary to say that criminal law is unique and that criminal sanction is the ultimate threat of law, which should be reserved for cases that really matter.  

Criminal law is harsh, thus a search for alternatives is called for.

There is merit to that point; but some reservation is in order. The assumption that criminal law involves harsher consequences for people than other legal branches, whether in regard to the formal sanction or the matter of condemnation, does not cover all cases.  

Existing criminal law includes offenses that the public and even the legal system may perceive as trivial. People convicted for minor traffic offenses are tried criminally, but that does not make the public condemnation or formal sanction harsher than that which alternative regimes would impose, administrative law for instance.  

Not all proscriptions bear an expressive load, nor do they necessarily

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126 See BENTHAM, supra note 3, at 199 (claiming that punishment is unnecessary in cases where the object is obtainable through less restrictive means, such as education).

127 See PACKER, supra note 1, at 250; Ashworth, supra note 112, at 408-409 (suggesting that punishment, in the sense of harsh treatment, calls for special justification); Dubber, supra note 17, at 546 (writing that criminal law includes the strongest and potentially most intrusive means to interfere with the very rights it is trying to protect). See also Wallerstein, supra note 25, at 2705 (speaking of "the minimalist principle"); PERŠAK, supra note 4, at 1 (asserting that since criminal law is the most intrusive of all social control institutions, it must be used minimally).

128 See PACKER, supra note 1, at 250-251 (claiming that legislators must examine other means of control); SIMESTER & SULLIVAN, supra note 9, at 21 (arguing that even after finding positive reasons for criminalization, one must look for less harsh means to obtaining the goal). See also the "presumptions filter": SCHONSHECK, supra note 11, at 68-69.

129 See ASHWORTH, supra note 4, at 1 (claiming that criminal law is the strongest formal condemnation society can inflict). But also See HART, supra note 8, at 404 (finding that it is difficult to base the distinction between criminal and civil on consequence, which might be severe in civil cases as well); FEINBERG, supra note 19, at 23 (claiming that a system of prior restraint exemplifies an alternative technique to criminalization that could prove more oppressive than criminal prosecution); Simester and Smith, supra note 94, at 4 (claiming that the civil-criminal distinction is not always sharp); Victor Tadros, Criminalization and Regulation, in THE BOUNDARIES OF THE CRIMINAL LAW 163, 164-9 (RA Duff et al., eds, 2010) (analyzing and demonstrating the resemblance between criminalization and civil regulation).

130 One might suggest that traffic law makes a poor example, since perhaps it should belong outside the scope of criminal law. However, this sort of argument expresses an underlying assumption that criminal law should only include morally wrongful
result in harsh sanctions.\textsuperscript{131} Even if we assume in general that punishment must be used as a last resort,\textsuperscript{132} this does not suggest that criminalization is necessarily the most restrictive regulation.\textsuperscript{133} Even if we had clear ways of quantifying what is harsher, short incarcerations, heavy administrative fines or revocation of licenses, the factor of judicial or administrative judgment (as outlined by law) would prevent us from making comprehensive generalizations. As long as the law allows judges some room to decide what punishment to impose, it is impossible to clearly and definitively generalize the consequences of criminal law, rather only the potential thereof.\textsuperscript{134} This is also true for other legal branches.

Having said that, and in light of the potentially high social costs of criminalization, we must search for ways to achieve our purpose through less restrictive alternatives. Obviously not all existing alternatives are less restrictive. At the end of the day, the decision regarding which alternative is generally less restrictive for the subjects (as opposed to a certain person),\textsuperscript{135} depends on domestic values. In contrast, the principle according to which we should search for the least restrictive regulation mechanism and choose it seems appropriate for any state, adhering to proportionality requirements. In addition, even if we do not find any moral problem with criminal law covering all rules in society, such over-inclusiveness might not only create inevitable economical problems of resource allocation, but also erode the moral expressive power of criminal law.\textsuperscript{136} And even if things do not appear critical when examining

\begin{itemize}
\item[(131)] See S.E. Marshall and R.A. Duff, \textit{Criminalization and Sharing Wrongs}, 11 CAN. J.L. & JURIS. 7, 8 13, 17, 21-22 (1998) (struggling to find meaningful differences between criminal and civil law). Also see Harcourt, supra note 105, at 170.
\item[(132)] See Nils Jareborg, \textit{Criminalization as Last Resort (Ultima Ratio)}, 2 OHIO ST. J. CRIM. L. 521, 523 (2005) (trying to show that in practice punishment often serves as a first resort); Nuotio, supra note 7, at 255-6 (emphasizing the need to avoid the legal arena in favor of alternatives).
\item[(133)] See Husak, supra note 17, at 545 (concluding that the last resort principle is less useful than expected when confronting the problem of over-criminalization). Also see PERŠAK, supra note 4, at 26, 124.
\item[(134)] We must also take into account that criminal law includes mechanisms meant to reduce the chances of convicted innocents.
\item[(135)] See FElNBERG, supra note 19, at 188 (maintaining that no interest, even of welfare, is shared by everyone; but still, the law obtains comfort and clarity and loses little if any justice by assuming that everyone has some interests and by imposing non-interference obligations in regarding thereto).
\item[(136)] See Coffee, supra note 95, at 200-201 (claiming that if criminal law is over-extended, it will lose its unique stigma); Paul H. Robinson, \textit{The Criminal-Civil Distinction and the Utility of Desert}, 76 B.U.L. REV. 201, 210-211, 214 (1996) (asserting that preserving the distinction between criminal and civil and the law's focus on moral culpability has practical values, not just aesthetical or philosophical); Robinson and Darley, supra note 59, at 479-482, 499 (suggesting that the more the stigmatic effect of criminal law is used for conduct which is not denounced, the weaker it gets); Stuntz, supra note 102, at 1894 (believing over-criminalization will erode the law's ability to inflict stigma and to send the message that crimes are awful things). See also Beale, supra note 89; HUSAK, supra note 10, at 82-91.
\end{itemize}
concrete proscriptions, they seem quite profound when we look at criminal law as a whole; therefore, the search for alternatives seems like a worthy general principle. Criminal law is not necessarily the most restrictive form of regulation. But as an initial assumption, it is suspected as being the most restrictive, due to the potential of sanction (punishment and condemnation) it can wield, hence the step involving the search for alternate regulation.

(2) The key to alternatives to criminalization: causation
As stated, even if criminal law can indeed fulfill the purpose of the harm principle, it may not be the best tool for the job: perhaps there is another way to handle the problem. Criminal law is but one option for reducing conduct and reduction of conduct is but one option for reducing harm. The links between criminalizing conduct and the reduction thereof and between reducing conduct and reducing harm are not necessarily exclusive. There may be other ways to reduce conduct and other ways to reduce harm. Once again, causation is the key.

As explained, the harm principle works in the following manner: a certain type of conduct ⇒ (behavioral causation) ⇒ harm.
Criminalization works as follows: criminalizing a certain type of conduct ⇒ (purposiveness) ⇒ reducing this type of conduct ⇒ reducing harm.
A thorough analysis of the relevant causal move might reveal alternate solutions to the intervention offered by criminal law. Sometimes there are other ways to interfere, to cut a causal chain at the beginning or middle thereof, all before harm is reached. Some ways are subjective; others are objective. The following discussion could be modified, at least in part, to the moral wrongfulness discourse.
Causal intervention might be aimed at one of three positions, three links in the chain. It might target causes before the conduct, at its foundation. It is possible to deny conduct by disrupting its necessary preconditions, or by reducing positive incentives leading up to it. Positive incentives for conduct might be direct (when conduct appears appealing to the agent) or indirect (when conduct appears to the agent as a means to achieving harm, which is appealing). This sort of intervention is

137 See HART AND HONORE, supra note 67, at 106-108 (explaining various ways for a condition to be necessary).
138 See WILLIAMS, supra note 6, at 14 (speculating why people cause harm).
also suitable for the moral wrongfulness discourse, which would support removing positive incentives and preconditions to conduct (rather than the harm it may produce).

In some cases, causal intervention might be aimed at another position: phases (if such exist) between conduct and harm.\textsuperscript{139} This would target behavioral causations. Sometimes other conditions or another type of conduct might exist between conduct and harm.\textsuperscript{140} These may either be within the perpetrator’s control (which would allow for intervention by creating proper incentives for perpetrators)\textsuperscript{141} or beyond it.\textsuperscript{142} The interruption thereof would prevent the harm but not the conduct in question. As mentioned, I have explicitly assumed that main object of criminal law is reducing harm; those who focus on moral wrongfulness, positing that it is more important to reduce wrong conduct than reduce harm, are not likely to support this kind of causal intervention.

The third position allowing for causal intervention is after the harm. A certain type of conduct might be reduced by creating negative consequences thereto or to the harm it may produce (once again: the moral wrongfulness discourse would support negative incentives to conduct, rather than to its subsequently produced harm, while the harm discourse would allow for both kinds of incentives). The deterrence created by criminal law is one kind of negative consequence or a negative incentive.\textsuperscript{143}

The search for possible positions for causal intervention, possible causal intersections, may be performed using a legal viewpoint beyond the issue of criminalization however the latter is the context in which I am currently interested. The above interventions, needless to say, are not necessarily possible for each specific type of

\textsuperscript{139} Regarding inchoate offenses, if the harm they come to prevent (“the ultimate harm”) is that which they create the risk for (see \textsuperscript{HUSAK, supra note 10, at 160}), rather than independent harm caused by their very being (say, risk of harm as harm in itself), then indeed there are intermediary phases between conduct and harm.

\textsuperscript{140} At that time, arguments against criminalization may be based on autonomy: the law should not proscribe conduct that is essentially harmless simply because the actor might later produce a risk of harm. Doing otherwise fails to regard people as responsible: R. A. Duff, Criminalizing Endangerment, 65 LA. L. REV. 941, 963-965 (2005); R. A. DUFF, CRIMINAL ATTEMPTS 135, 147 (1996); ASHWORTH, supra note 4, at 25-26; SIMESTER & SULLIVAN, supra note 9, at 7.

\textsuperscript{141} From Duff’s argument regarding autonomy we might derive a form of causal intervention, relating to perpetrators: the conduct at hand does not necessarily produce harm and the actor has some control over the consequence; this suggests that we could create incentives (either positive or negative) for the actor to deny harm.

\textsuperscript{142} See SIMESTER & SULLIVAN, supra note 9, at 86 (explaining that not all consequences are related to people); Duff, Criminalizing Endangerment, supra note 140, at 963-964 (distinguishing “direct” risk offenses from “indirect” risk offenses).

\textsuperscript{143} See Adam Crawford, Crime Prevention and Community Safety, in THE OXFORD HANDBOOK OF CRIMINOLOGY 866, 870-871 (Mike Maguire et al., eds., 4th ed. 2007) (claiming the modern state places all crime prevention eggs in the tertiary prevention basket, which is merely a narrow field).
conduct. Generally speaking, the more elaborate the causal move, the higher the potential to identify points of possible intervention.\textsuperscript{144}

(3) Tools for causal intervention

Criminal law is but one tool in the legislator's toolbox, a box containing diverse regulative tools.\textsuperscript{145} For instance, legislators can act through taxing, licensing, administrative fines, tort law and contract law, and they can also act ad-hoc, for example through decisions to subsidize. Obviously, regulation also exists outside the law. Other regulators, at times acting differently than the law, can also reduce conduct.\textsuperscript{146} The causal move I have discussed may reveal potential positions for regulation, main intersections (bottlenecks) where large powerful corporations are often found and at which they may be able to serve as the law's gatekeepers, its proxy.

(4) Alternatives to criminalization: formulating

The third step of criminalization, the search for alternatives, begins with a thorough causal examination: where might the causing of harm be interrupted? A causal chain of a harmful conduct might look like this:

\textbf{Existence of preconditions and positive incentives} \Rightarrow \textbf{a certain type of conduct} \Rightarrow (behavioral causation) \Rightarrow \textbf{harm} \Rightarrow \textbf{lack of negative consequences to perpetrators}.

Causal intervention might strive to remove the necessary preconditions required for a certain type of conduct, or remove positive incentives that encourage such conduct; this move is "pre-behavioral causation intervention". Causal intervention might alternatively be aimed at intermediate phases (if such exist) between conduct and harm; this move is "behavioral causation intervention". And finally, causal intervention might also aspire to create negative incentives for conduct: "post-behavioral causation intervention". Once causal intervention is available,\textsuperscript{147} one might

\textsuperscript{144} Interestingly enough, we can use theories that attempt to elaborately base arguments regarding the existence of behavioral causation between a form of conduct and harm (attempting to convince us that it is a dangerous conduct), to suggest positions for intervention outside criminal law. Theories of crime occurrence are also theories of crime prevention. See Pease, \textit{supra} note 7, at 965.

\textsuperscript{145} See Jareborg, \textit{supra} note 132, at 524-525 (suggesting that a variety of legal tools should be tried, while criminal law should be the last tool considered: one that may be used only when other tools fail).

\textsuperscript{146} I refer to Lawrence Lessig's four modalities: law, architecture, social norms and the market. \textit{See} CODE – VERSION 2.0 121-137, 340-345 (2006).

\textsuperscript{147} The three kinds of causal intervention relate to (though do not overlap) the division made by Brantingham and Faust. \textit{See supra} note 114, at 295. In many (though not all) aspects, my terminology and substance are closer to what Clarke called "crime science" than to criminology. \textit{See} Clarke, \textit{supra} note 2, at 56-62 (and \textit{See} the table of comparison in page 56).
claim that criminalization is uncalled for, due to the existence of alternate courses of regulation. In contrast, when no kind of causal intervention is available, in the absence of other tools to address the problem, the legitimacy of criminalization increases.

I should point out that alternatives to criminalization are dynamic; the law has means to encourage the improvement and development thereof. Perhaps technology will offer a way to achieve goals outside criminal law and perhaps we might encourage technology to do so. This is no surprise: the law is dynamic and so is criminal law. Regulation is also dynamic, responding to technological, social and economic changes. I do not claim that existing alternatives preclude applying criminal law simultaneously; however, successful existing alternatives, which have proven effective in the long term, set an initial argument against criminalization ("criminalization is unjustified, because there are other effective ways to deny a certain type of conduct or the harm caused thereby").

(5) Achieving goals through alternatives to criminalization: summation

Dismantling the causal move of harm allows us to identify points of potential intervention; thus wield other regulative tools to reduce the conduct in question or the harm involved; and therefore indirectly achieve the harm principle's goal. However, due to the reservation made regarding criminal law not necessarily being the most restrictive (or intrusive) form of regulation, we must devote some attention to the possible consequences of each course of regulation.148 Even when alternatives exist, sometime they are no better than criminalization. We must examine the consequences of each potential regulative decision. And even if there is no alternative, we still must assess the consequences of criminalization. That is the last step of criminalization.

D. Assessing the Social Costs entailed in the Solutions to the Offensive Conduct, Reducing Costs and Striking a Balance

(1) Background

Whether or not we found alternatives to criminal law capable of achieving the goal of reducing harm, assessing the possible consequences of the regulative choice brings about the last step of criminalization. At this point we know criminalization can achieve its goal; however, perhaps this achievement involves social costs that pose an

148 However, it is not necessary to conduct a series of practical attempts in order to find the least restrictive alternative. HUSAK, supra note 10, at 158.
argument against criminalization.\textsuperscript{149} Inasmuch as these costs are predictable and identifiable, they must be carefully weighed.\textsuperscript{150} We need to assess the social costs entailed in the various solutions. Obviously, alternate regulation may also include negative aftereffects; however, due to the diversity of alternative solutions, I will focus on the social costs involved in criminalization.

\section*{(2) Criminalization costs}
The costs of criminalization may be divided into two components: proscription costs and enforcement costs. Proscription costs are related to the meaning of the written law whereas enforcement costs are related to the enforcement strategy, as best it may be generally estimated. Both cases, then, are once more a matter of causation.

\subsection*{(2)(a) Proscription costs}
The immediate and clear social cost of any behavioral proscription has to do with the deprivation of freedom to act in certain manners: freedom in the sense of whatever the law does not proscribe.\textsuperscript{151} Those who perceive "freedom" as including a normative moral component (for instance: "there is no freedom to harm another"),\textsuperscript{152} could still agree that all citizens have an interest (not necessarily a compelling one), if not an initial freedom, to act as they will.\textsuperscript{153} It is possible to suggest that there is an initial value to any conduct, at least a welfare interest to those who wish to practice it, thus resulting in a possible value to society.\textsuperscript{154} Identifying the affected interest does not suggest that it is significant. It might be trivial, negligible; but still it is an interest and we should not presume its absence in advance, even if identifying it might prove

\begin{footnotesize}
\begin{enumerate}
\item See PACKER, supra note 1, at 267 (claiming that the "harm to others" formula requires an inquiry regarding the possible consequences of criminalization); SIMESTER & SULLIVAN, supra note 9, at 23 (suggesting that criminalization is limited in light of its aftereffects).
\item See SCHONSHECK, supra note 11, at 70 (addressing the prediction of criminalization consequences in the first stage of the "practical filter").
\item See FEINBERG, supra note 19, at 7-8 (defining "freedom" as the absence of legal coercion); and also Miriam Gur-Arye, Comments on Douglas Husak's Overcriminalization, 1 JRSLM. REV. LEGAL STUD 21, 33 (2010); Re'em Segev, Is the Criminal Law (so) Special? Comments on Douglas Husak's Theory of Criminalization, 1 JRSLM. REV. LEGAL STUD 3, 11 (2010).
\item One might claim that even without proscriptions, citizens have no "freedom" to harm others. This claim involves matters of defining rights and freedoms, a deep normative discussion beyond the scope of this article. Compare: do citizens have the "right" to break the law? Ronald Dworkin, Taking Rights Seriously, in TAKING RIGHTS SERIOUSLY 184, 186 (1978).
\item See FEINBERG, supra note 19, at 206-213 (suggesting that when conduct is criminalized, every citizen's freedom is reduced); See also Joel Feinberg, Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?, 58 NOTRE DAME L. REV. 445, 463 (1983).
\item See Adler, supra note 69, at 1303-1308 (describing three philosophical concepts of welfare); FEINBERG, supra note 19, at 191 (claiming that one might find some value in those who choose to practice any willful conduct). In contrast See Moomr, supra note 12, at 786 (emphasizing that what counts as benefit or loss to some of the community is not necessarily considered to be benefit or loss to the entire community).
\end{enumerate}
\end{footnotesize}
Identifying the interrupted freedom or interest does not necessitate "a presumption of freedom", according to which freedom is the norm and coercion always calls for special justification. Even those who do not support this presumption might still find value in the freedom / interest to act in certain ways. The abovementioned cost also relates to behavioral causation. The more complex or indirect the causal move between a certain type of conduct and harm, the more phases it includes and the more some of those phases are not inherent, the higher the social costs seem. Meaning, if the causal move basing the linkage between conduct A and harm D is: $A \Rightarrow B \Rightarrow C \Rightarrow D$; however, A sometimes leads to G instead of B (meaning, A is a dual conduct, one involving indeterminate behavioral causation), or C may lead to H instead of D, then the proscription costs also reflect the value society attributes to G and H, those conducts which are "lost in criminalization" (assuming, of course, that B and C are unwanted conducts; otherwise, they must also be accounted for). In other words, proscription might be overly broad. This relates to its lingual phrasing, which in turn relates to another possible cost: the vaguer a proscription, the more it is likely to produce cooling effects. Citizens might avoid conduct simply because they fail to understand the meaning of the law.

Another possible proscription cost involves an expressive aspect, not directly linked to freedom. Proscriptions (and sometimes the absence thereof) have social meaning. Following an expressive law theory, according to which the law has symbolic and/or social meaning and through that meaning it affects conduct through its words, by changing attitudes or social norms, criminal proscriptions might perhaps send undesired messages. They might convey an unwanted social message of excessive governmental interference in subjects’ lives. Proscription based on paternalism or


156 See FEINBERG, supra note 19, at 9 (noting that most criminalization scholars have adopted a presumption of freedom). Also see SCHONSHECK, supra note 11, at 63; Finkelstein, supra note 11, at 371; MILL, supra note 18, at 13; Clark Wolf, Liberalism and Fundamental Constitutional Rights, 37 ARIZ. L. REV. 185, 188 (1995); PERSAK, supra note 4, at 76.

157 See MILL, supra note 18, at 95 (explaining that this conduct involves consequences which vary from bad to good); and also Neal Kumar Katyal, Criminal Law in Cyberspace, 149 U. PA. L. REV. 1003, 1050 (2001) (addressing the issue of bad and good online encryption and pseudonymity).

158 See FEINBERG, supra note 19, at 5, 12, 57-68 (writing that the main argument against paternalism involves its harm to personal autonomy).
on legal moralism\textsuperscript{159} may do just that. Generally speaking, proscriptions that address extremely controversial issues might be controversial as well.\textsuperscript{160}

Beyond the abovementioned considerations, we should also attempt to assess the negative aftereffects of the existence of a proscription in the statute book. Legal proscriptions are something that at least some entities cannot afford to disobey. For example, when the type of conduct involved is the consumption of products, the existence of legal prohibitions is expected to prevent large institutions from providing these products. A possible outcome is the rise of black markets. Black markets provide unsupervised products, therefore increasing the risk involved (not necessarily the same risk underlying the proscription).\textsuperscript{161} The price of said product is expected to rise due to increased seller risk;\textsuperscript{162} this rise, in turn, might produce other types of unwanted conduct.\textsuperscript{163} Sometimes costs are two-sided.\textsuperscript{164} Each criminalization provides black markets with ammunition; whatever the law proscribes, black markets provide. In this sense, criminalization constitutes oxygen for black markets. If not legalized, drugs, prostitution, gambling and so on provide black markets with employment, money and power, giving rise to industries involving harm that includes not only the harm stemming from the offensive conduct but also derivative harm such as gang wars and so on.

Another matter to be considered, perhaps, is the cost involved in the expansion of criminal law (although when we examine a single conduct, it is hard to attribute any significant or even clear part of criminal law expansion thereto).

**(2)(b) Enforcement costs**

Even assuming that any conduct may allow for some enforcement strategy, and that the criminalization thereof can achieve the goal of preventing such conduct, an argument against criminalization may still arise due to the possible costs of

\textsuperscript{159} See FEINBERG, HARMLESS WRONGDOING, supra note 24, at 3 (specifying what legal moralism may mean).

\textsuperscript{160} Ibid, at 5 (illustrating the expressive weakness of paternalism).

\textsuperscript{161} During the 1960s, abortion was a crime in every state in the United States. Although enforcement was quite weak, there were still consequences. Dignified establishments avoided allowing abortions thus the service became worse and more expensive. The outcome was the death of thousands of poor women, determined to undergo the procedure and attempting to operate on themselves or through cheap (and dangerous) black market services. See Stuntz, supra note 102, at 1886-1887.

\textsuperscript{162} This is the "crime tariff". See PACKER, supra note 1, at 277-282; See also Luna, supra note 4, at 728-729.

\textsuperscript{163} See Jareborg, supra note 132, at 530 (claiming that criminalization must consider secondary effects).

\textsuperscript{164} HUSAK, supra note 155, at 92 (discussing problems arising from the criminalization of drug abuse); and also Harcourt, supra note 28, at 175; SCHONSHECK, supra note 11, at 73.
enforcement. For example, composing enforcement strategies might reveal a high potential for selective enforcement. While proscription costs relate to the existence of the written law and the subjects' knowledge thereof (and the subsequent behavioral changes this may produce), enforcement costs relate to the manner in which proscriptions are enforced. I refer not merely to social costs regarding punishment (defendant suffering) or to financial costs of enforcement in terms of resource allocation; these are relatively obvious costs which do not require elaboration. In some cases enforcement may entail another practical cost. For example, in relation to offenses that are usually committed in private, enforcement might involve costs which are beyond deprivation of freedom, i.e. violation of privacy. And so, enforcement itself might involve costs (including monetary costs, about which I have not elaborated) that require consideration, inasmuch as they are inherent (obviously, enforcement costs are quite dynamic). Regarding some proscriptions, we might also note social costs that are derived from the prosecution itself.

(3) The exclusivity of criminalization costs, reducing costs and striking a balance

Proscription costs and enforcement costs constitute criminalization costs, setting a possible argument against criminalization. However, this argument may lose its appeal if there is no exclusive causation between criminalization and the costs in question. If, for example, it appears that criminalization bears costs which are already in place due to other factors, then considering criminalization costs seems pointless or unconvincing (to some extent, this is reminiscent of the underbreadth test). In addition, the cost argument may be diminished through mechanisms that reduce costs but still allow criminal law to function; for instance, mechanisms allowing accountability may reduce the cost of misusing criminal law.

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165 See Stuntz, supra note 102, at 1873-5 (explaining the dynamics and dangers of selective enforcement). Also see Luna, Principled Enforcement of Penal Codes, supra note 74, at 556-7.


167 See PACKER, supra note 1, at 283-5 (emphasizing that the enforcement of some offenses requires visible intrusions into private lives). Also see SCHONSHECK, supra note 11, at 76.

168 See HUSAK, supra note 156, at 92-5 (claiming that the price of enforcement might justify avoiding criminalization).

169 Dhammika Dharmapala and Richard H. McAdams, Words That Kill? An Economic Model of the Influence of Speech on Behavior (with Particular Reference to Hate Speech), 34 J. LEGAL STUD. 93, 110 (2005) (claiming that social costs may derive from directing the public spotlight toward the perpetrators of expressive crimes). Also See Stuntz, supra note 102, at 1882.

Eventually, criminalization costs may form an argument against criminalization. Decisions shall be made by striking a balance\textsuperscript{171} or conducting a cost-benefit\textsuperscript{172} analysis; all after assessing the costs involved in the alternatives to criminalization as well, including examination of exclusivity costs and cost reduction attempts.

(4) **Assessing the social costs entailed in the solutions: formulating**

Balancing the benefits of criminalization (achieving its goal and perhaps other goals)\textsuperscript{173} and the costs thereof sets a "criminalization internal balance". Balancing the benefits of an alternative to criminalization and its costs sets an "alternative internal balance". If the criminalization internal balance is positive (benefits outweigh costs), one might still reject criminalization in light of a more positive alternative internal balance. This sort of argument reflects a "winning alternative". Granted, under such circumstances, there is no need to choose between criminalization and alternate regulation and perhaps both are possible simultaneously; however, in certain instances one could argue against criminalization in light of the alternative's ability to effectively achieve the goal at lower costs.

If the criminalization internal balance is negative (costs outweigh benefits), an "offensive criminalization" occurs.\textsuperscript{174} One could reject criminalization in light of a positive alternative internal balance or at least in light of "the nothing alternative".\textsuperscript{175}

(5) **Assessing the social costs entailed in the solutions: summation**

At the end of the day, as is customary to say, any criminal proscription should do more good than bad.\textsuperscript{176} While the good is relatively clear at this step, consisting

\textsuperscript{171} I will not dive into the complex issue of how to strike that balance. \textit{See} T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 YALE L.J. 943, 945, 972-978, 992-994 (1987) (emphasizing that balance does not necessarily include objective criteria for evaluating or comparing interests).

\textsuperscript{172} \textit{See} Sanford H. Kadish, \textit{The Crisis of Overcriminalization}, in \textit{BLAME AND PUNISHMENT – ESSAYS IN THE CRIMINAL LAW} 21, 33 (1987) (finding that criminal law is not suited to deal with all conducts and sometimes does more bad than good); Sanford H. Kadish, \textit{More on Overcriminalization}, in \textit{BLAME AND PUNISHMENT – ESSAYS IN THE CRIMINAL LAW} 36, 38 (1987) (explaining that it is easier to declare the utility and cost than accurately measure them or reliably and objectively estimate them). \textit{Also} \textit{See} Moohr, supra note 12, at 785-786 (suggesting evaluation if criminalization would do the community more good than bad); Rosenzweig, supra note 4, at 813 (suggesting conducting a cost-benefit analysis of criminalization).

\textsuperscript{173} Brown, supra note 167, at 325-6, 343 (pointing out various benefits of criminal law).

\textsuperscript{174} \textit{See} Hart, supra note 80, at 7 (thinking some forms of conduct are best left for entities outside the law); \textit{TYLER, supra} note 74, at 277 (emphasizing that the use of power, mainly coercive power, requires many resources to achieve even modest and limited influence over people's conduct).

\textsuperscript{175} \textit{See} PACKER, supra note 1, at 259 (emphasizing that there is always an alternative: doing nothing about anti-social conduct or an aspect thereof); Husak, \textit{supra} note 99, at 32 (reminding that the state always has the alternative of doing nothing, or of utilizing non-criminal tools).

\textsuperscript{176} ibid, at 45.
mainly of the prevention of harm, the bad requires estimating socially undesired consequences. Analyzing the cost of proscription and enforcement allows this estimation. Eventually, the argument that may arise in this context against criminalization involves balance: internal balance between criminalization costs and benefits (which may give rise to offensive criminalization arguments) and external balance, the criminalization balance versus the alternative balance (which may give rise to winning alternatives arguments). The nothing alternative is a fairly clear balance: while the prevention of harm is not obtained, the costs which would have resulted from either criminalization or the alternative are not incurred.

**Part Three: Benefits of the Ladder**

(1) **Background**

The various steps and considerations of criminalization systematically organize and distinguish arguments which often arise in concrete discussions of criminalization. Sometimes, the presented arguments are not conceptualized, they merely support another conceptualized consideration; sometimes they are part of a mixture of arguments in favor of and against criminalization. For example, an argument regarding enforceability arises when claiming that criminalization is pointless, for the public cannot withstand it (and therefore enforcement is impossible). Examining types of conduct beyond the analyzed conduct also appears in other places. The underbreadth test, combined with criminalization costs, also relates to slippery slope arguments. The ladder formulates these arguments and distinguishes among different steps and considerations. Each step and every consideration is analyzed separately, erasing the shuffling and disorder which characterize criminalization arguments that jump from purpose to costs and so on, without any (visible) understanding that these are all different layers. The approach of general balance, of presenting all the pros and cons, is far from systematical, pushing analyzers to creative and non-systematical efforts which often lead to same arguments over and over.

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177 For instance, See HUSAK, supra note 10, at 42, 165-168 (setting out "the consummate harm requirement", according to which such an offense is justified only if the state is also allowed to proscribe conduct creating the harm involved, directly and indirectly). The underbreadth test is broader than Husak's test, by aiming not only at a-fortiori arguments, but also at analogy arguments. Also See PERSAK, supra note 4, at 28.

178 See Frederick Schauer, Slippery Slopes, 99 HARV. L. REV. 361, 361-365, 368-369, 382 (1985) (explaining that a slippery slope argument means that a certain act, which may be non-problematic in itself and perhaps even desired from an insulated view, might lead to similar yet undesired events in the future). Regarding criminalization: the immediate case is criminalizing conduct X to avoid harm Z, which would later suggest criminalizing conduct Y (also leading to Z), an act that in turn includes the loss of positive outcome W.
over again. In contrast, distinguishing between different steps and considerations of criminalization facilitates organized and focused discussions and also illuminates the proximity of various offenses and rationales, instead of settling for looking at only one conduct. The ladder promotes criminalization transparency, in the sense of not adhering to vague concepts such as the harm principle and not following general balance, which does not obligate decision makers to refer to all relevant considerations, allowing commentators to present only parts of the picture.

(2) The criminalization ladder, not a complete model of criminalization
I have presented the general steps and considerations which are seemingly important to any criminalization discussion and often also to general conduct-regulation discussions. Those who find one or more considerations irrelevant might still utilize the rest of the ladder. At the end of the day, I have not provided legislators with a way to make final determinations. This article does not present a complete criminalization model allowing legislators to determine whether or not to criminalize certain conducts. While the ladder can certainly facilitate that determination, it does not seek to construct criminal proscriptions; rather, it helps us address existing or proposed proscriptions. It makes it easier to uncover weak (and strong) spots regarding the criminalization of concrete types of conduct, whether or not already criminalized. Pointing out problems and accurately positioning them (for instance, regarding the causal move of harm or the social costs of criminalization) might pave the way to solutions.

(3) Capability of analyzing any type of conduct
The ladder contributes to what has thus far been the most scant layer of the criminalization discourse: the intermediate layer, linking the abstract philosophical layer with the most concrete layer. The ladder is relatively abstract and allows for criminalization discussions regarding any type of conduct. This is true for "consequential" conduct (such as murder) as well as for "inchoate" conduct, like risk creation (such as drug possession). This is true for mala prohibita and for mala in se,179 for physical conduct or speech, positive conduct or omissions. The ladder does

179 See Marshall and Duff, supra note 131, at 14 (explaining that mala prohibita conduct is perceived as morally wrong due to its violation of a social rule serving some public good; mala in se conduct is perceived as morally wrong in apart due to existing social norms). Also see FEINBERG, supra note 19, at 20-21 (distinguishing direct proscriptions from derivative crimes).
not require preliminary conduct-categories or existing constitutional distinctions. Its abstract level enables it to function in various legal systems. The considerations take the same form, even though they may produce different (intermediate or final) results in different states, in accordance with local values and other factors. The analyzed type of conduct fills the discussion with substance; the domestic regime fills the discussion with values. The ladder does not require prior preferences regarding values and in itself is indifferent thereto; however, as far as such prior preferences exist in a given state, the ladder does not ignore them. When applied, the ladder relates to a given system: legally, socially and economically speaking. For instance, when discussing the criminalization of speech, one can consider the importance of freedom of speech and apply the principles of the First Amendment, in accordance with one's values and the Constitution, throughout the ladder; this holds for the attributes of the required behavioral causation, the costs of criminalization, the proper balance, and so on.\textsuperscript{180}

I must emphasize: I do not claim that the ladder is either value-free or an objective or neutral model. I have emphasized that the ladder revolves around the normative layer of crime, the layer of values. Every consideration discussed relates to values in one way or another. The decision to search for harm at the ladder's first step is a moral choice (even though I have not elaborated on the specifics of the causation requirement, in terms of probability), for it is possible to suggest that it is not necessary; the choice to examine whether criminal law can execute its work methods, as well as to prevent harm, is also moral (and as clarified, one can reject certain considerations and still find the rest of the ladder useful); and so is the choice to search for alternatives to criminalization and examine which solution is less restrictive. Indeed, unlike a complete model of criminalization, the ladder does not pour all possible moral substance into the different considerations, although it does formulate them. The ladder does not rank the moral significance of different considerations (I did not set a moral scale, nor did I claim that freedom of movement is more important than human dignity and so on); and still, clearly they all involve an element of values (even though I have neither declared nor morally tagged them), and so does the combination thereof. Indeed, the ladder neither determines nor aspires to determine, nor is it even capable of determining in favor of or against criminalization

\textsuperscript{180} See R.A. Duff et al., supra note 8, at 7, 15 (claiming that one cannot speak of the proper goals of criminal law independently of a particular political structure: a normative theory should draw from both morals and politics).
in concrete cases. Even if the considerations it describes have been passed through a moral filter, this filter is relatively crude and the ladder is still a point of origin, not a finish line. An additional substance of moral values is required for the practical utilization of the ladder. The ladder does not say yes or no (to the criminalization of conduct X); it says how (to decide if it is a harmful conduct, to decide if criminalizing it would help avoid harm, and so forth).

(4) Suitability for complex analysis
Murder, rape, robbery: all are types of conduct capable of being analyzed step by step. It seems that any democratic regime would respond by criminalizing them, both descriptively and normatively. The ladder is seemingly not necessary for such types of conduct. However, it might prove extremely useful when complex analysis is in order. Such analysis might be needed for complicated types of conduct, like those involving vague harm. In addition, the ladder might also contribute to relatively clear types of conduct after they have metamorphosed (at least allegedly) in some manner. A social, economical, technological or even legal change of circumstances might revive discussions of criminalizing a certain type of conduct which had not previously given rise to lively debate; for example, in light of a new medium or technology entering the arena (the internet, perhaps).
I have not included many examples illustrating the ladder in this article. Laconic or anecdotal reference to relatively complex types of conduct (say, drug-abuse) would have left me exposed to criticism for not expressing the full complexity of the issue at hand, while a thorough analysis would demand significant space. In contrast, referring to relatively simple types of conduct (say, murder) would have left me exposed to criticism regarding banality, having chosen conduct involving obvious conclusions. Extensive and systematic analysis of the ladder shall be conducted elsewhere. For now, an illustration will suffice.

Part Four: A Short Illustration – Criminalizing Online Gambling
(1) Background

I will now illustrate the ladder's function as related to a complex type of conduct existing in a complicated medium and subject to current debates around the world: that of online gambling. My purpose here is not to thoroughly analyze the criminalization of online gambling, but to pave the road to analysis. Therefore I will not exhaust the readers with footnotes describing the literature I have relied upon, but merely illustrate climbing the major steps (not all minor steps) of the ladder of criminalization.

(2) Offensiveness
Criminalization begins with identifying offensive conduct: setting a type of conduct within the sights of criminalization, in light of the harm it causes. Three variables play a part: conduct, harm and the linkage between them, i.e. behavioral causation.

The conduct selected in this case is online gambling. The alleged harms examined are diverse: addiction and financial loss, minors victimized by participation, consumer fraud, money laundering, the loss of state income or the loss of local business income.

Behavioral causation to these harms may be portrayed as follows:

a. **Online gambling** ⇒ increased availability of gambling + absence of monetary visual presentation + difficulties in identifying gamblers’ mental state ⇒ **addiction** and **financial loss** (+ accompanying harms).

b. **Online gambling** ⇒ increased availability of gambling + absence of minor-identifying means ⇒ addiction and/or financial loss ⇒ **victimized minors**.

c. **Online gambling** ⇒ consumer inability to monitor games ⇒ opportunities and temptations for casinos to defraud ⇒ **consumer fraud**.

d. **Online gambling** ⇒ speedy transactions + enablement of offshore transactions ⇒ opportunities and temptations for organized crime ⇒ **money laundering**.

e. **Online gambling** ⇒ (posing competition to state lottery ⇒ diverting subjects’ resources) and/or (tax collection difficulty) ⇒ **the loss of state income** from jobs, taxes and regulated gambling.

f. **Online gambling** ⇒ posing competition to local business ⇒ diverting local subjects’ resources ⇒ **the loss of local business income**.

(3) Purposiveness
Once offensiveness has been identified, the next step is that of verifying the ability of criminal law to handle it, to reduce conduct and harm: purposiveness is on the line.
First we examine enforceability. There are means of detecting online gambling and gamblers, either through technology or proxy. Challenges certainly arise due to the global facet of cyberspace, especially with regard to foreign operations and the difficulties entailed in decreasing gambling through the methods of criminal law when the culprits are offshore. Thus, we must devise an enforcement strategy.

We then conduct the underbreadth test: search for other types of conduct that produce the same harm. Do other types of conduct produce addiction and financial loss, victimized minors, consumer fraud and so on? We must point out such types of conduct and examine how common they are and how criminal law treats them. Meaning, the legislator must focus on the bigger picture and remember: the fight against (any) crime stems from the resultant harm and if that same harm is caused by other types of conduct, it does not seem justified to wage selective and useless fights.

(4) Alternatives to criminalization
The third step in the ladder involves a different vantage point: seeking solutions to prevent harm through means other than criminalization. The key is causation: the causal move enables identifying possible intersections at which to interrupt harm.

Three points of intervention may be considered. The first is before the conduct takes place: for example, limiting the results provided by search engines, blocking online sites and so on. The second is after the conduct has occurred but before the harm has been incurred: for instance, age verification, software regulation, monitoring gambling sites, licensing and so forth. The third, after the harm has taken place, is harder to imagine in relation to gambling, which is traditionally considered to be "victimless”.

(5) Assessing the social costs of criminalization
The last step of the criminalization process is assessing the possible consequences of criminalization and the alternatives thereto, en route to striking a balance and making an appropriate regulative choice.

Proscription costs include the deprivation of freedom to gamble: for many, gambling is a form of recreation and entertainment. Other proscription costs may be the loss of money which is transferred offshore, black market issues and so on.
Enforcement costs include possible diplomatic conflicts, as gambling is widely legal around the globe; potential for police misuse and selective enforcement; violation of privacy through enforcement; and more. After attempting to reduce criminalization costs and the costs of alternatives, the legislator must strike a proper balance and decide whether to criminalize online gambling, to regulate it or just let it be.

**Conclusion**

Beginning with the harm principle, I have proposed a criminalization ladder. The first step along this path commenced with the issue of identifying types of offensive conduct which result in harm. The issue of harm, even if easily phrased ("is conduct X harmful?"), is complicated and includes three variables: harm, conduct and behavioral causation. An argument against criminalization might aim at any of these factors, suggesting that there is no justification to proscribe a specific type of conduct either because it is not suitable (due to a lack of moral wrongfulness or difficulties regarding its lingual phrasing), because there is no sufficient causal linkage between that type of conduct and harm, or because the alleged harm is not actually harm at all.

The harm principle points out problems. What about the solutions? Criminal law has traditional ways of solving problems, mostly related to punishing those found guilty of committing harmful acts. These solutions do not necessarily fit all problems. If criminal law cannot execute its work methods, for any reason (ability to detect the harmful conduct, to apprehend and detain perpetrators, to gather evidence sufficient for prosecution, or to reduce conduct through punishment), then those who do not share the view of entirely expressive approaches (asserting that criminalization is enough to reduce conduct) might object to criminalization. This sort of objection relates to enforceability. Alternatively, in some instances criminalizing a specific type of harmful conduct would do little to prevent harm, because other non-criminalized types of conduct produce that very harm in any case. This argument relates to "underbreadth": even though criminal law is capable of executing its work methods regarding a certain type of conduct, this does not result in the reduction of harm. And vice-versa: if enforceability and "sufficient criminalization" do exist, then there is "purposiveness": a direct link between criminalization and the achievement of its purpose.
The existence of such a link does not yet imply legitimate criminalization. The search for alternatives is common in criminal discussions. Granted, criminal law is not necessarily the most restrictive alternative for every person under any circumstances, but it nonetheless has the highest restrictive potential. Various alternatives may allow for causal intervention that would be aimed at phases prior to the conduct, its preconditions or its positive incentives ("pre-behavioral causation intervention"), at phases (if such exist) between the conduct and the harm ("behavioral causation intervention"), or at phases after the harm has occurred, offering negative incentives ("post-behavioral causation intervention"). These interventions might arise independently or through the non-criminal law.

All these possibilities should be compared to criminalization, which is but one single (albeit important) tool in the legislator's toolbox. This decision also depends upon the costs related to each option. Criminalization involves the deprivation of freedom or interests. It may also involve more complex considerations, such as a concern regarding the rise of black markets. Enforcement might include additional costs other than proscription costs. Arguments against criminalization in these contexts would rely on the internal balance of criminalization. If that balance is positive, a "winning alternative" might arise, one including a more positive alternative internal balance; if it is negative, then we would have an "offensive criminalization" which may still constitute a winning alternative, or at least "the nothing alternative".

The ladder presents a method that could bring order to the chaotic criminalization discourse. It allows for a systematical analysis of any type of conduct (and particularly complex conducts) with the help of formulated considerations, rather than aimless wondering while searching for all the pros and cons. It promotes transparency and understanding of the rationales behind criminalization and points out possible weak and strong points of criminalization. It enriches the layer of the criminalization discourse which thus far has been the most scant, the intermediate layer that lies between abstract philosophy and discussions of concrete types of conduct. In short, it offers a practical theory. And although it contains a moral layer, it leaves room for moral judgment and for domestic values. It is a point of origin for legislators, commentators and critics regarding criminalization; it is not the bottom line.
Appendix: The Steps to Criminalization: a Diagram

A. Offensiveness: identifying types of offensive conduct

(Simply put: is the type of conduct in question harmful?)

1. **Type of conduct** (linguistic phrasing; the issue of moral wrongfulness)
2. **Behavioral causation**: sufficient linkage between conduct and harm
   3. **Harm**

B. Purposiveness: preventing harm through criminal law

(Simply put: can criminal law achieve its goal?)

1. **Enforceability**: can criminal law prevent the type of conduct in question by executing its work methods? Is it capable of:
   (a) detecting harm and perpetrators
   (b) apprehending and detaining perpetrators
   (c) gathering evidence sufficient for prosecution
   (d) reducing the proscribed conduct through punishment
2. **Sufficient criminalization**: can criminal law prevent the relevant harm: is this harm also caused by other types of conduct: the *underbreadth / selective enforcement* test

C. Searching for alternatives to criminalization

(Simply put: are there other ways to prevent harm?)

Analyzing alternatives at three points in time:

1. **Pre-behavioral causation intervention**: can we remove necessary preconditions or positive incentives allowing or encouraging the type of conduct in question?
2. **Behavioral causation intervention**: can we interfere with intermediate phases (if such exist) between conduct and harm?
3. **Post-behavioral causation intervention**: can we create non-criminal negative incentives for the type of conduct in question?

D. Assessing the solution costs, reducing costs and striking a balance

(Simply put: which of the available solutions is the best regulative choice?)
1. Examining criminalization costs
   (a) Examining proscription costs: estimating the costs involved in proscription: the deprivation of freedom/interest to act; expressive costs; black market creation; etc.
   (b) Examining enforcement costs: estimating the costs involved in enforcing a proscription, in light of the devised enforcement strategy
2. Examining criminalization cost exclusivity: is the linkage between criminalization and the costs related thereto exclusive?
3. Reducing criminalization costs: are there ways of reducing criminalization costs while maintaining purposiveness?
   (a) Examining the costs of alternatives, including examining cost exclusivity and ways to reduce costs (this step can also take place after the search for alternatives)
   (b) Striking a balance:
      (1) Conducting criminalization internal balance, between the benefits and costs of criminalization
      (2) Conducting alternative internal balance, between the benefits and costs of the alternatives
      (3) Assuming a positive criminalization internal balance: is there a winning alternative, which includes a more positive alternative internal balance?
      (4) Assuming a negative criminalization internal balance (offensive criminalization): is there a winning alternative? If not, the nothing alternative is called for