

ALESSANDRO SPENA

*Harmless Rapes? A False Problem for the Harm Principle**

1. Introduction – 2. Gardner and Shute on Harmless Rape and the Harm Principle – 2.1. *Is Pure Rape a Wrong to Its Victim?* – 2.2. *The Criminalizability of Pure Rape Under the Harm Principle* – 3. *Assessing G&S's Account* – 3.1. *Harm Principle and General Prevention* – 3.2. *The “Non-Discovery Requirement”* – 3.3. *Is G&S's Account of the Harm Principle Tenable?* – 4. *Attempting to Solve the Puzzle* – 4.1. *Harms and Rights* – 4.2. *A Sketchy Conclusion*.

1. Introduction

Could rape ever be harmless? And even admitting that a rape could be harmlessly performed, how could the criminalization of such a harmless rape be justified if one endorses the harm principle as an absolute constraint on the moral legitimacy of criminal norms?

In an article first published about ten years ago¹, John Gardner and Stephen Shute (hereafter G&S) have articulated an affirmative answer to these questions: in their view, while it is possible that under certain circumstances the performance of a rape does not directly harm its victim (nor anyone else), criminalizing such harmless instances of rape would nonetheless meet the requirements of the harm principle².

* I would like to thank Professors Douglas Husak and Lucia Zedner, and Dr. Giorgio Maniaci, for their helpful comments on a previous version of this article. The usual disclaimer obviously applies.

¹ “*The Wrongness of Rape*”, originally in J. HORDER (ed.), *Oxford Essays in Jurisprudence*, 4th series, Oxford: OUP, 2000, pp. 193-217, and now re-printed in Gardner, *Offences and Defences. Essays in the Philosophy of Criminal Law*, Oxford: OUP, 2007, pp. 1-32, wherefrom I shall quote henceforth.

² In “*Beyond the Harm Principle*” (in “*Philosophy & Public Affairs*”, 34 (3), 2006, pp. 215-245), Arthur Ripstein confronts the same question: could the harm principle justify the criminalization of harmless wrongs «that most liberals would agree merit prohibition despite their harmlessness»? (p. 218) He imagines the case of a “harmless trespass”:

In this paper I will argue that, while G&S's insights into the wrongness of rape strike one as reasonable (however, this is a point which I will not dwell on here), and while their general conclusion, that (what they take to be) a harmless rape should be criminalized, is to be agreed with, their argument in support of this conclusion ultimately fails, both for conceptual and normative reasons. On a conceptual level, their attempt to include the criminalization of "harmless" rape under the flag of the harm principle, adequately scrutinized, proves to be logically impossible due to the (over-demanding) features of their concept of "harmless" rape. On a normative level, their general account of the harm principle seems to be no less problematic, as it is more concerned with the social consequences indirectly stemming from the act to be criminalized than with the harm directly caused (or threatened) by it.

That G&S fail in their attempt, however, does not necessarily mean that the criminalization of "harmless" rape cannot meet the standards of the harm principle anyhow. In order to see how this can be possible, we have to provide a better description of the paradigm case of so-called "harmless" rape and to refine our very understanding of the notion of "harm" in the harm principle. Then we will easily see that, insofar as we cling to the inner logic of the harm principle, rape can never be "harmless", so that even cases of alleged "harmless" rape can straightforwardly be criminalized under the flags of that principle.

2. *Gardner and Shute on Harmless Rape and the Harm Principle*

The idea of a "harmless rape" may, at first glance, seem a moral aberration: how could such a hideous and outrageous and disrespectful

Suppose that, as you are reading this in your office or in the library, I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic and lint-free pajamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent. By any ordinary understanding of harm, I do you no harm.

In contrast to G&S, Ripstein thinks that «the harm principle fails to account for» such «a significant class of wrongs» as "harmless" trespass, and that the harm principle should be superseded by (what he dubs) "the sovereignty principle", according to which «the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other» (pp. 229 ff.).

As I will try to show later, Ripstein is right in arguing for the inadequacy of a "narrow construction" of the harm principle to arrange such cases of so-called "harmless wrongs"; but, in my view, he is wrong in believing that the "narrow" one is the only plausible account of the harm principle.

action be considered “harmless”? Isn’t rape an evident *malum in se*? And doesn’t it follow from this that, in a way, rape is a structurally (and thus necessarily) harmful action?

The conceivability, or inconceivability, of harmless rape, however, obviously depends on many variables: what is rape? What is the concept of harm on which one relies when wondering whether a rape can be harmlessly performed? What is the kind of harm(s) one assumes to be connected with (harmful) rape?

In G&S’s conception, for instance, – where «[r]ape, understood in the modern way,» is defined as «non-consensual sexual relationship»³, and “harm” is defined as «the diminution of someone’s prospects, the change for the worse in his or her life»⁴ – the conceivability of harmless rapes easily follows: it is evident, indeed, that there might be cases in which a non-consensual sexual intercourse is so performed that it does not change the victim’s (nor anyone else’s) life for the worse, because she does not experience (nor does anyone else) those feelings of violation, hurt, distress, that are usually associated with the fact of being raped.

For example,

A victim may be forever oblivious to the fact that she was raped, if, say, she was drugged or drunk to the point of unconsciousness when the rape was committed, and the rapist wore a condom. [...] Then we have a victim of rape whose life is not changed for the worse, or at all, by the rape. [...] She has no feelings about the incident, since she knows nothing of it. Indeed the story has no perspective dimension for the victim, except possibly a hangover in the morning; otherwise the victim’s life goes on exactly as before. Not even, for that matter, a prospective dimension for others, who might be put in fear of midnight rape by tales of soporific victims taken unawares. Remember: in our example the incident never comes to light at all. (Let’s add, for complete insulation, that the rapist, who told nothing of what he did, is run over by a bus as he leaves the house, and that this would have been no less likely to happen to him even if he had not perpetrated the rape, since that did not either delay or precipitate his leaving. So the rape makes no difference even to *his* prospects)⁵.

³ G&S in GARDNER, *Offences and Defences*, p. 20.

⁴ *Ibidem*, p. 4. See also RAZ, *Autonomy, Toleration, and the Harm Principle*, in R. GAVISON (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987, pp. 327 ff.

⁵ G&S in GARDNER, *Offences and Defences*, p. 5.

In such cases, G&S argue, rape is performed in its “purest” form, «entirely stripped of distracting epiphenomena»⁶ (such as: violence or threats, on the rapist’s side; and fear, pain, shame, on the victim’s side): all (or rather, the only morally relevant event) that happens here is, so to speak, neither more nor less than a rape⁷, that is, the performance of sexual intercourse without the victim’s consent.

2.1. *Is Pure Rape a Wrong to Its Victim?*

Given that, in G&S’s pure case of rape, no experiential harm is caused either to the victim or to others, a question arises: is it a wrong to its victim? Is pure rape, though experientially harmless, wrongful?

The question might seem merely rhetorical, and easy to answer affirmatively. Its relevance, however, lies in the conceptual puzzle it represents to those who incline to think that the wrongness of rape is just a function of its experiential harmfulness⁸. If the consequences of this premise were coherently drawn, it should then be admitted indeed that pure rape, exactly because of its experiential harmlessness, is also lacking in wrongness. This conclusion, however, would come up against two serious problems. In the first place, it is clearly counter-intuitive to say that “pure rapists” do nothing wrong. Insofar as people have a right to sexual autonomy, or integrity⁹ – and insofar as this right entails the claim not to suffer unwanted sexual intercourse – pure rape is a violation of such a right, and it is very hard to see how any such violation might not amount to a wrong.

Moreover, to link the wrongness of rape to experiential harm risks casting doubts on the very rationality of the feeling of violation in which the experiential harm itself largely consists: «to be rational,» the victim’s bad reactions to rape «must be epiphenomenal, in the sense that they cannot constitute, but must shadow, the basic, or essential, wrongness of rape»¹⁰. Otherwise (if there were nothing wrong in rape beside the victim’s experience), the victim’s bad

⁶ *Ibidem*, p. 6.

⁷ «It is rape pure and simple». *Ibidem*, p. 7.

⁸ See, for instance, WERTHEIMER, *Consent to Sexual Relations*, Cambridge: CUP, 2003. See also HUSAK, *Gardner on the Philosophy of Criminal Law*, in “Oxford Journal of Legal Studies”, 29 (1), 2009, p. 184: «According to the experiential view, rape is wrongful because of the awful experience suffered by its victim. [...] Although it encounters problems of its own, I have a good deal of sympathy for the experiential view.»

⁹ See, e.g., LACEY, *Unspeakable Subjects*, Oxford: Hart Publishing, 1998, pp. 98-124.

¹⁰ G&S in GARDNER, *Offences and Defences*, p. 7.

reactions should count as groundless and irrational, which would morally mean to add insult to injury¹¹.

Nor does Alan Wertheimer's suggestion, that «[w]e can say that A's behavior is wrong because it is *likely* to result in harm to B without having to insist that B was harmed in this case»¹², help evade our puzzle. The pure case of rape is so construed that in fact – even at the very moment of its performance – it is *unlikely* to result in an experiential harm. The question to be answered is then exactly the one to which Wertheimer's argument does not apply: how can we explain the wrongness of rape in cases where a rape does not result, *nor is likely to result*, in experiential harm?

As G&S sensibly point out, to solve the puzzle we have to separate the wrongness of rape from its experiential harmfulness, which is to say that the first must not be conceived as a function of the second: if rape is wrong (and surely it is), it is not because of the experiential harms it normally causes¹³. It is quite the contrary: rape typically causes awful experiences because it is a wrong in the first place. And – brushing with very broad brush strokes – it is wrong exactly because it is “rape”, namely, non-consensual sexual intercourse, and thus a violation of the victim's right to sexual autonomy¹⁴.

2.2. *The Criminalizability of Pure Rape Under the Harm Principle*

Once it is established that (pure) rape's wrongness is conceptually independent of its possible experientially harmful consequences, a new question arises: should pure rape be criminalized? Probably, many of us

¹¹ *Ibidem*, p. 7: «The [...] view, that [experiential] harms are what make rape wrong, turns the victim of a rape, in a way, into a victim twice over: for she is now, in her reactions to the rape, additionally a victim of irrationality, a pathological case. [...] the victim's feeling of violation must be epiphenomenal to rape, or else there is nothing in rape to give her cause to feel violated.»

¹² *Consent to Sexual Relations*, Cambridge: CUP, p. 111.

¹³ To say that experiential harms do not found the *basic* wrongness of rape obviously does not exclude the possibility that they can (and generally do) contribute to aggravating it: to make rape more wrong (a more serious wrong) than it would otherwise be. See G&S in GARDNER, *Offences and Defences*, p. 7. See also HUSAK, *Gardner on the Philosophy of Criminal Law*, p. 184.

¹⁴ In a sense, rape is then *conceptually wrong*, insofar as it conceptually consists in the violation of a right (the right to sexual autonomy). This, in turn, easily fits with the widely shared idea that rape is a *malum in se*. Perhaps, it is this that G&S have in mind when they (somewhat obscurely) argue that «[p]robably, [rape] is among those wrongs which are never justifiable.» G&S in GARDNER, *Offences and Defences*, p. 1.

will intuitively think it should. But, how can we rationally and morally defend such an intuition? *Why*, in other words, should pure rape be criminalized? Admittedly, it is an immoral act. But, immorality *per se* is not a sufficient basis for criminalization. As is widely (even if not uncontroversially) admitted, the criminalization of an action, in order to be legitimate, should meet the standards of «some [...] principle of toleration»¹⁵, or «liberty-limiting» or «coercion-legitimizing» principle¹⁶, the most credited (and debated)¹⁷ of which is the harm principle.

Does the criminalization of pure rape meet the standards of the harm principle? At first sight, it clearly does not, inasmuch as the harm principle is interpreted as ruling out the criminalization of harmless actions and the experiential harmlessness of pure rape is taken to mean that it is harmless *tout court*.

Here, however, we are aided by one of the more intriguing aspects of G&S's analysis: a sophisticated account of the harm principle, under which, they argue, the criminalization of pure rape would be warranted «with flying colours».

In the authors' view,

It is no objection under the harm principle that a harmless action was criminalized, nor even that an action with no tendency to cause harm was criminalized. It is enough to meet the demands of the harm principle that, if the action were not criminalized, *that* would be harmful¹⁸.

Non-instrumental wrongs [such as pure rape], even when they are perfectly harmless in themselves, can pass [the] test [of the harm principle] if their criminalization diminishes the occurrence of them, and the wider occurrence of them would detract from people's prospects¹⁹.

¹⁵ GARDNER, *Prohibiting Immoralities*, in "Cardozo Law Review", 28 (6), 2007, p. 2613.

¹⁶ FEINBERG, *Harm to Others*, New York, Oxford: OUP, 1984, pp. 9 ff.; *Harmless Wrongdoing*, New York, Oxford: OUP, 1988, p. ix.

¹⁷ For some critical accounts of the harm principle, see, among others: DRIPPS, *The Liberal Critique of the Harm Principle*, in "Criminal Justice Ethics", 17 (2), 1998; HARCOURT, *The Collapse of the Harm Principle*, "Journal of Criminal Law & Criminology", 90 (1), 1999; HOLTUG, *The Harm Principle*, in "Ethical Theory and Moral Practice", 5, 2002; RIPSTEIN, *Beyond the Harm Principle*; CANE, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, in "The Journal of Ethics", 10, 2006; DUFF, *Answering for Crime*, Oxford: Hart Publishing, 2008, Ch. 6. From a criminological perspective, see ZEDNER, *Criminal Justice*, Oxford: OUP, 2004, pp. 52-58.

¹⁸ G&S in GARDNER, *Offences and Defences*, p. 29.

¹⁹ *Ibidem*. See also GARDNER, *Reply to Critics*, in *Offences and Defences*, p. 242: «the

In other words, the criminalization of a harmless act-type (A) is only justified under the harm requirement insofar as:

1. it is able to (it will probably) reduce the occurrence of A-act-tokens;

and

2. the reduced occurrence of A-act-tokens is, in its turn, able to (it will probably) reduce the occurrence of some kind of harm (B) either directly or indirectly related to A-act-tokens' occurrence.

As to our present question (that of the criminalizability of "harmless" rapes under the harm principle), in particular, G&S's argument is that

[i]f the act in this case were not criminalized, then, assuming at least partial efficacy on the part of the law, people's rights to sexual autonomy would more often be violated. This would be a harm, not only to those people (if they were conscious and became aware of the rape), but also to a broader constituency of people (in our culture mainly women) whose lives would then be even more blighted than at present by violations of their right to sexual autonomy and, more pervasively still, by their justifiable *fear* of violations of their right to sexual autonomy. These blights are harms which the legal prohibition on rape, if it is functioning properly, helps to reduce. For the purposes of the harm principle that is all that is needed. There is no need to show, in addition, that a given rape caused, or was likely to cause, harm²⁰.

To sum up, in G&S's view the criminalization of pure rape is warranted under the harm principle because, they assume, it would directly reduce (or would be likely to reduce) the total amount of pure rapes performed in a given society, and, indirectly (that is: *via* the primary reduction of pure rapes), it would reduce (or would be likely to reduce) the total amount of harms typically connected with the performance of (harmful) rapes (feelings of violation, hurt, fear, etc.), thus contributing to reducing the total amount of harm suffered by that very same society.

harm principle does not require of each legal prohibition that it (proportionately) prohibits harmful wrongdoing. Rather, it requires of each legal prohibition that it (proportionately) serves to prevent harm. The law may prevent harm by prohibiting a harmless wrong where the non-prohibition of such a harmless wrong would itself be harmful».

²⁰ G&S in GARDNER, *Offences and Defences*, pp. 29-30.

3. *Assessing G&S's Account*

G&S's general argument is promising. Duly qualified, for instance, it might provide a sensible explanation of why the criminalization of some *per se* harmless (or not sufficiently harmful) actions is quite uncontroversial when their repeated or collective performance is likely to contribute to the occurrence of some relevant "accumulative harm"²¹: pouring a small but not negligible quantity of a polluting substance into a river might *per se* be harmless (*i.e.*, not seriously polluting); nonetheless, the performance of many such actions, by the same person or by many different persons, will probably result, in the long run, in serious pollution of the river. Applied to such cases, the argument of G&S seems to work: criminalizing a harmless (or not sufficiently harmful) wrong might meet the standards of the harm principle, insofar as it constitutes a reasonable and proportionate means in order to prevent a harm which would probably be caused if the criminalized action would be repeatedly performed.

But the case of pure rape is clearly different from that of accumulative harms. The harmlessness of a single act-token contributing to an accumulative harm is, so to speak, a *simple matter of scale*: every single act-token contributing to an accumulative harm is by itself harmful (every single act-token of pouring a non-negligible amount of a polluting substance into a river is an, although minimal, act of pollution); its harmfulness, however, is not sufficiently "weighty" as to make it a relevant harm: the harmfulness of any such actions becomes relevant only "in perspective", "accumulatively". Numbers make a difference here: while an act-token may be *per se* harmless (or rather, not sufficiently harmful), many act-tokens (the repetition over time of that very same act-token, either by the same or by different persons) will become (sufficiently) harmful; the single act-token, though *per se* harmless (or not sufficiently harmful), *directly* contributes to the causation of the accumulative harm.

By contrast, the experiential harmlessness of pure rape is not a matter of scale; it is, rather, a *matter of conceptual necessity*, pure rape being completely void of experiential harm; and, in the logic of G&S's argument, this is necessarily so, given that, if pure rape was not experientially harmless, it would not be pure. Numbers do not make any

²¹ On "accumulative harms" see, e.g., FEINBERG, *Harm to Others*, pp. 225 ff.; v. HIRSCH, *Extending the Harm Principle: 'Remote' Harms and Fair Imputation*, in A.P. SIMESTER, A.T.H. SMITH (eds.), *Harm and Culpability*, Oxford: Clarendon Press, 1996, p. 265 ("accumulative harms" as a species of "remote harms"); WALLERSTEIN, *Criminalizing Remote Harm and the Case of Anti-Democratic Activity*, in "Cardozo Law Review", 28 (6), 2007, pp. 2697 ff.

difference here: because of its being *per se* experientially harmless, the perpetration of pure rape cannot directly contribute to any variation in the overall amount of experiential harm suffered by society. The performance of 1000 pure rapes, being – metaphorically – the sum of 1000 zeroes, cannot have any different direct impact on the experiential harm suffered by society than the performance of a single pure rape would have²².

This is not, of course, a decisive and definitive rejection of G&S's argument. The authors might agree with the above distinction between pure rape and "accumulative" harms, though arguing at the same time that their account of the harm principle applies to pure rape as well. They might insist, for instance, that the harm principle does not necessarily require that the harm sought to be prevented be a large-scale projection of an (insufficiently weighty) harm already existing *in nuce* in every single token of the criminalized act-type. The criminalization of pure rape would then be justified by the fact (that G&S assume to be true) that it indirectly contributes to preventing a wider occurrence of the harms typically deriving from (harmful) rapes: although the harm of harmful rapes is not already embodied in pure rapes, the criminalization of the latter would nevertheless be warranted insofar as

1. its non-criminalization is likely to result in an increase in the occurrence of pure rapes;
2. and, in its turn, an increasing amount of pure rapes is likely to result in an increasing amount of the typical harms of rape.

Unfortunately, in spite of G&S's optimism on this point, *their* case of pure rape could hardly pass *their* two-prong harm test. One might notice, first of all, that the authors do not support their assumption with a sufficient empirical basis: on which data do they rely for arguing that the criminalization of pure rape will «probably» reduce the occurrence of pure rapes, and that the reduction of pure rapes will «probably» result in a reduction in the occurrence of the typical harms of rapes?²³

²² See also RIPSTEIN, *Beyond the Harm Principle*, p. 223 (comparing pollution with its case of "harmless" trespass):

releasing toxins into the environment is harmful in the aggregate, and setting limits on particular instances prevents that harm. This model does no better with harmless trespasses. My nap is not one of many small contributing causes that combine to produce a serious harm. It is just as objectionable (or innocent) if one person does it as if many do.

²³ See HUSAK (*Gardner on the Philosophy of Criminal Law*, p. 186) for this, indeed sensible, objection.

Its empirical groundlessness, however, is only a secondary and derivative flaw of their argument. As I will try to show shortly, if G&S do not provide their reasoning with empirical support, it is because they *cannot* do it: the conceptual features of *their* pure case of rape, defined as a rape that «never comes to light», make it logically impossible for criminalization of such a wrong to contribute to a reduction in both the amount of pure rapes performed in, and the amount of the typical harms of (harmful) rape suffered by, a given society on the whole.

The next two sections will be particularly devoted to highlighting these conceptual flaws in G&S's reasoning.

3.1. *Harm Principle and General Prevention*

In order to pass G&S's harm requirement's test, as we have seen, criminalization of pure rape must, in the first place, be likely to reduce the occurrence of pure rapes. In other words, it should be the case that, «[i]f the act in this case were not criminalized, then, assuming at least partial efficacy on the part of the law, people's rights to sexual autonomy would more often be violated»²⁴ because of a more frequent performance of harmless rapes.

This passage usefully underlines the close connection between the harm principle and the idea that criminal law has a general preventive efficacy: if we assume (as the harm principle does) that the very existence of criminal law is firstly justified as a means to prevent certain types of harms, the criminalization of an action, in order to be legitimate, must have a chance to reduce the amount of harm which, by it, is sought to be averted, which is to say that it must be capable of influencing the behaviour of its addressees, and thus of producing general preventive effects. This implies that a first (minimal) condition of legitimacy of a criminal norm is the existence of some logical space for its enactment to influence the actions of its addressees (let me assume: the citizens) so as to convince them not to undertake the criminalized action²⁵.

²⁴ G&S in GARDNER, *Offences and Defences*, pp. 29-30.

²⁵ A second condition on which the general preventive hypothesis is grounded is an *empirical generalization*, according to which it is empirically true, or at least empirically demonstrable, that the enactment of a norm criminalizing an action will influence the general constituency of the citizens (or, at least, part of it) so as to make them refrain (because of fear or respect) from performing the criminalized action. That criminal law (or the enactment of a criminal norm) have in fact such an empirically demonstrable general preventive effect, however, is one of the most debated assumptions among criminal theorists and criminologists: many argue that the general preventive effect of criminal law is an indemonstrable and non-measurable myth. On

This action-influencing efficacy – which, notoriously, might take two main forms²⁶, namely, *deterrence* (or *negative prevention*)²⁷ and *positive prevention*²⁸ – depends on the connection between crimes and

this problem, see, among others, PAGLIARO, *Empirical Verification of the Effects of General Prevention and Incapacitation*, in “European Journal of Crime, Criminal Law, and Criminal Justice”, 11 (4), 2003, pp. 398-412; ZEDNER, *Criminal Justice*, p. 92; ROBINSON, DARLEY, *Does Criminal Law Deter? A Behavioural Science Investigation*, in “Oxford Journal of Legal Studies”, 24 (2), 2004.

²⁶ e.g., ANDENAE, *General Prevention – Illusion or Reality?*, in “Journal of Criminal Law, Criminology & Police Science”, 43, 1952, pp. 179 ff.; PAGLIARO, *Empirical Verification*, pp. 398 ff.; MILITELLO, *La prevenzione dei reati*, in FERRACUTI (ed.), *Trattato di criminologia, medicina criminologica e psichiatria forense*, vol. V, Milano: Giuffrè, 1987, pp. 181 ff.; GARDNER, *The Functions and Justifications of Criminal Law and Punishment* (1998), in N. JAREBORG, A. VON HIRSCH, B. SCHÜNEMANN (eds.), *Positive Generalprävention als letzte Auskunft oder letzte Verlegenheit der Strafrecht*, Heidelberg: C.F. Müller Verlag, reprinted in GARDNER, *Offences and Defences*, pp. 201 ff.

²⁷ In which case the preventive effect is deemed to result: either from the *fear* of the punishment whose infliction the relevant criminal norm threatens (in Feuerbach’s terminology, deterrence as psychological coercion – *psychologischer Zwang* – against citizens); or from a rational calculation of the costs (*i.e.*, the risk of being punished) and opportunities of committing a crime.

On deterrence see, e.g., BECCARIA, *Dei delitti e delle pene* (1764), Turin: Einaudi, 1965, § XLI; Bentham, *An Introduction to the Principles of Morals and Legislation* (1823), Oxford: Clarendon Press, 1907; FEUERBACH, *Anti-Hobbes*, Erfurt: Hennings, 1798, Ch. 7; *Revision der Grundsätze und Grundbegriffe des positiven Peinlichen Rechts* (1799), vol. I, anastatic reprint, Aalen: Scientia Verlag, 1966, pp. 39-60; *Lehrbuch des Gemeinen in Deutschland Gültigen Peinlichen Rechts* (1847), anastatic reprint of the 14th edition, Aalen: Scientia Verlag, 1973, pp. 36 ff.; ANDENAE, *Does Punishment Deter?*, in “Criminal Law Quarterly”, 11, 1968, pp. 76-93.

²⁸ In which case the preventive effect is deemed to stem from «the seal of authoritative moral judgement» [Feinberg, *Harmless Wrongdoing*, p. 13] that we (allegedly) attach to criminal norms, and from the respect that these norms (allegedly) instill (or should instill) into us all. With regard to this, Joannes Andenae talks of a «moral or socio-pedagogical influence of punishment» (*The General Preventive Effects of Punishment*, in “University of Pennsylvania Law Review”, 114 (7), 1966, p. 950), which is grounded on the fact that «[p]unishment is not only the artificial creation of a risk of unpleasant consequences, it is a means of expressing *social disapproval*». See *Does Punishment Deter?*, p. 81.

It is of positive general prevention that Neil MACCORMICK (*Legal Right and Social Democracy. Essays in Legal and Political Philosophy*, Oxford: Clarendon Press, 1982, p. 34) is essentially talking when he sensibly argues that

[t]here is a powerful and plausible case for supposing that, precisely because of its symbolic force as the public morality of the state, the criminal law with its public drama and symbolism of trials and punishments can be to some extent *constitutive*

punishments, that is, on the possibility of being punished for having committed a crime. This is obviously the case as for deterrence, given that it derives from *fear* of punishment, or at least from a rational calculation of the costs (the risk of punishment) that an agent is disposed to pay in order to gain its benefit (the commission of a crime). But positive general prevention, resting on the moral authority which is (deemed to be) expressed by the threat of (legal) punishment, also requires the possibility of being punished: it is only the view of punishment, embodying a message of «public reprobation and moral censure»²⁹, that gives criminal norms their (alleged) mark of moral authority; it is, thus, the possibility of a punishment that people should take as a particularly telling index of the fact that a certain norm, and the value or interest it aims to protect, are, from the law's perspective, worthy of particular respect.

The relevant question is, then, whether the criminalization of pure rape could have general preventive effects. G&S clearly assume it could (although they do not specify whether they refer to negative or positive general prevention); but, I am afraid that, by defining pure rape as rape that 'never comes to light', they introduce a sort of a Trojan horse in their general argument: inasmuch as pure rape is so defined, its criminalization cannot result in any reduction of the overall amount of pure rapes performed in a given society.

Indeed, if the very concept of pure rape entails its never being discovered by anyone, it also entails pure rapes as such never being punished. A penal law criminalizing them would then be a law whose content logically entailed the impossibility of enforcing it: an unenforceable law criminalizing a thus non-punishable crime. But, as we have seen, the enforcement, and the enforceability, of a threat of punishment are of vital importance to its general preventive efficacy³⁰. A non-enforceable criminal norm could hardly claim any kind of deterrent effects: no fear might be instilled (in rational beings) by punishment that self-evidently cannot be enforced; on the other hand, the "benefits" of committing the crime would find no offset in the (in fact, nonexistent) risk of punishment. Moreover, a non-enforceable criminal norm could not even have any positive general preventive efficacy: first of all, as I have argued before,

of a common morality for the body of citizens as such. The criminal law does not always and necessarily *reflect* a moral consensus; but it tends to generate one.

²⁹ J. FEINBERG, *Harmless Wrongdoing*, p. 12. See also ID., *The Expressive Function of Punishment*, in "The Monist", 49 (3), 1965, pp. 397-423; A. VON HIRSCH, *Censure and Sanctions*, Oxford: OUP, 1993; R.A. DUFF, *Punishment, Communication, and Community*, Oxford: OUP, 2001; J. TASIIOULAS, *Punishment and Repentance*, in "Philosophy", 81, 2006, pp. 283 ff.

³⁰ A. VON FEUERBACH, *Anti-Hobbes*, Ch. 7.

positive general prevention, as well as deterrence, depends on the link between crime and punishment, so that no positive preventive force could be claimed by a self-evidently unenforceable criminal norm; secondly, it would be completely pointless to attribute a positive general preventive efficacy to the criminalization of actions which straightforwardly constitute (as happens, in our cultures, even for pure rape) *mala in se*: if the job of a criminal norm is to convince the citizens that a certain conduct is seriously wrongful, it should be concerned with a conduct *per se* not obviously so; otherwise, the norm would be completely useless and redundant. In other words, as to *mala in se* (for instance, as to those actions – such as homicide, rape, etc. – whose wrongness might be classified among the principles of a Hartian “minimum content of natural law”) there is no logical space for positive general prevention, given that people’s awareness of their wrongness hardly needs criminalization, a formal law declaration³¹. In such cases, criminal law’s general preventive efficacy, if any, can only take the form of deterrence.

It is, thus, logically impossible for G&S’s pure rape incrimination to have any kind of general preventive efficacy, and thus to pass the first step of (G&S’s) harm requirement test: criminalization of pure rape cannot have the general preventive effect of reducing the overall amount of pure rapes occurring in a given society.

3.2. The “Non-Discovery Requirement”

If my arguments hit the mark, G&S fail to show that a criminalization of pure rape, *as they conceive it*, would be warranted under the harm principle, *as they conceive it*. Insofar as the relevant definition of pure rape contains a “non-discovery requirement”, there will be no point in criminalizing it, and its criminalization will then be – *qua* pointless – unjustified. In fact, I know of no jurisdiction that defines (any types of) rape by making use of a non-discovery clause. G&S seem to argue for the contrary when they say that in some jurisdiction «[e]ven the pure case is classified as rape, and criminally so»³²; but, they arguably refer to cases in which the pure case of rape is criminalized regardless of whether it comes to light³³.

³¹ John Gardner seemingly argues for the contrary when he writes that the increasing occurrence of harmful rapes, as consequence of non-criminalization of pure rape, would be due to the fact that «it [*i.e.*, the non-criminalization of pure rape] would license men to regard women as less sexually autonomous, and hence encourage their use as sex objects» [*Reply to Critics*, p. 242].

³² G&S in J. GARDNER, *Offences and Defences*, p. 29.

³³ Think, for instance, of the *Clause 1* of the UK *Sexual Offences Bill 2003*: “A person (A) commits an offence [of rape] if (a) he intentionally penetrates the vagina, anus or

Why then do they think that the “pureness” of rape requires that it never come to light? As far as I can see, the rationale of such a non-discovery requirement lies in the authors’ intent to make it clear that a rape may be wrongful even when it is experientially harmless³⁴. But, do they really need such a demanding requirement in order to reach that conclusion? No doubt, in the case of a rape that never comes to light the conceptual separation between wrongness and experiential harmfulness of rape emerges in its clearest form: the evaluation of the act is made here completely disregarding its consequences. Such an appreciable benefit comes, however, at a greater cost: that of rendering absurd, illogical, the very idea of criminalizing pure rape.

In fact, there is no need to pay such a cost. Generally speaking, if we want to argue that the moral quality of an act does not depend on its consequences, we only need to disregard them and exclusively focus on the act’s intrinsic characteristics; and if we also want to separate the moral quality of the act from even the likelihood (the “risk”) that it result in certain consequences, we only need to construe our paradigm case in such a way that it is unlikely to result in those consequences. In sum, we only need to leave the consequences of the act, as well as the probability that it will result in them, out of our focus; we need not, instead, bring the actual non-occurrence of those consequences into focus, by committing ourselves to the hypothesis that the act will never result in them.

By enriching their pure rape case with a non-discovery clause, thus, G&S do (much) more than is required in order to show that the wrongness of rape is not a function of its experiential harmfulness: it would have been sufficient to limit their description to those circumstances alone («the victim [...] was drugged or drunk to a point of unconsciousness when the rape was committed, and the rapist wore a condom»; «the rapist [...] told no one of what he did,» and he did not do anything anomalous after the fact) that make it sure that a rape is so performed that it is not directly experienced, and is unlikely to be ever experienced, by anyone.

3.3. *Is G&S’s Account of the Harm Principle Tenable?*

Let us return to the argument put forward by G&S in their article. Any logical obstacle to an application of their harm principle test to their paradigm case of

mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.”

³⁴ «Acts which never come to light are not rendered innocent by that fact alone.» G&S in J. GARDNER, *Offences and Defences*, p. 6.

pure rape clearly vanishes, once this case is amended as suggested above: criminalization of pure rape seems now not to be nonsensical from a general-preventive point of view, so that there would be logical space to criminalize it as a means to decrease (via general prevention) the overall amount of the typical harms of rape occurring in a given society³⁵.

A normative question, however, immediately arises: is theirs a tenable account of the harm principle?

As we have seen, G&S's is a two-stage account, according to which, for the criminalization of an action to meet the harm requirement's standards, it is enough that the occurrence of a socially harmful condition be *indirectly* connected to the performance of the criminalized action: «[s]o far as the harm principle is concerned, [...] an indirect connection to harm is all that is required to justify a (proportionate) legal intervention»³⁶; it would not be necessary that the criminalized action be *per se* harmful; it would be sufficient that, if the action were not criminalized, *that* (assuming that criminal law has a general preventive efficacy) would indirectly cause a harm to society.

Although it seemingly works in some cases³⁷, I don't think this a plausible account of the harm principle. Its major problem lies, in my view, in the fact that it does not adequately distinguish between *direct* harm (the harm directly caused, or threatened, by the criminalized action) and *social* (or *indirect*) harm (the harm that society may indirectly suffer because of the performance of a given act), and, consequently, it does not give direct harm its due weight, as it treats it instead as a negligible aspect of the harm principle, perfectly substitutable by considerations of social harmfulness. A shift in the focus of the harm principle, from direct to social harm, risks depriving that principle of its peculiar constraining force³⁸, and therefore «has the potential to expand the scope of the criminal law exponentially»³⁹, instead of contributing to constraining it within reasonable limits. Many *per*

³⁵ Clearly, this does not eliminate the need for empirical assessment of such a preventive claim; but this is a point I will not dwell on here.

³⁶ GARDNER, *Reply to Critics*, p. 242.

³⁷ See *supra*, note 21 and accompanying text. The case of "accumulative harms, however, only "seemingly" fits G&S's test (or rather: is only seemingly similar to G&S's paradigm case of harmless wrong, that is pure rape), because, as we have seen, the harm sought to be prevented in such a case is *in nuce* already contained, and thus is one *directly* deriving (although *per accumulationem*) from, every single (*per se* insufficiently harmful) token of the criminalized act.

³⁸ As is powerfully shown by BERNARD E. HARCOURT, *The Collapse of the Harm Principle*, pp. 124 f., 139-181.

³⁹ HUSAK, *Overcriminalization*, Oxford, New York: OUP, 2008, p. 72, fn. 82. See also ID., *Gardner on the Philosophy of Criminal Law*, p. 187.

se harmless, and perfectly “normal”, actions might ultimately result in some “socially harmful condition”: to drive a car (an action that might result in a car accident), to omit to use tissues when sneezing (an action that might contribute to a flu epidemic), to omit to wear a condom when having sex (an action that might result in HIV spreading), and so on.

G&S’s reply to this objection might be as follows: the harm principle is only a necessary, but not sufficient, condition for criminalization; to be legitimate, it is not enough that the criminalization of an action meets the harm requirement’s standards; it also has to meet other standards: first of all, (what we might call) a standard of “wrongness”. As to rape, for instance, Gardner notes that, even in the pure case, «the would-be rapist is a would-be wrongdoer. This already picks him out as a suitable person to be threatened with punishment (coerced)»⁴⁰.

This argument, however, while having some appeal as to the case of rape, seems instead incapable of supporting Gardner’s (and Shute’s) general point about the harm principle. First, it would not apply to cases of *mala quia prohibita*, where «it is the law’s recognition of the wrong that makes it into a wrong»⁴¹: in such cases there would not be any pre-criminal wrongness to pick the (criminal) wrongdoer «out as a suitable person to be threatened with punishment.»

Furthermore, Gardner’s argument from wrongness, associated with that from social (indirect) harmfulness, could hardly save the harm principle from collapsing into a pan-criminalizing legal moralism, given that potentially any type of moral evils (even perfectly “free-floating evils”)⁴² might be interpreted as capable of resulting, in the long run, in some kind of socially undesirable consequences. One may ask, for instance, if Gardner is consistent with his own argument when he argues that the wrong of «interrupting or talking over other people in a conversation, cannot be criminalized *consistently with the harm principle*»⁴³; contrary to what Gardner claims, it seems indeed that the criminalization of such a wrong would straightforwardly be allowed by his (and Shute’s) account of the

⁴⁰ GARDNER, *Reply to Critics*, p. 243.

⁴¹ GARDNER, *Reply to Critics*, p. 239. This objection may possibly be overcome by distinguishing between “legal regulation” and “criminalization” so as to argue (as does Anthony Duff) that a *malum quia prohibitum* is «[c]onduct that was not wrongful prior to its legal regulation’ but becomes ‘wrongful as a breach of a justified [“pre-criminal”] regulation: wrongful in a way that in principle merits criminalization.» [DUFF, *Answering for Crime*, pp. 89 ff.] However, given that, as far as I know, G&S do not expressly accept Duff’s account, I will disregard this possibility here.

⁴² That is, evils that are «detached from individual needs, interests, deserts, claims, and rights». See FEINBERG, *Harmless Wrongdoing*, pp. 17 ff.

⁴³ GARDNER, *Reply to Critics*, p. 241 (emphasis added).

harm principle: if interrupting and talking over other people in conversations spread widely in society to the point of becoming the usual way in which people related to each other, this would clearly amount to a socially harmful consequence. (Wouldn't people's prospects in life be worsened by the fact of being unable to speak politely with each other?)

But many other examples may be marshaled to show how weak a constraint on criminal law would the harm principle be if interpreted according to G&S: for instance⁴⁴, why not criminalize anyone who «uses all the money that he has won fairly in a lottery to buy racehorses and champagne and refuses to donate any of it to a desperately deserving charity», given that, if widely repeated, such wrongful action might result in the socially undesirable consequence of sentencing to death many deserving charities? And why not to criminalize «[a]n athlete [who] takes part in sports competition with the representatives of an oppressive or racist state», given that, if he is emulated by many others of his fellow-colleagues, this might result in the socially undesirable consequence of compromising the international public image of their country? And why not criminalize «[a]n individual [who] joins or supports an organization which he knows has racist leanings, such as the National Front in the United Kingdom[...], and [...] exercises his own vote in its favor», given that this might result in the socially undesirable consequence of politically empowering such a blameful organization?

The conclusion, that these – and similar – actions «cannot be criminalized consistently with the harm principle»⁴⁵, could hardly rely on G&S's account. That conclusion may only be drawn if we give direct harm its due weight, and assume that, according to the harm principle, an action should not be criminalized unless it is directly harmful, that is, if it is not the case that its very performance directly causes, or risks causing, harm to others.

4. *Attempting to Solve the Puzzle*

The puzzle of pure rape seems to remain untouched by our discussion so far.

If pure rape is a *per se* harmless wrong, an account such as that of G&S (according to which the harm principle only requires that, if a given action were not criminalized, an indirect, social harm would then follow)

⁴⁴ The following three examples are taken from WALDRON, *A Right to Do Wrong*, in "Ethics", 92 (1), 1981, p. 21.

⁴⁵ This conclusion is not at all compromised by the fact that there might also be other reasons not to criminalize those actions (for instance, the fact that in our examples the person who acts has a right to do it).

seems to be the only way to warrant its criminalization under the harm principle. But, if we maintain that G&S's approach ultimately fails (and has to be superseded by one in which it is required instead that the action to be criminalized either directly causes or risks causing harm), any attempt to reconcile the criminalization of pure rape with the logic of the harm principle turns out to be impossible⁴⁶.

This is not a negligible obstacle to acceptance of the harm principle. I take it for granted that pure rape, being a hideous *malum in se*, should be criminalizable under every reasonable theory of criminalization. Hence, if the harm principle really was unable to accommodate its criminalization, serious doubts would then be cast on its eligibility as an absolute and insurmountable limit of criminal law.

But, is it really so? Is pure rape really harmless? And can its criminalization really not be warranted under the harm principle? An analysis of the inner logic of that principle, of the distinctive moral reasoning underlying it, will help us understand that in fact the moral reasons why, according to it, harmless wrongs should not be criminalized do not apply in the case of pure rape: we will then realize that criminalization of pure rape perfectly fits the moral logic of the harm principle just because pure rape *is* harmful in the sense of that principle.

4.1. Harms and Rights

1. As is well known, the “harm-to-others principle” represents, in its most famous version, John Stuart Mill’s attempt to solve the fundamental problem of «the limits [of] the authority of society over the individual»⁴⁷: under what conditions is it legitimate for a society (‘as the protector of all its members’)⁴⁸ to coercively forbid, to criminalize⁴⁹, the performance of

⁴⁶ G&S advance two alternative solutions to this puzzle: «[O]ne could sideline [the pure case of rape] by saying that the harm principle is a rule of thumb, and tolerates some departures from its standard. One could also sideline the pure case by observing that the harm principle’s standard is met if the class of criminalized acts is a class of acts which *tend* to cause harm, and that is true of rape in spite of the possibility of the pure case.» [in GARDNER, *Offences and Defences*, p. 29] These are clearly “second-best” (or “emergency-exit”) strategies: it makes sense to resort to them only insofar as one has definitively ruled out the possibility of the harm principle fully confronting puzzling cases such as that of pure rape. As will become clearer later in the text, I still have not abandoned all hope of that possibility.

⁴⁷ *On Liberty*, 4th ed., London: Longman, Green, Longman, Roberts & Green, 1869, Ch. IV, and *passim*.

⁴⁸ *On Liberty*, Ch. IV, par. 7. It is society’s (alleged) role as the «protector of [...] its

an action by an individual? Mill's answer essentially appeals to an *"it's-not-your-business argument"*, based on a «distinction [...] between the part of a person's life which concerns only himself, and that which concerns others»⁵⁰. In view of this argument, a society may not legitimately prohibit the performance of an act by a person inasmuch as that person may, with good reason, reply by saying: "that's not your business: it is nobody else's business but mine, whether or not I perform such an act". In Mill's words:

the individual [...] must not make himself a nuisance to other people. But if he refrains from molesting others *in what concerns them*, and merely acts according to his own inclination and judgement in *things which concern himself*, [...] he should be allowed, without molestation, to carry his opinions into practice at his own cost⁵¹.

Notice that, when Mill talks of «what concerns them [*i.e.*, the other members of society]» and of «things which concern [the individual] himself», he is not using these expressions descriptively, as statements of

members» that seems to give it the moral standing required to legitimate its use of coercion on individuals through criminal law.

This might give raise to an objection to the idea that the "harm principle" is properly accounted for in terms of an "harm to others principle", so that it also necessarily entails the rejection of legal paternalism: if society is the protector of *all* its members (and if it is exactly because of this role that it has the moral standing required to legitimately use coercion on individuals), isn't it also the protector of the actor when he/she acts against him/herself? And, if it is, doesn't this give society the moral standing to coerce individuals not to harm themselves? (See HART, *Law, Liberty, and Morality*; Stanford, Calif.: SUP, 1963, pp. 30-34. See also J. RAZ, *Autonomy, Toleration, and the Harm Principle*, pp. 326 ff.) To this objection it might be tentatively replied that society is entitled to act as protector of its members only insofar as they need protection; which is not the case when one of those members, being a suitably rational agent able to adequately appreciate the adverse consequences of his/her actions, acts against himself alone.

For further reflections on «the question of moral standing», see G. POSTEMA, *Public Faces—Private Places: Liberalism and the Enforcement of Morality*, in G. DWORKIN (ed.), *Morality, Harm, and the Law*, Boulder, Oxford: Westview Press, 1994, 81 ff.; *Politics is About the Grievance. Feinberg on the Legal Enforcement of Morals*, in "Legal Theory", 11, 2005, 307 ff.

⁴⁹ Although Mill is not specifically concerned with criminalization, criminal law is the proper ambit of this article; to criminal law and criminalization I will therefore limit my reading of the harm principle. Similarly, for instance, MACCORMICK, *Legal Right and Social Democracy*, pp. 28-34; FEINBERG, *Harm to Others*.

⁵⁰ *On Liberty*, Ch. IV, par. 8.

⁵¹ *On Liberty*, p. 260 (emphasis added).

fact; rather, he is speaking normatively, and thus morally: his point is whether any member of society (and thus society as a whole) *should* or *should not* be concerned with the performance of the relevant act by the actor; the issue, therefore, is not whether there are any (singular or plural) subjects⁵² who “are *in fact* interested in” the performance of the relevant act, but whether any (singular or plural) subject “has an interest – better still, a *legitimate* interest⁵³ – in” it⁵⁴, whether it is against the interests of some (singular or plural) subject other than the actor.

If nobody but the individual himself has a legitimate interest in (if, so to speak, nobody else is legitimated to be concerned with) the performance of the act – if nobody else’s legitimate stake is called into question (*i.e.*, adversely affected) by such an act being performed – if, in other words, it is nobody else’s but an actor’s exclusive business, so that there is nobody who needs protection against the actor, then society (*as the protector of its members*) and the criminal law (as the last means, the *extrema ratio*, to which society may resort to protect itself and its members) lack any moral entitlement (“jurisdiction”) to coercively forbid, and thus to criminalize, it:

As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person’s conduct affects the interests of no persons besides himself⁵⁵.

According to the harm principle, the proper ambit of criminal law is therefore limited to issues involving some legitimate interests, and thus to actions that negatively affect any such interest.

Notoriously, however, a great bulk of debate lies behind the concept of “legitimate interest”. Many of its opponents have contended (and some of

⁵² On plural (public and collective) interests (and harms), see G. POSTEMA, *Collective Evils, Harms, and the Law*, in “Ethics”, 97, 1987, pp. 414-440; FEINBERG, *Harmless Wrongdoing*, pp. 33-37.

⁵³ See, e.g., N. MACCORMICK, *Legal Right and Social Democracy*, p. 29; ASHWORTH, *Principles of Criminal Law*, 5th ed., Oxford: OUP, 2006, p. 30 (in the harm principle, «the concept of ‘interest’ [should be understood] as matters in which a person has a legitimate stake»).

⁵⁴ The distinction between “being interested in X” and “having an interest (in) X” has also been underscored by JOHN KLEINIG, *Crime and the Concept of Harm*, “American Philosophical Quarterly”, 15 (1), 1978, p. 28, whose interpretation, however, is slightly different from that on which I am relying here.

⁵⁵ *On Liberty*, p. 276.

its supporters have conceded) that the harm principle does not, by itself, tell us *what* a legitimate interest is, and that it thus does not help solve the substantive problem of which actions, being harmful, may rightfully be prohibited. This is partly true, but its truthfulness amounts more to a clarification than to an objection. That, in order to concretely work, the harm principle requires an underlying substantive moral theory establishing which interests are legitimate, is obviously true⁵⁶. But, this is not a special feature of that principle: every criterion of criminalization (every “liberty-limiting” principle)⁵⁷ presupposes an underlying substantive moral theory, at least insofar as one assumes that the criminalization of an act requires a special moral justification⁵⁸.

This does not mean that the harm principle (as well as every other liberty-limiting principle) is *per se* vacuous, unless and until it is filled with some substantive moral theory. Although it requires such an underlying theory, it has, nonetheless, a (moral) role of its own to play in the (moral) reasoning leading to the criminalization of an act. This role is not that of “nominally” indicating *which* interests are or not legitimate and which concrete actions should or should not be prohibited, but instead that of providing us with *a format, a scheme of reasoning*, into which a substantive moral argument should be translatable if it has to work as a legitimate ground for criminalization: the harm principle provides us, metaphorically, not with a detailed map, but with a compass supplying coordinates that will necessarily need more moral specifications in order to be concretely useful.

The stringency of the harm principle only depends, therefore, on how reasonable and exacting is the format it provides. To call the harm principle vacuous, it should be the case that every possible moral content could be poured into such a format, that every possible “immorality” could count as harm⁵⁹. But this is not the case. On the contrary, by combining an “it’s-not-your-business” reasoning with the idea that only legitimate interests are criminally protectable, the harm principle provides us with a particularly demanding criterion, which, although not directly enumerating *which* interests are protectable, helps us understand *what* an interest has to be in order to be criminally protectable under the harm principle: that an interest be “legitimate”, indeed, essentially means

⁵⁶ See, e.g., MACCORMICK, *Legal Right and Social Democracy*, pp. 28-34; RAZ, *Autonomy, Toleration, and the Harm Principle*, p. 328; FORTI, *Per una discussione sui limiti morali del diritto penale, tra visioni «liberali» e paternalismi giuridici*, in *Studi in onore di Giorgio Marinucci*, Milan: Giuffrè, 2006, pp. 315 ff.

⁵⁷ For an exhaustive list of such principles, see FEINBERG, *Harm to Others*, pp. 26-27.

⁵⁸ FEINBERG, *Harmless Wrongdoing*, pp. 12-13.

⁵⁹ «[I]f we begin to count as ‘harmful’ every kind of wrongful conduct that we see good reason to criminalize, the Harm Principle will do little to constrain legal moralism» [DUFF, *Answering for Crime*, p. 130].

that its owner is entitled to demand that it be respected by others, so that an it's-not-your-business argument does not apply. In order to count as legitimate, interests should thus be deemed sufficiently important as to warrant a corresponding claim against others. In other words, an interest can count as *legitimate* only insofar as it figures in the justification of a right.

According to the harm principle, not every interest is then protectable by the criminal law, but only those that can be counted as legitimate because of their figuring in the justification of a right. "*Harm*" then, in the sense of the harm principle, is *nothing more nor less than the infringement of a right* (i.e., of the interest that figures in the justification of a right): an act should not be criminalized unless it amounts to such a right-infringement. Not every immorality is punishable by criminal law, but only those that entail the infringement of a right⁶⁰.

2. By appealing to an it's-not-your-business argument, and thus to the harm principle, the actor figuratively stands up and cries: "you have no *right* to demand that I refrain from performing this action; your being concerned with it does not amount to a claim of yours against me (nor, correlatively, to a duty of mine to you); your concern is not sufficiently important as to deserve protection in the form of a right, held by you against me, that I refrain from performing the act at issue".

Thus stated, the argument strikes me as both intuitive and definitive: nothing, I think, can be sensibly replied against it, insofar as one admits that the issue at stake (the performance of the relevant act) is exclusively "an actor's business": as far as I can see, the only way to overcome an it's-not-your-business argument is by defeating it, that is, by showing that the performance of the relevant act is not in fact an actor's exclusive business, that there are other persons which are rightly concerned with it, that there are people who rightly, with (moral or legal) good reason,

⁶⁰ A rights-based account of the harm principle, therefore, while being a *moralized* account, does not necessarily conflate the harm principle with legal moralism: not if we assume (as seems plausible) that rights-violations are only a sub-class of (and not the entire class of the) moral wrongs: if we admit that not every moral wrong consists in the violation of a right, and thus that not every moral wrong presupposes the infringement of a right, legal moralism would then differ from the harm principle inasmuch as it allows the criminalization of moral wrongs which do not consist in the infringement of a right. According to the harm principle, instead, not every immorality could, nor should, count as a legitimate ground for criminalization, but only those immoralities which, consisting in the violation of a right, first of all presuppose the infringement of a right. There are different ways in which actions may be immoral: of these ways, only those consisting in the violation of a right may constitute, according to the harm principle, appropriate candidates for criminalization.

contend that the “if and how” of the relevant act’s performance is of some importance to them.

3. An interpretation of the harm principle founded on the idea of protection of rights has a long and noble tradition. Mill himself sometimes puts the issue this way:

every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists first, in not injuring the interests of one another; *or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights*; and secondly, in each person’s bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. [...] The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, *without going the length of violating any of their constituted rights*. The offender may then be justly punished by opinion, though not by law⁶¹.

But even before the first edition of Mill’s essay (1859), the idea that the criminal law’s proper ambit is the protection of rights, and that criminal norms may only be enacted insofar as it is necessary to protect rights, had been one of the most distinctive flags of so-called “Enlightenment reformers of criminal law”, on whose thought was largely based the massive trend of liberal reform of criminal law that took place throughout the European continent during the last decades of the eighteenth century and the first half of the nineteenth⁶². Subsequently, that very same leading idea passed into the agenda of the liberal continental criminal law scholarship, headed, among others, by the German criminalist Paul Anselm von

⁶¹ *On Liberty*, Ch. IV, par. 3 (emphasis added). Correctly, therefore, Jean Hampton aligns Mill among the supporters of a “rights-based liberalism”. See HAMPTON, *Retribution and the Liberal State*, in “Journal of Contemporary Legal Issues”, 5, 1994, pp. 135 f.

⁶² See WÜRTEMBERGER, *Das System der Rechtsgüterordnung in der Deutschen Strafgesetzgebung seit 1532* (1933), Neudruck, Aalen: Scientia Verlag, 1973, pp. 209 ff.; SCHMIDT, *Einführung in die Geschichte der Deutschen Strafrechtspflege*, 3. Aufl., Göttingen: Vandenhoeck & Ruprecht, 1965, pp. 212 ff.; OEHLER, *Wurzel, Wandel und Wert der Strafrechtlichen Legalordnung*, Berlin: Walter de Gruyter & Co., 1950, pp. 96 ff.; AMELUNG, *Rechtsgüterschutz und Schutz der Gesellschaft*, Frankfurt a.M.: Athenäum Verlag, 1972, pp. 15-28; CAVANNA, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, vol. II, Milano: Giuffrè, 2005, pp. 71 ff.

Feuerbach⁶³, and then – later in the nineteenth century – was expressed at its best by the Italian founder of the so-called *Scuola classica di diritto penale*, Francesco Carrara^{64 65}.

More recently, a rights-based account of the harm principle (and, more generally, of criminalization) has been developed⁶⁶ by Joel Feinberg in his famous four-volume *The Moral Limits of the Criminal Law*⁶⁷.

Notoriously, Feinberg slightly but significantly changed his views on the matter in the course of writing his masterpiece. It would then be misleading to attribute to him a single, monolithic position on the concept of harm and on the harm principle as a moral limit of criminal law. As far as I can see, however, it would not be incorrect to say that throughout his

⁶³ FEUERBACH, *Revision der Grundsätze und Grundbegriffe des positiven Peinlichen Rechts*, pp. 65 («Der Staat kann nur Rechtsverletzungen, und zwar als solche bestrafen. Der Grund der strafenden Gewalt ist die Sicherung vollkommener Rechte»); *Lehrbuch des Gemeinen in Deutschland Gültigen Peinlichen Rechts*, §§ 21 («ein Verbrechen [...], im weitesten Sinne, ist eine unter Strafgesetze enthaltene Beleidigung oder eine durch ein Strafgesetz bedrohte, dem Rechte eines Anderen widersprechende Handlung»), 23 («Da Erhaltung der Rechte überhaupt Zweck der Strafgesetze ist, so sind sowohl die Rechte der Unterthanen, als auch die dem Staate (als moralischer Person) zukommenden Rechte, Gegenstand ihrer schützenden Drohungen»).

⁶⁴ CARRARA, *Programma del corso di diritto criminale. Del delitto, della pena* (1871), reprint of the fourth edition, Bologna: il Mulino, 1993 [the first edition of Carrara's masterpiece is contemporary with Mill's *On Liberty* first edition: 1859], §§ 42 («Oggetto del delitto non può che essere un diritto al quale la legge abbia espressamente accordata la sua tutela col divieto e con la sanzione»), 150 («la essenza del delitto (intendendo sempre sotto questo vocabolo il delitto vero e proprio ben diverso dalle trasgressioni di polizia) sta nella violazione di un diritto protetto dalla legge penale»), and *passim*. See also CARMIGNANI, *Elementi di diritto criminale*, first Milanese edition, Milan: Francesco Sanvito Editore, 1865, pp. 45 ff. (Carmignani was Carrara's master.)

⁶⁵ Just in passing, it is worth noting that, since the last decades of the nineteenth century, in the Euro-continental (German, Italian, Spanish) criminal law theory, the conception of "crime" as "infringement of a right" has been largely (I would say, completely) superseded by another conception, which is assumed to be alternative to the first, according to which "crime" consists in the infringement of a "legal good" (*Rechtsgut, bene giuridico, bien juridique*). See, among others, AMELUNG, *Rechtsgüterschutz und Schutz der Gesellschaft*, pp. 52 ff.; DUBBER, *Theories of Crime and Punishment in German Criminal Law*, in "The American Journal of Comparative Law", 53, 2005, pp. 682-696.

⁶⁶ Although along lines of thought largely different from that followed by the eighteenth and nineteenth century Euro-continental liberals, and only partly inspired by Mill's doctrine.

⁶⁷ See particularly FEINBERG, *Harm to Others*, Ch. 3. On Feinberg's "rights-based liberalism", see, e.g., ALEXANDER, *Harm, Offense, and Morality*, in "Canadian Journal of Law & Jurisprudence", 7 (2), 1994, p. 202; HAMPTON, *Retribution and the Liberal State*, pp. 136 ff.; POSTEMA, *Politics is About Grievance*.

work he constantly maintained that the concept of harm in the harm principle should be interpreted in (at least, partly) moralized terms, as “the overlap” of both a non-normative (setback to interest) and a normative (violation of rights) sense of the word, so that it should properly «apply only to setbacks that are also wrongs», that is, to setbacks that consist in the unjustifiable and inexcusable violation of a person’s rights⁶⁸. Moreover, Feinberg also interprets the notion of “offense” in the so-called “offense principle”⁶⁹ as based on the violation of a right:

[L]ike the word “harm”, “offense” has both a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc.), and the latter referring to those states only when caused by wrongful (right-violating) conduct of others. Only the latter sense – wrongful offense – is intended in the offense principle as we shall understand it⁷⁰.

It might then be argued that Feinberg’s theory of criminalization is characterized by its being grounded in what Gerald Postema has appropriately dubbed a «grievance morality»⁷¹, that is, a conception according to which criminal law should be properly concerned only with those «types of evil [that] are grounds of personal grievance»⁷², that are «inflicted upon individual persons»⁷³, and that therefore constitute violations of a person’s rights⁷⁴.

The differences between Feinberg’s account, as so construed, and the interpretation of the spirit of the harm principle that I have put forward in this article can be summarized as follows. I think it responds to the inner logic of the harm principle that the “harm” be *conceptually equated* to (exhaustively

⁶⁸ FEINBERG, *Harm to Others*, pp. 105 ff. But see also, for example, FEINBERG, *Harmless Wrongdoing*, pp. x, xviii.

⁶⁹ Which is, in Feinberg’s standard approach, the other liberty-limiting principle that, along with the harm principle, exhausts the range of good grounds for criminalization. See FEINBERG, *Offense to Others*, New York, Oxford: OUP, 1985.

⁷⁰ FEINBERG, *Offense to Others*, pp. 1-2.

⁷¹ POSTEMA, *Politics is About Grievance*, pp. 307 ff.

⁷² FEINBERG, *Harmless Wrongdoing*, p. 17 and *passim*.

⁷³ *Ibidem*, p. 18.

⁷⁴ «Grievance evils, Feinberg argues, are wrongs done to specific persons. Grievance evils are of immediate personal concern to them; the evils directly affect their own good and interests, goods in which they have a direct and personal stake. These goods ground rights, and these rights imply duties on the part of others to respect and even promote the goods and interests that the rights are designed to protect». [POSTEMA, *Politics is About Grievance*, p. 307.] «Part of what it is to have a genuine moral grievance, Feinberg seems to say, is that one can demand protection against violations of one’s rights.» *Ibidem*, p. 308.

defined in terms of) an “infringement of rights”: harm in the harm principle is *precisely* the infringement of a right. Feinberg, instead, disentangles the two notions, as is made clear, for instance, by the fact that he makes not only the notion of harm in the harm principle but also the notion of offense in the offense principle conditional upon the violation of a right. This inclines me to think that, in his view, the idea of a “right-violation”, instead of being part of the very notion of harm (or of that of offense), is a further qualification of those notions, only required to make them relevant, respectively, to the harm principle and the offense principle⁷⁵. (An implication of the difference just mentioned is that, in the interpretation I have provided, there is no point in singling out an offense principle as distinct from the harm principle: insofar (but only insofar) as an “offense” is only relevant if it “infringes/violates a right”, its criminalization is already warranted by the harm principle)⁷⁶.

Another peculiar feature of Feinberg’s moralized approach is that he defines the “normative sense” of its notion(s) of harm (and offense) as the “unjustified and inexcusable violation of a person’s right.” This raises at least two kinds of objections – hopefully evaded instead by the interpretation of the harm principle I have suggested. First, it overlooks the basic distinction between offences⁷⁷ and defences⁷⁸. “Unjustifiability and inexcusability” are obvious conditions to make an actor punishable for having committed the *actus reus* of a crime with the appropriate *mens rea*, but they have nothing to do with the logic of the harm principle: they work on a different level than the harm principle; while the latter’s role is that of contributing to the definition, to the identification, to the singling out of the *types of acts* that – because of their being (or not being) seriously harmful – should (or should not) be made criminal, justifications and excuses instead, *qua* defences, are essentially predicaments of *act-tokens*, not of act-types: they say nothing on the kind of harm embodied in a certain type of act; rather, if available, they serve to shield criminal responsibility from a *concrete* defendant who has *concretely* committed

⁷⁵ To be sure, in *Harm to Others* Feinberg argues that “wrong” (as “violation of a right”) is one of the possible senses (the normative one) of “harm”. See Feinberg, *Harm to Others*, pp. 109 ff. Subsequently, however, he abandoned this terminology. See Feinberg, *Harmless Wrongdoing*.

⁷⁶ For a hint at this, Donini, “Danno” e “offesa” nella *c.d. tutela penale dei sentimenti*, in “Rivista italiana di diritto e procedura penale, 2008, p. 1575.

⁷⁷ Here I am using “offence”, and “defence”, (with “c”) for convenience only, as a way to distinguish the word in its present use (as the definition of the *actus reus* and *mens rea* of a crime) from its Feinbergian use in the context of the “offense [with “s”] principle.”

⁷⁸ On this distinction, see, e.g., FLETCHER, *Rethinking Criminal Law*, Boston: Little, Brown & Co., 1978, pp. 552 ff.; HUSAK, *Philosophy of Criminal Law*, Totowa, NJ: Rowman & Littlefield, 1987, pp. 187 ff.; GARDNER, *Offences and Defences*.

an act that is an instance of the act-type described in a criminal norm. By grounding the normative aspect of the concept of harm in the harm principle on the “unjustifiability and inexcusability” of the potentially criminalized conduct, Feinberg thus «confuses eligibility of action-types for criminal prohibition with certain defenses that might be available to defendants (namely, certain excuses or positive justifications)»⁷⁹.

Related to this, another problem arises. If the “unjustifiability” (and thus, the injustice) of the “harm” is not relevant to the harm principle, it is then inappropriate to define the normative sense of harm by resorting to the notion of “right-violation”, provided that the violation of a right is exactly an *unjust* infringement of a right⁸⁰. Hence, by talking of the *violation* (and not of the *infringement*) of a right as part of his moralized concept of harm, Feinberg, once again, impliedly conflates an aspect properly regarding the harm principle (namely, the infringement of a right) with other aspects regarding instead the (un)availability of certain kinds of defences to the concrete actor as a condition of his/her criminal responsibility.

4.2. A Sketchy Conclusion

To sum up, as I have interpreted it in this paper, the harm principle is a criterion of criminalization according to which an act may legitimately be

⁷⁹ POSTEMA, *Politics is About Grievance*, p. 298.

Slightly different is the point expressed in Anthony Duff’s critique [see *Harms and Wrongs*, in “Buffalo Criminal Law Review”, 5 (1), 2001, pp. 18-19]: in his view, Feinberg should have paid

more attention to the distinction between questions of “wrongdoing” and “attribution”: between questions about what kinds of conduct should be defined as criminal and questions about the conditions under which such criminal conduct should be attributed to a defendant who can be held responsible and liable for it[...] For questions of excuse are typically questions of attribution, rather than of wrongdoing: what is at stake is not whether a wrong was done (of a kind that concerns the criminal law), but whether the wrong can be attributed to this agent as something for which he can be held criminally liable. To build inexcusability into the criteria of criminalization, as Feinberg does, thus conflates distinct questions.

⁸⁰ Thomson, *Some Ruminations on Rights* (1977), in EAD., *Rights, Restitution, & Risk*, edited by W. Parent, Cambridge, Mass., London: Harvard UP, 1986, 51 ff. The distinction between infringement and violation of a right is explicitly accepted by Feinberg himself. See, for instance, FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in “The Tanner Lecture on Human Values”, Delivered at The University of Michigan (April 1, 1977) and Stanford University (April 11, 1977).

criminalized only insofar as it amounts at least⁸¹ to the infringement of a right. This is an admittedly moralized interpretation. Arguably, if that principle has to work as a *moral constraint* on criminalization (if it has to show why it would be *morally illegitimate* to criminalize harmless conduct), it has to have some kind of *moral strength*, or appeal. To make sense of the harm principle as a moral limit of the criminal law (as a means «to pick out the kinds of wrong that properly concern the criminal law», «[w]e [...] cannot appeal to a non-moralised or pre-moral notion of harm»⁸²: that notion should be, to some extent, morally informative; otherwise, the harm principle could not «explain the distinctive status that it assigns to harm: why harm matters, when harm matters, or why harm, in particular, would be especially relevant to the criminal law»⁸³.

The interpretation for which I have argued here – that the concept of harm in the harm principle is to be equated to that of a right's infringement – suitably meets (or, at least, tries to meet) these warnings.

Now we are in a position to attempt a sketchy solution of our initial puzzle: how can the criminalization of pure rape be warranted under the harm principle? My answer should now be clear: although experientially harmless, pure rape is not harmless *tout court*. Exactly because it is the violation of the victim's right to sexual autonomy, it always necessarily entails (*a maius ad minus*) a victim's right also being infringed, and thus – harm being the infringement of a right – it always entails harm to its victim. For the sake of the harm principle, that is sufficient.

⁸¹ Following the original Mill's position, I have been appealing here to a *negative* conception of the harm principle, in which it is properly conceived as a (tendentially insurmountable) limit to, and not simply as a possible good ground for, criminalization: according to such an account, the harmfulness of a conduct is a *necessary, though not sufficient*, condition of every legitimate criminalization.

The harm principle might also be *positively* interpreted, as a good (but not necessarily exclusive) reason in support of criminalization. This is, for instance, Feinberg's account: «*The harm principle*: It is always a good reason in support of penal legislation that it would probably be effective in preventing [...] harm to persons other than the actor [...]» [*Harm to Others*, p. 26]. As we have seen, Feinberg admits of the moral legitimacy of at least another liberty-limiting principle, the "offense principle" [ID., *Offense to Others*]. Feinberg's position is substantially shared, among others, by SIMESTER, VON HIRSCH, *Rethinking the Offence Principle*, in "Legal Theory", 8 (3), 2002, pp. 269-295; SIMESTER, SULLIVAN, *Criminal Law. Theory and Doctrine*, Oxford and Portland, Oregon: Hart Publishing, 2007, pp. 581 ff. But see also HART, *Law, Liberty, and Morality*.

On the distinction between "positive" and "exclusive" accounts of the harm principle, see RIPSTEIN, *Beyond the Harm Principle*, p. 216; DUFF, *Answering for Crime*, pp. 123 f.

⁸² DUFF, *Answering for Crime*, p. 128.

⁸³ RIPSTEIN, *Beyond the Harm Principle*, p. 216 (footnotes omitted).