FRAMING MEANING THROUGH CRIMINALIZATION: A TEST FOR THE THEORY OF CRIMINALIZATION

*Javier Wilenmann**

Contemporary legal scholarship on criminalization focuses on evaluating the legitimacy of legislative decisions according to abstract standards of justice. In recent years, socio-legally oriented scholarship has attempted to do away with this focus by linking the theory of criminalization to the study of the real trends of criminal law enforcement. The article offers a critique of both approaches in what refers to the traditional area of application of the theory of criminalization, namely symbolic criminalization. It argues that whereas traditional papers discuss the legitimacy of the "enforcement of morality" through the criminal law, symbolic criminalization conflicts actually originate in disputes about meaning in plural societies. The real question that this phenomenon poses is thus not whether the enforcement of neutral morality is legitimate, but rather whether meaning framing through criminalization is.

Keywords: *criminalization, symbolic conflict, legislation, harm principle, legal moralism*

*Javier Wilenmann is Associate Professor of Law at the Universidad Adolfo Ibáñez. He received his doctorate in criminal law in the Albert-Ludwigs Universität Freiburg in Germany. His major research interests focus on criminal law doctrine and on the institutional and constitutional setting of criminal justice. Address: Diagonal Las Torres 2640, Office 217, Building B, Peñalolén, Santiago, Chile. E-mail: javier.wilenmann@uai.cl. The research was funded by the Alexander von Humboldt Foundation through a fellowship program that took place in 2016 and via Grant No. 1170056 of the Fondecyt program led by CONICYT, the Chilean government's research agency. A preliminary version of this paper was presented in a seminar in the Universidad Adolfo Ibáñez in January 2018. I am grateful to all assistants for the comments provided in that seminar. I am especially grateful with Vincent Chiao, who made very valuable recommendations to the same draft of the paper.

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INTRODUCTION

How should legal scholarship study the institutional phenomenon of state punishment? Theoretical criminal law scholarship is generally concerned with different ramifications of that general question. Questions such as "Why is there state punishment at all?", "How is state punishment distributed and why?", or "What conducts should be laid open to state punishment?" form a core of discourses (theory of punishment, theory of criminal responsibility, theory of criminalization) around which criminal law scholarship organizes its knowledge production regarding state punishment. Although I am generally concerned about the main definitions that legal scholarship adopts in this inquiry, in this article I want to focus specifically on the theory of criminalization.

In criminal law scholarship, the theory of criminalization generally fulfils the goal of evaluating legislation. Its central question is thus: What conducts can the legislature legitimately subject to prohibition and potential punishment? (Moore, 1997, p. 639; Simester & von Hirsch, 2011, p. 3). In short: mainstream criminalization theory deals with the limits of substantive criminal legislation.

Given its tendency to deal with cases that are situated outside the core of wrongful or harmful behavior (*mala in se*), criminalization theory generally aspires to be of use in the evaluation of claims to legislative criminalization or decriminalization in issues with symbolic relevance. In English-speaking legal and philosophical scholarship, for instance, the classic Hart-Devlin debate (Cane, 2006, pp. 14ff.; Devlin, 1959, 1962; Hart, 1963) is situated precisely in the area of sexual behavior, whereas in German legal scholarship, the decriminalization of some sex offenses is presented as the main success behind the theory of the protection of legal goods (*Rechtsgut*), the dominant theory of criminalization (Pawlik, 2012, p. 135). In the real world of state politics, the intensity and frequency of symbolic criminalization conflicts is also especially high. Abortion, hate crimes, sexual assault, or drug use are thus amongst some of the key issues that serve as focal points of identification and conflict between conservatives and liberals (or between other politically relevant groups), and therefore consume a major part of agonistic politics in modern Western democracies (Balkin, 1997; Green, 2013, p. 473; Kahan, 1999, p. 413).

Given both the relevance of criminalization conflicts and the historical link that the theory of criminalization has with evaluating their legitimacy,

a central goal of developing a framework of evaluation is to offer a clear and convincing structure to assess what is at stake in such conflicts and how we should judge their legitimacy.

This article shows, however, that this is hardly the case. By idealizing legislation, normative theories of criminalization tend to lose sight of what is really at stake in symbolic criminalization conflicts: meaning framing. By looking at criminalization conflicts mainly as attempts at conduct regulation with the purpose of achieving social governance or a fair distribution of rights, a major part of what is relevant is simply overlooked. More importantly, the main moral question that the phenomenon poses—the legitimacy of imposing meaning frames through criminalization—is thus avoided instead of faced.

Two shortcomings are thus exposed by this article. On a more particular note, normative theories of criminalization tend to suffer from lack of reflection on the legitimacy of meaning framing. The article attempts to draw attention to the importance of this question and draws some general lines on how this problem should be dealt with. But it also reveals a more general methodological problem, namely the difficulty that philosophical criminal law scholarship exhibits in integrating knowledge of the very phenomena it seeks to analyze (Husak, 2008, p. 62; Weisberg, 2012). Although this article does not strive to offer a solution to this—indeed, this is not a theoretical problem but rather a question of scholarly motivation in the definition of its methods—it seeks to illustrate the usefulness of such an integration process.

The body of the article proceeds in three steps. The first part of the article reconstructs the uses and purposes of symbolic criminalization conflicts. It shows that, in them, legislation serves less as a means to establish general conduct and sanction norms than as a communicative tool in the struggle for cultural control. It thus thrusts before us the question of the conditions under which such form of behavior may be seen as legitimate. The second part of the article attempts to assess the uses of the available criminalization theories to deal with these questions. To this end, it offers a brief review of the state of literature on the subject and shows their shortcomings when faced with symbolic criminalization. The third and final part recapitulates on the sources of the shortcomings seen in criminalization theories on the subject, identifies the theoretical source of those shortcomings, and finally, offers some light on how to deal with these problems.

I. SYMBOLIC CRIMINALIZATION CLAIMS AND THEIR USES

A. The Phenomenon of Symbolic Criminalization

In both legal and philosophical scholarship as well as in political practice, criminalization conflicts are generally situated outside of the core definition of criminal offenses. Philosophers, legal scholars, and politicians normally do not discuss whether murder, assault, or robbery should be prohibited and sanctioned. Assuming the legitimacy of criminal law as a sanctioning practice, the legitimacy of attributing a criminal character to these felonies is not really contested (R. A. Duff, 2014, p. 219); sanctions are certainly contested, but the underlying conduct norms imposed on citizens are not.

Criminalization conflict and divergence are located outside of that core area. In some cases, divergence comes from the legal structure of the criminalization decision, as in the case of preventive criminalization that we will delve into later. In other cases, however, the very definition of a conduct as prohibited and punishable is that which is contested. One of the main cases where this takes place is, as we will call it here, the area of symbolic conflicts, sometimes referred to with labels such as "simple moral deviations" (Hart, 1963; Roxin, 2006, pp. 19–21), "moral issues," and the like.

Coming up with a definition of symbolic conflicts is certainly no easy task. Two main features may help us define the object of inquiry. First, what we call symbolic conflicts are the result of social pluralism that is reflected in social morality. Be it as an expression of different and easily identifiable social groups coexisting or as a result of generational conflicts, conflict that is related to establishing a certain conduct as "wrong" or "right" is only understandable if, as a matter of fact, there is moral pluralism inside a group that is subject to common regulation. Second, symbolic conflicts are generally related to actions whose attributed meaning is contested and thus nonnegotiable to the parties (Mouw & Sobel, 2001). Whether non-marital, sexual intercourse consented by a woman has a special meaning attributed to it—be it sin, promiscuity, liberation, self-fulfillment, or something else—was something contested between social groups and different generations in several Western societies up to the 1970s and, in many cases, also later. Of course, even in the case of core felonies, different meaning attributions and some sort of conflict might be involved. Robbing the rich or stealing from big corporations can be seen by some as a form of political emancipation or as a moral duty, just as some social groups might construe

the killing of another human being in a particular way. Those views, however, are only locally represented (i.e., inside specific groups) and thus negated by a dominant frame inside the larger group. Symbolic conflict is only possible when such a form of strong, normative hegemony is absent. Whether one believes that this is generally the case in our social world (Hunter, 2009) or only in what refers to certain issues, it is hard to deny that symbolic conflict is only possible through the simultaneous reality of pluralism and lack of hegemony.

Symbolic conflicts have been historically stressing for mainstream political philosophy: it is, at the same time, an area that is marked red and should stay outside the sphere of state intervention, in the generally liberal self-understanding of the main theories of criminalization, and yet few other areas mobilize so much political energy as do criminalization and decriminalization claims in symbolic areas. The modern, liberal state is thus presented by mainstream legal scholarship as having standing and function only in preserving individual rights that are not dependent on substantive and potentially conflictive moral conceptions; the enforcement of (social) morality is the key negative concept around which the harm principle should draw content (Green, 2013; Hart, 1963). But, in these same areas, moral conflict and motivation to political action abound (Kahan, 1999). The conjunction of, on the one hand, an illiberal aura and, on the other, political relevance makes symbolic conflicts a key area for the philosophy of criminal law.

The very constitution of the area of symbolic criminalization as emotionally charged, thus dangerous, and contrary to the primary constitution of liberal democracies, can perhaps account for the historical distrust of criminal law scholars in this area (Hart, 1963; Mill, 1989). However, before we rush to review the way in which this distrust is expressed, it seems sensible to try to understand the phenomenon itself, why it consumes so much political energy, and what is really at stake for the parties involved in the conflict. Thus, we will proceed by reviewing some findings on the logic of symbolic conflict and only then review the evaluative standards that are used here.

B. Understanding the Phenomenon of Symbolic Conflict and Claims to Criminalization

If we are to obtain a more grounded and politically sensitive understanding of symbolic criminalization conflicts, it is a good idea to start by trying to

understand the goals and motivations that are attached to symbolic criminalization/decriminalization claims by the conflicting parties themselves. As a political phenomenon, what is really at stake by the claim can only be understood by looking at what the parties seek, and not only at the effects it produces in the legal system once a legislative act takes place. This is, of course, also true in the general case of legislative criminalization *tout court*. Legislative criminalization is a form of collective action and is thus dependent on motivation to collective action for a demand for change in the legal system to take place (L. Friedman, 1975, p. 148). As in any form of collective action that aspires to produce a legislative output, formal criminalization reflects the goals that, in a political community, have enough motivational influence to provide for collective action at the level of the legislature. But, sometimes, the motivational structure of the claim to criminalization can be described with enough accuracy through the mere reference of what a criminalization decision means at face value for the legal system: conduct regulation and attachment of a potential sanction to it—that is what is sought out by those claiming for reform. You do not need to refer to any other political motivation to understand what is at stake in simple cases.

However, something important is missing from the picture when symbolic criminalization conflicts are looked at in this way. Conduct regulation is typically less relevant in this area: there are generally fewer money-related or physical safety–related interests at stake. The very ideas of neutralization or deterrence, for instance, are also generally hardly applicable in these areas. It is thus not very plausible to say, for instance, that pro-life groups want to neutralize women who seek abortions by putting them in jail. The quest for social governance, whatever the means to achieve it, does not seem to be central here.

If the conflict cannot be understood by projecting the general uses of the criminal law, what then should we look at? Under an assumption of instrumental rationality, the conflict might seem hard to understand even from the viewpoint of the parties: outside of "moral entrepreneurs" (Becker, 1963), individuals committed to symbolic criminalization campaigns do not seem to gain much from their activities. Here, there is not only an Olsonian question of the rational motivation to be a free-rider (Olson, 1965), but there simply does not appear to be any individual material interests at play whatsoever. And, yet, symbolic criminalization conflicts by far mobilize the greatest degree of political energy, as the long discussion on contemporary culture wars has shown (Hunter, 1992; Nolan, 1996).

Here, it is perhaps reasonable to draw on sociological knowledge regarding the reasons why identity groups make criminalization a central goal. Probably the best known studies along these lines follow the trends initiated by Jerome Hall's (1952) study of the laws of theft and Joseph Gusfield's (1986) classic work on the criminalization of alcohol ("Prohibition"): the interpretation of the history of theft in relation to the changing demands of stakeholders in light of alterations in the structures of production and commerce, as well as that of Prohibition as symbolic status differentiation of native rural Protestants in relation to immigrant urban Catholics marked a trend in the establishment of a link between criminalization and conflict sociology (Bernard, Snipes, & Gerould, 2010, Chapter 12; Hagan, 1980; Hopkins, 1975; Turk, 1969, 1976, 1977; Vold, 1958, Chapter 11), which has been extended to cases such as the criminalization of drug consumption (Becker, 1963), pornography (Zurcher & Kirkpatrick, 1976), or several white collar offenses (Savelsberg & Brühl, 1988).

Let us try to recreate here the main ideas involved in a conflict-sociology reconstruction of symbolic criminalization claims. As a theoretical hypothesis, symbolic conflicts may be deemed essential to the existence of non-interest groups in modern societies (Hunter, 2009). The Durkheimian sociology of group conformation, identification, and solidarity shows that conflicts cannot be rightly understood without looking for the uses that the conflict itself has for the group (Collins, 2004, Chapter 7, 2016). Symbols, rituals, and shared commitment make up social groups; the same energy that drives conflicts drives social commitment. As different phenomena of real life compete for the attention of an individual, his/her commitment to a group must be driven by focal objects. Struggles about symbols can play this role. Criminalization decisions have relevance for identity groups because of the fact that they can affect (confirm, attack) the values or social markers that conform their very identity. In symbolic criminalization, the decision is thus directly linked to the identity of a collective group.

Here, let us return to the very familiar case of abortion. Considered through legal lenses, abortion discussions tend to be understood as dealing with the protection granted to a human fetus in relation to that granted to the pregnant woman—i.e., a purely abstract question of justice. However, politically considered, it is also, and foremost, about the different meaning frameworks that we see as legitimately usable and dominant in public law discussions. Abortion and similar issues mobilize so much energy because they are easily understandable as a part of what Stuart Hall (1982) labelled as

"the politics of signification": the struggle to impose the interpretation of certain events or issues in a way that fits the identity or interests of the struggling parties.[1] Abortion is also a locus of group integration: identities such as pro-life and pro-choice cannot exist without such a conflict. The more general identities connected to those very specific group identities (Christians, conservatives, liberals, feminists, etc.) thus have major stakes in conflicts of this type: the conflict itself calls them to confirm their identity and to mobilize for the production of social frames that value this identity; the actions of their rivals, as sources of symbolic threats, also tend to confirm their identity (Stephan & Stephan, 2000).

This does not mean, however, that all members of the group are seeking an instrumental increase in status (Gutmann, 2003, p. 9). Although this may be the case in some of them, claiming (Balkin, 1997; Gusfield, 1986; Kahan, 1999) that this is *the* motivation behind the claim, is misleading and implausible as an empirical claim. It is likely that most members do not seek to satisfy any specific material interest (Carson, 1974). Their goals must be described in a more general way. In the field of criminal law, value-oriented groups struggle for a definition of the desired content that mimics the meaning which the group attributes to the actions that are to be criminalized or decriminalized, thus seeking to confirm the validity of the framework they use when attributing meaning to those actions.

In the more general sociological literature, this form of behavior is studied under the concept of framing. "Framing" refers to the study of the means by which a social group negotiates its inner identity in a way

1. Of course, the politics of signification goes far beyond those issues that are generally understood as value-driven or symbolic. Stuart Hall's example is a clear way to show this: "To give an obvious example: suppose that every industrial dispute could be signified as a threat to the economic life of the country, and therefore against 'the national interest'. Then such significations would construct or define issues of economic and industrial conflict in terms which would consistently favour current economic strategies, supporting anything which maintains the continuity of production, whilst stigmatizing anything which breaks the continuity of production, favouring the general interests of employers and shareholders who have nothing to gain from production being interrupted, lending credence to the specific policies of governments which seek to curtail the right to strike or to weaken the bargaining position and political power of the trade unions" (Hall, 1982, pp. 64–65). By putting the accent only on signification and framing in the case of symbolic issues, I do not mean to say that there is no struggle for meaning when it comes to other issues. The point here is about the link between the criminalization issue and its use for the struggling parties: there is nothing beyond meaning framing in symbolic issues.

that leads to the imposition of its frames to the interpretation of the relevant issues or events to outsiders (Benford & Snow, 2000; Snow & Benford, 1988). Symbolic criminalization struggles can thus be reconstructed in two analytically distinct stages that form a continuous process: framing *for* legislation, so that framing may then be redefined *through* the law. The idea can be easily explained. In their struggles for meaning imposition, given both the symbolic relevance and the publicity of legislation (Laws, 2013; Marshall, 2003), achieving an identity-confirming legislative outcome can be seen as a tool that helps achieve a much wider resonance to the frame that a group seeks to impose (Leachman, 2013). The relevant identity groups thus engage in framing campaigns whose purpose is precisely to achieve legal reform that can be expected to increase resonance—they organize their framing campaigns so that they lead to legislative success; they *frame for legislation*. The fact that "nearly all social movement objectives" are legal (Pedriana, 2006) can be thus explained. That piece of legislation that is sought out very often, but not always, implies criminalization, because the criminal law carries a wider symbolic relevance and is much easier to de-codify socially than other legal techniques.[2] But, of course, framing is a continuous process in modern human societies: success in legislative terms does not put an end to framing actions by all conflicting parties. Rather, legislative success acts as a new frame to be appropriated, radicalized, or contested, opening up framing opportunities and changing the environment in which the struggle for meaning will keep taking part (Pedriana, 2006).

C. Political and Moral Implications

By drawing on framing theory, a simple and plausible explanation to the relevance that symbolic criminalization claims play is made available. The phenomenon is certainly well known and there are other languages that could be used to explain it, but the framing reconstruction is especially

2. The cases of reform that do not refer to criminal law while having the same framing importance are generally associated with legal institutions that have as much symbolic relevance as criminal law does. The obvious example is gay marriage. Yet again, it is not hard to understand why, despite all the differences that LGBT groups have regarding rights and, therefore, all the risks that focusing attention on marriage implies, framing for gay marriage recognition achieved so much relevance. In this respect, see Miriam Smith (2007).

illuminating in explaining the relevance of identity politics and its frequent link with criminalization conflicts.

From this analysis, some additional implications can be drawn that also have influence for the normative evaluation of these kinds of claims. Both (1) social structure and (2) power configuration are related to the phenomenon of symbolic and more general meaning conflicts in modern societies, and both are essential to understanding what is truly at stake in formal criminalization related to such conflicts. Formal criminalization is thus expressive of specific characteristics of (1) and (2) but as we will see, the connection between them has consequences for the type of use that legal scholarship can give to a theory of criminalization.

1. With regard to the **social structure**, two linked features can be associated with symbolic criminalization trends: (a) symbolic conflicts reflect strong intra-group solidarity that denounces value fragmentation in a pluralistic society, out of which (b) coordination problems in the judgment frameworks used by individuals arise. As this is a fact of most modern Western societies, it is unlikely that they will stop playing a major political role. Just doing away with them, by declaring the type of claim itself illegitimate, thus seems hardly useful.

a. Symbolic motivation derives from strong ("mechanical") intra-group solidarity in pluralistic societies—that is, solidarity arising from common cultural identity of a given group. If linked to a criminalization conflict, that same symbolic commitment is built at least partially in opposition to other groups (Garland, 2013; Hunter, 2009). As a general hypothesis, therefore, the more symbolic criminalization processes can be found in a given society, the more fragmented it is into different sub-groups with strong ties of solidarity between them which are forged or at least reinforced through conflict with other groups. Group fragmentation and symbolic conflict are thus two sides of the same social process.

b. From the viewpoint of the system, symbolic criminalization claims also denounce **lack of coordination** in the judgment frameworks (Boltanski, 2010; Boltanski & Thévenot, 1991, 1999; Tilly, 2004) used by members of a community. For the conflicting parties, criminalization is a tool of imposition or confirmation of a framework that has at least local (= group) validity, but whose general validity is denied or is seen as denied by the other group(s). As the judgment framework aspires to have general validity, it thus calls for the reestablishment of coordination which confirms it.

2. **Power configuration**, the second relevant feature of symbolic claims, is related to the structure of the claim itself and thus to its power dimension. As the motivational impact of the claim depends on value identification, value-motivated political action is generally only convincing for the *converted*, that is, precisely for those who use the moral framework whose validity is reclaimed through the claim.[3] Its motivational impact should therefore typically depend on the level of support which society at large bestows on the group's values.

For our purposes, a very general conclusion can be drawn from this analysis. Symbolic criminalization claims are only properly understood by also looking at the *input* side of the legislative process instead of observing only legislation as a legal output. Symbolic criminalization and decriminalization is, first and foremost, linked to meaning conflicts and, in that context, aims at confirming a shared identity and denying the validity of an alien identity. That is what meaning framing is all about; criminal law is useful here not because of its nature as a sanction norm, but because of its symbolic power at denying the validity of actions with symbolic relevance for a certain group.

II. THE THEORY OF CRIMINALIZATION AND SYMBOLIC CONFLICTS IN CURRENT LEGAL SCHOLARSHIP

Does normative criminal law scholarship offer adequate standards to deal with the assessment of symbolic criminalization claims? This section reviews the answers provided by mainstream legal scholarship to the question of criminalization and shows its shortcomings when applied to this phenomenon. It starts by looking at the dominant theories of criminalization and then proceeds with a review of more recent trends.

A. Main Features of Current Legal Scholarship

Following the trends set by Feuerbach's natural law theory of felonies as violations of individual rights in the continental world (Feuerbach,

3. This is coherent with some of the information we have on the empirical conditions under which changes of opinion in value-related issues are produced (Berkowitz & Walker, 1967; Walker & Argyle, 1964): influence from the outside is very ineffective in producing such changes, but individuals are receptive to peer opinions and this can indeed have impact in producing moral change.

1800, p. 11), as well as by Mill's harm principle in the English-speaking world (Mill, 1989, p. 13), in legal and philosophical scholarship, criminalization theory tends to be synonymous with the establishment of the necessary conditions for the legitimacy of a legislative criminalization decision. Making criminalization theory usually means, therefore, discussing the merits of alternative approaches to the application of substantive standards of justice to the question of what conducts should be prohibited and punished.

All of these contributions share some basic common features (Farmer, 2016, Chapter 1). They are generally abstract, at least partially detached from the political (i.e., conflictive) character of many criminalization decisions (Brown, 2007), but intend to serve as standards of normative evaluation for real legislative practices. In this quest, many different variants are present. To enable us to have a more structured look at it, I will distinguish and present two types of traditional, mainstream approaches, and offer a preliminary critique of each one in what refers to the issue of symbolic conflicts. This critique will be then supplemented by revisiting socio-legal scholarship on criminalization in the final sub-section.

1. The top-down abstract critical approach

This is the first type of approach, the identification of which can be traced back to Gerald Dworkin's (1998) distinction between a "principled" (or generalistic) (Dworkin, 2011, p. 5) and a "particularistic" approach to criminalization theory, the former referring to the quest for a general standard of legitimacy of criminalization decision and the latter to approaches that renounce to that expectation. Given, however, the critical nature of the theory, the term "top-down abstract critical approach" seems a more complete description of the first trend.

Under such an approach, the scholar assumes an abstract normative framework as a standard of legitimacy for a given practice and then applies it critically to recent trends of criminalization. If the real practices of criminalization deviate from these standards, then they are used to produce criticism of current legal reality. In criminalization literature, this is generally connected to the assumption of a given teleology regarding the state: the state's coercion ought only to secure private spheres of freedom or ought only to enable autonomous self-fulfillment; the state ought to foster not exclusively formal autonomy but rather autonomous self-realization

(Raz, 1986, Chapter 14), and so on (Brown, 2009, p. 278; Lacey & Zedner, 2017, p. 70). When faced with the reality of the actual scope covered by criminal law and the current trends of formal criminalization, the scholar will then give an account of how illegitimate such trends are.

The available top-down critical frameworks are well established. In English-speaking legal scholarship, for instance, thanks to the impact of the Hart-Devlin debate, theories of criminalization tend to be grouped around a liberal, harm-preventing option (Feinberg, 1984; Hart, 1963; Mill, 1989) and its main rival, legal moralism—criminalization is only legitimate on the basis of the wrongfulness of the conduct that is made into an offense (A. Duff, 2007, Chapters 4–6, 2010; R. A. Duff, 2014; Moore, 1997, Chapters 16–18). Although the opposing views between harm prevention and legal moralism are very influential in Anglo-American legal scholarship, their differences should not be overestimated: in most cases, the opposition is only partial. Thus, Feinberg himself accepts that the harm principle only works under the assumption that the harm-causing conduct is wrongful. And Simester and von Hirsch (2011, Chapters 2–3) seek out a convincing middle ground between both options by literally inversing Feinberg's solution: wrongfulness is the necessary and non-sufficient condition for legitimate criminalization, but in most cases, only the prevention of harm-causing behaviors provides a sufficiently powerful reason to criminalize them. Some separated rationales might thus be sufficiently powerful reasons for criminalization.

There certainly are sensitive differences between all the different variants of top-down critical criminalization frameworks,[4] and many well-known

4. Outside of the legal moralism–harm prevention opposition, there are, to be sure, other options available: Kantian personal sovereignty guardianship (Dubber, 2010; Ripstein, 2006) is, for instance, a liberal alternative to the harm principle. In German legal scholarship, which has been generally very influential outside of the English-speaking world, discussions are generally centered on the merits of the concept of legal good (*Rechtsgut*)—developed as a conceptual refinement to the Feuerbachian theory of subjective rights (Amelung, 1972, p. 35; Hefendehl, 2002; Pawlik, 2012, p. 127)—to serve as a realistic yet critical standard for formal legislative criminalization (de Figureido Dias, 2014; Dubber, 2005; Kudlich, 2015; Martins, 2015; Nuotio, 2010; Schünemann, 2003; Stächelin, 1998). Its main rival is thus mostly negative, especially after the ruling handed down by the German Federal Constitutional Court on incest in 2008 (BVerfGE 120, 224), which explicitly rejected the constitutional relevance of the concept of *Rechtsgut*. Several contributions have argued that the standard of "exclusive protection of legal goods" does not hold any relevance for legal scholarship and practice which should rather focus rather on refining the

critiques are especially addressed at just one variant. Thus, when faced with the reality of contemporary political practices, the harm principle seems to be much more connected with justifying criminalization decisions instead of controlling them (Brown, 2009, p. 279; Harcourt, 1999), whereas legal moralism is immediately faced with the plurality of conflictive moral representations existing in complex societies. For our purposes, however, their common features when dealing with symbolic criminalization are much more relevant. All the main variants of top-down critical criminalization theories share two features here: they are meant to be most easily applicable to cases of symbolic criminalization—indeed, the question of the pure enforcement of morality has been historically presented as its preferred case of application (Devlin, 1962; Green, 2013; Hart, 1963; Raz, 1986)—and they are both built upon the common representation that the relevant moral question is related to the face value of a legislative criminalization decision, that is, its status as a legal norm that is part of a quest for social governance and conduct regulation (Simester & von Hirsch, 2011, pp. 6–14), and not to the meaning it carries for the actors who pushed for the decision to be made.

By proceeding this way, the reality of criminalization is simplified in a way that ignores one of the basic features of symbolic criminalization, namely its strong dependence on political conflict and, precisely, its tendency to spring from it. The use of the reified image of the "state" helps fulfill this purpose: the fact that *government* subjects non-harmful conduct to punishment or that it is *the government* that tries to impose morality is made into an object of concern. This is part of what Roger Cotterrell has named (one of) the image(s) of the social that is dominant in legal philosophy: legal philosophers tend to assume, as a matter of methodological definition, the image of the law as the normative subjection of individuals deriving from one personified political authority (Cotterrell, 1995, p. 222; 2006, p. 40) and to make their judgments based on this assumption. Legal rationality controls the image with which legal philosophers tackle criminal legislation issues (Shiner, 2009, p. 169).

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institutional meaning of constitutional rights for criminalization control (that is, on *Grundrechtsdogmatik*) (Appel, 1996; Gärditz, 2010; Stuckenberg, 2011; Wilfert, 2017). Except for renouncing a general framework of control over criminalization decisions that is expressed in the last case, all of these options share the main features of a top-down critical approach and thus do not need to be discussed in detail.

Moreover, only one side of the coin that makes up legislation is made into an object of inquiry by means of methodological definition. Legislative criminalization, as a specific form of legislation, is both an institutionally defined output and a product of a political practice (Lacey, 2016, p. 15; Lacey & Zedner, 2017). As an institutional output, it is the result of a process culminating in a certain text being recognized as a criminalizing law, that is, as commands addressed to state officials to prosecute and sanction for carrying out certain actions, and a prohibition or command to carry out/omit carrying out that action. This side of the coin is the object of inquiry and criticism in most pieces of legal scholarship. But criminalization is also the end result of a process that is not ruled by legal rationality but by political rationality, namely by the actions of political actors with specific goals that are meant to be satisfied through the achievement of the criminalization output. There is no continuity between the input side and the output side here. Superimposing legal rationality onto criminalization claims when judging them is the result of an implicit judgment, namely that what is really relevant in this phenomenon is the fact that a conduct ends up being defined as criminal and open to criminal enforcement.

Those assumptions may make up for a more straightforward object to be criticized in the theory of criminalization. But the precision with which some of the relevant normative political questions are identified is jeopardized by ignoring the fact that the practice is controlled by the political meaning attached to criminalization. By making the law into a straightforward object of assessment, in order to emphasize its unique dignity and power, the legal phenomenon that is to be studied and judged ends up being deformed.

2. The inductive dissection approach

A second type of approach is less rigid and, in appearance, free from the rigidity that a more general approach imposes. It can be labelled the "inductive dissection approach" or simply *particularism* (Dworkin, 1998, 2011). With this approach, the scholar first sets out to uncover different trends of contemporary legislative criminalization, establishes sufficiently clear distinctions in order to analyze them, and finally, attempts to set ad hoc critical standards related to each trend. Those distinctions might appeal to the heterogeneity of substantive moral conflicts involved in criminalization discussions (*moral particularism*). But the acknowledgement

of relevant differences can refer not only to the nature of the moral discussion itself but also to the legal structure of a certain group of criminalization decisions; a *legal-structural particularism* is thus also observable in current scholarship.

To illustrate the main features of contemporary legal-structural particularism, it might be helpful to briefly make reference to the vast body of literature that has been produced on "preventive criminalization" (Ashworth & Zedner, 2012, 2014, p. 24; Asp, 2013; Zabel, 2017, p. 16). Following the groundbreaking analysis made by the German scholar Günther Jakobs in the mid-1980s (Jakobs, 1985) and the reality of anti-terrorism legislation following the 9/11 terrorist attacks in New York City (Ashworth & Zedner, 2014, Chapter 8; Tadros, 2007), several pieces of scholarship in both continental and English-speaking literature have established the existence of a contemporary tendency to criminalize actions that are seen as preparatory for other offenses (terrorist acts, sexual abuse of children, etc.). As the general model of substantive criminalization that dominated Western democracies for the last two centuries, namely responsible harmful wrongdoing (Husak, 2008, p. 65; Lacey, 2016), does not seem to be followed here, several different scholars have thus set out to establish a specific justification or "rationale" for preventive criminalization. Other distinctive categories can be seen, for instance, in the category of "regulatory offenses" or in the criminalization of the consumption side on certain markets. Legal-structural particularism refers to the quest to identify trends of criminalization through legislative techniques that break with the common image of responsible and harmful wrongdoing, and to assess their merits without superimposing frameworks that have been specifically designed to work under that common image.

There is certainly no denying the relevance of this type of literature, as it allows us to go beyond overly abstract critical standards, and acknowledge and then criticize different regulatory rationales that are relevant in contemporary political systems (Lacey & Zedner, 2017). Although the conceptual pluralism involved in such an approach can certainly be seen as affecting consistency, it is hard to deny that the relationship with the real practices of criminalization is much better served this way as under the first approach. The same might be said of moral particularism.

However, in what matters to symbolic criminalization conflicts, some of the same problems that affect the more general theories are also present in both moral and legal-structural particularism. In general, both the image of

the criminalization claim as an authoritative normative decision emanating from one personal source (state, government) and the image of the goals linked to criminalization decisions as those that can be attributed to criminal legislation at face value are still present here.

This can be seen by taking a quick look at two well-known contributions that can be considered as part of this trend, namely Gerald Dworkin's (1998) defense of Devlin's argument against a principled approach to the question of criminalization, and Husak's (2002; 2008, pp. 60–61) criticism of the tendency among philosophical and legal scholars dealing with criminalization to focus on the question of the enforcement of morality. In both cases, the political question that is addressed assumes the impersonal form that characterizes legal philosophy's social imaginary.

In the case of Dworkin, the central question around which the analysis of criminalization is organized deals precisely with the legitimacy of the "enforcement of morality" by the law/government (Dworkin, 1998, p. 930). As legitimacy is judged here in relationship to impersonal actions of government, the central question of his contribution refers to whether non-harmful wrong conducts can be prohibited by law and subject to state coercion (p. 943), that is, to the law as an output connected only with an impersonal author. Moral particularism here is simply an answer—a negative one—to the question that drives top-down critical approaches; and yet the question with which they tackle symbolic conflict is maintained.

In his highly relevant book on the subject of criminalization, Doug Husak notices precisely this problem: by focusing on the question of the enforcement of morality (that is, with symbolic conflicts) inherited from nineteenth century liberalism and the Hart-Devlin debate (or the reform of sexual crime laws in most of the West), the real problems connected with the evolution of criminalization are simply ignored by most contributions to the theory of criminalization (Husak, 2008, p. 61). For Husak, the issue seems to be that of opportunity. The tendency to enact overlapping offenses, to criminalize risk and other phenomena that have taken place in recent legal evolution, provoked major changes in the criminal justice system as a social governance system, whereas the issue of the enforcement of morality would be much less relevant for the criminal justice system. The image of criminal law as an impersonal tool of social governance plays no role here in deforming the real issues related to symbolic criminalization, but rather is used to dismiss the usefulness of debating about those issues. Husak's point is partially right: as a tool of social governance applied

on a mass scale, symbolic criminalization plays only a minor role. But this is precisely so because its relevance is not to be found there. In reference to this issue, the inability to correctly deal with symbolic criminalization derives from the same source.

B. Socio-legal Theories of Criminalization and the Initial Argument Against Mainstream Criminalization Theory

As we have seen, the shortcomings in addressing symbolic criminalization that are linked to mainstream scholarship deal with the methodological understanding of the law and the state that is assumed by most legal philosophers. Those same shortcomings have been highlighted in recent years by socio-legal studies dealing more generally with criminalization (Lacey & Zedner, 2017; Ramsay, 2012). However, that source of criticism has not been used, as far as I can see, to highlight the real problems that we face regarding symbolic criminalization conflicts.

The lack of concern with symbolic criminalization from more realist-oriented scholarship comes from a shift in focus: a move from interest in legislation toward interest in practices of criminal law enforcement and punishment allocation (Lacey, 2016) or in social government rationales in criminal law policy (Ramsay, 2012; Simon, 2007). By focusing too narrowly on legislation as the paradigmatic source of modern law and instead simply focusing on the abstract justice evaluation of the content in those rules, traditional legal scholars would seem to have chosen to leave aside the integration of legislation into a system of administration of power whose effects can only be judged by looking in detail into "the law in action." Using a different focus, this trend can be easily recognized in both U.S. and British legal scholarship.

In the United States, the impact of "overcriminalization" on the bargaining power that prosecutors have gained has meant that the traditional approach has been supplemented with more pressing concerns related to the recent evolution of the criminal justice system (Husak, 2008). Legislative criminalization is thus analyzed in relation to its potential impact on the real allocation of punishment. In the United Kingdom, the same traditional normative approach has been supplemented with questions of historical meaning and explanation of criminalization trends (Farmer, 2014, 2016; Lacey, 2009, 2016; Lacey & Zedner, 2017). Criminalization is thus removed from its normal place in legislation theory and made into

part of an analysis of the distribution of punishment at the level of the real subjects of the criminal justice system.

William Stuntz and Nicola Lacey's works are illustrative of this type of movement in their respective areas of work. In the case of the late Stuntz (2002, 2006, 2010, p. 258), the analysis of criminalization is part of a general assessment of what caused the unprecedented expansion of the U.S. criminal justice and correctional system: legislative pushbacks against procedural restrictions through increasing criminalization and increases in prosecutors' bargaining power. Criminalization is here, and in similarly oriented pieces of scholarship (Brown, 2007, p. 228), studied not in relationship to its justice merits, but rather to assert its impact on changes in the practice of punishment allocation and enforcement in the broader criminal justice system. This calls for a much more fine-grained level of analysis than the abstract evaluation of morality: it is only through a reading of the interaction among political trends, legislative action, and prosecutorial politics, and of their impact on criminal procedures, that criminalization can be properly understood (Husak, 2008).

On a more abstract and theoretical level, Nicola Lacey has insisted on breaking with the scholarly practice of discussing criminalization as a purely legislative concern and instead analyzes "criminalization" as a complex administrative phenomenon: criminalization theory certainly deals with the political decision to subject certain conducts to punishment, but the real definition of what conducts are actually criminalized as a matter of social governance cannot be known without looking at enforcement behavior. The starting point of her analysis of criminalization is thus precisely the assumption based on the centrality of the practices of punishment allocation as an object of inquiry. "My argument makes the assumption . . . that the meaning of what goes on in criminal courts can only be understood by tempering our interpretation of legal-doctrinal arguments with socio-legal facts about how cases are selected for trial and processed after conviction, about the operation of rules of evidence and procedure, and about the institutional structure of criminal courts. In short, my argument assumes that criminal law can and should be understood *as part of an integrated process of criminalization* . . . " (Lacey, 2016, p. 14).

Conceptually, this scholarly displacement of interest is expressed by Lacey's distinction between the concepts of "formal" and "substantive" criminalization and its focus on the latter (Chalmers & Leverick, 2014;

Lacey, 2009, 2016, p. 15; Lacey & Zedner, 2017). This is an important and influential distinction. Formal criminalization designates the purely semantic aggregated definition of all offenses in a formal legal system—that is, a system as established by formal rules of recognition (Hart, 2012, Chapters 5–6)—whereas substantive criminalization designates the patterns of enforcement and allocation of punishment to real conducts by all officials involved.

The distinction between formal criminalization and substantive criminalization is introduced to explain the shift in focus: traditional scholarship focuses exclusively on formal criminalization at the legislative level, whereas the real definition of what is actually punished has to be supplemented by a study of substantive criminalization.

The advantages of such an approach to the theoretical (and empirical) study of criminalization can easily be seen: the theory is not only directly connected to the real practice to which it refers, but the object of research is at the same time expanded and connected to the real experience of both officials and subjects of the criminal justice system. There is no questioning the "fit" of theory and practice.

In the case of symbolic criminalization, however, the same goal to produce *fitting* theoretical knowledge cannot be achieved by focusing on enforcement practices. Here, it is precisely the quest for the formal recognition of offenses that is sought out. Enforcement is secondary and, in many cases, arguably not even relevant for the practice. The actors pushing for criminalization or decriminalization may thus certainly act beyond the level of legislature, as is obvious in the (mainly) American practice of seeking favorable decisions by means of federal or state litigation (Kagan, 2002). Litigation and judicial decisions are, however, substitutes of state politics and legislation because, as we have seen, it is the "expressive capital of the criminal law" (Kahan, 1999, p. 421) that is made into an object of appropriation. Theoretical inquiry into symbolic criminalization should therefore *not* move away from legislation.

This has normative implications. The shift toward criminalization as real punishment allocation can be linked to a moral intuition: in the areas in which the criminal law does work as a tool of social governance through coercion, the lives of individuals are affected by enforcement practices (policing, trial, sentencing) and not by abstract definitions. Enforcement practices might well be partially dependent on abstract definitions taken at the legislative level or on important judicial or administrative decisions, but

those decisions cannot fully explain the patterns of enforcement. From the viewpoint of normative legal scholarship, the shift in focus represented by the insistence on studying "substantive criminalization" should perhaps be seen as a call for distributive justice evaluations to take those practices into account. For our purposes, it is, however, not *that* call which is relevant, but rather a focus on the real goals of criminal legislation decisions or its substitutes: meaning imposition. And this does not take place at the level of enforcement but rather of formal recognition.

III. MEANING IMPOSITION, LEGITIMACY AND INSTITUTIONAL CONSTRAINTS

A. Changing the Questions

As we have seen, taking a closer look at the practice of symbolic criminalization not only gives us more information about the reasons for its persistence, but can also serve as a call to change the moral and constitutional questions that are connected to the practice of symbolic criminalization: in this area, governed by a very specific form of political rationality, the central moral question is not about the conditions under which the achievement of social governance is illegitimate, or about the legitimacy of the neutral enforcement of morality by an impersonal agent, but rather about meaning imposition between social groups. Criminal law is not only a tool for achieving social governance but also a tool for contemporary cultural struggles. Under what conditions is it sensible to acknowledge the power of social groups to attempt to frame meaning through legislative and other legal products, especially through formal criminalization?

This question is not frequently dealt with in mainstream normative legal and philosophical scholarship, which operates rather under the concept of the "enforcement of morality." Structured from a neutral and impersonal standpoint, the question regarding the conditions under which meaning framing through formal criminalization is legitimate is hardly posed at all. A rare exception, Dan Kahan (1999) is however more concerned with showing how the use of "deterrence arguments" in symbolic criminalization conflicts plays a role in attempting to hide the true, illiberal nature of criminalization conflicts. In other words, even if Kahan certainly notices

and analyzes the phenomenon, he does not aim at evaluating the practice itself but instead attempts to highlight the sublimation role that traditional scholarly arguments play in this field.

The lack of normative treatment for the phenomenon of symbolic criminalization is, of course, understandable, as the very idea of judgment framework imposition through the criminal law has a sinister tone to it—perhaps even more than the already unpopular idea of the impersonal enforcement of morality. Social movements may seek to impose meaning frames through all forms of social mobilization, but don't they go too far when they criminalize social markers of opposing groups? Even posing the question about their legitimacy would imply that we acknowledge that the practice is at least sometimes right—perhaps even that step should be avoided. And yet, everyday reality shows that this type of political behavior abounds and that it is not always rejected as unfair. Symbolic conflicts can bring about judgment coordination in a positive way. Of course, it is not unusual that this form of coordination is re-established through decriminalization rather than criminalization (Brown, 2007). The campaigns to abolish the criminalization of obsolete "moral" offenses (adultery, same-sex intercourse, or incest between siblings) can be categorized as being part of this trend. But there is nothing preventing criminalization from achieving this result. An expansion of sexual offenses to include some cases of harassment or the expansive redefinition of rape would probably be compatible with the general moral frameworks that recent scandals have shown to exist.

If claims to criminalization and decriminalization with symbolic goals are not taken as illegitimate per se, two fields of inquiry open up. The first is purely normative and abstract, and deals with establishing the conditions for legitimacy of the practice as a question of political philosophy. The second is institutional and at least partially procedural, dealing with possible constitutional constraints to accepting legislative decisions regarding symbolic criminalization.

B. Framing Through Criminalization as a Justice Question

As the imposition of a normative framework through the expressive value of the criminal law, symbolic criminalization decisions need political justification. Formally, their justification emanates from their being taken through the procedural means of democratic legislation. But a democratic decision can be right or wrong; otherwise, the very practice of criticizing

legislative decisions would be pragmatically shallow. What kind of substantive justification can be linked to such a decision?

The legitimacy of such a decision must be based at least on the possibility of identifying from a neutral perspective one beneficial effect of the practice. In the context of plural societies, excluding at least one of the rival frameworks applicable to a certain issue can coordinate judgment frameworks, and the symbolic capital of the law can theoretically play that role. In societies that are, however, committed to freedom of opinion and tolerance, the use of the law to exclude moral and cultural frameworks carries with it a prima facie aura of suspicion. In other words, the gain that is obtained by coordination cannot by itself justify the decision.

This imposes different conditions of legitimacy to criminalization and decriminalization claims with symbolic relevance. In the latter case, the claim itself is the expression that a given cultural framework is affected by the content of the criminal law. Although this effect might be appropriated by one of the conflicting groups, it is still the law that imposes that burden on a group. Thus, the decision to decriminalize the symbolic conduct that marks a group's identity as illegitimate can be deemed legitimate by the mere fact of the suppression of the burden, as long as the affected framework may be deemed acceptable. Although the decriminalization decision in that case will not necessarily result in judgment coordination, it should at least mark the acceptance of a certain identity and therefore will be reconcilable with the neutral framework of tolerance and acceptance. This should account for the natural tendency of legal scholars and (traditional) civil rights movements to associate positive normative evolution with symbolic decriminalization.

In the case of symbolic criminalization claims, on the other hand, the conditions of legitimacy seem to be much stricter. One of the main liberal arguments in excluding simple wrongdoing as a sufficient reason to criminalize might account for this: even though anyone who is not a radical moral sceptic might have to acknowledge that it is good that morally wrong actions do not take place (Dworkin, 1998), acknowledging a broad space of reactive state coercion through the criminal law to enforce morality bears too great a risk to be politically acceptable (Feinberg, 1990, p. 11). There is, of course, much that is right with this line of thinking; procedurally, it may account for higher burdens of persuasion for symbolic criminalization claims when compared to decriminalization. But the reasons that may account for the legitimacy of a criminalization decision are actually very

much the same: in a democracy that is committed to diversity and tolerance between social groups, symbolic criminalization can only be acceptable if it at least marks judgment coordination in the sense that the excluded framework is seen as incompatible with tolerance and respect. Yet again, this accounts for the fact that, when symbolic criminalization is associated with positive normative evolution, it is so by linking the decision with a gain in tolerance.

C. The Institutional Challenge Linked to Symbolic Criminalization and Decriminalization Claims

Although the brief reflections on the conditions for the legitimacy of symbolic criminalization and decriminalization decisions presented above might strike the reader as simple and, hopefully, convincing, this is so because the challenge presented by this phenomenon is institutional and political rather than moral. Politically, the phenomenon of symbolic competition is a reflection of what classic democratic political thought saw as the danger of factionalism (Madison, 2001) for democracy. Although its effects might be beneficial and compatible with democratic values, what is at stake for the acting groups is simply identity confirmation and not neutral justice realization. This is, of course, the pessimistic diagnosis of current political reality under the culture wars hypothesis (Hunter, 1992). As Madison (Madison, 2001) in *Federalist No. 10*, could already see, with regard to the causes, factionalism cannot be controlled without falling into tyranny or utopia. In our times, however, his confidence in the ability of representative democracy to tame the effects of factionalism might be seen as overly optimistic. Therefore, wouldn't any sort of institutional ban on this sort of legislative decision, at least when it comes to criminalization, simply be the only sensible solution?

The voices pushing for stronger forms of substantive constitutional criminal law review powers seem to share this mindset (Dubber, 2011; Greco, 2008, 2013; Kudlich, 2015; Schünemann, 2016; Stuntz, 2006). Unfortunately, as any form of institutional control is entwined not only in legal but also in political rationality, very intense dangers are linked to the involvement of any court or agency in deciding such a conflict. Symbolic competition arises *out of the fact* of pluralism and lack of coordination. As such, a decision by a controlling agency to hold a statute unconstitutional brings with itself the danger of being mired in the political conflict that gave

rise to that statute (Wilenmann, 2017, p. 35). This is so even in the case of decriminalization claims, as resisting parties may also be involved in them. When considering legislation as a process in which both promoting and resistant parties are involved, the insufficiency of assuming a third-person position becomes even more transparent (Brown, 2007, pp. 245–249).

In the context of the debates on judicial review as a matter of comparative constitutional law, the problem of political pushbacks is well known. Two broad mechanisms of generating unwanted political consequences can be distinguished here: an aggressive decision may trigger a direct reaction against the decision or even against the deciding court itself (Young, 2017, Chapter 4). More generally, however, the long-term political consequences of overly aggressive control decisions on politically relevant issues may be counter-productive, both in terms of limiting substantive criminalization (Stuntz, 2006, 2010) and in the maintenance of a balanced institutional setting.

This does not mean, however, that any form of institutional control should be ruled out altogether. In the case of decriminalization, for instance, the permanence of a criminalizing law is not necessarily linked to a represented political group having stakes in its continued validity and application. Sometimes, as perhaps is the case with incest between siblings, permanence is simply the expression of legal inertia and lack of interest in revising the content of the law. If the law is constitutionally problematic, the intervention of an institutional agency with standing shouldn't be overly disruptive.

Aside from the wisdom implied in prudent restraint regarding hot button issues, the likeliness of pushbacks also has implications regarding the types of arguments that must be deemed persuasive in symbolic issues. In particular, the consideration of political acceptance when judging symbolic criminalization norms or decisions seems to be especially relevant (Brown, 2007, p. 251; B. Friedman, 1993), as it becomes apparent from the American discussion on the constitutionality of laws criminalizing same-sex intercourse: the main criticisms addressed at the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), by the majority in *Lawrence v. Texas*, 539 U.S. 528, 572 (2002), refer precisely to the fact that the *Bowers* Court did not take into account that political development was "pointing in an opposite direction." The success of *Lawrence*, when compared to *Roe v. Wade*, may come precisely from a better judgment on acceptance.

CONCLUSION

By focusing on symbolic criminalization decisions, this article has shown the shortcomings that affect current theoretical scholarship on the subject. In general, it has shown that research on formal symbolic criminalization is affected by lack of regard for the input side of the legal system. The complexity of the real world makes the reconstruction of the demands on the legal system and their processing through legislature an inevitably reductive exercise. But clarity can be gained through such an exercise.

In this article, the input-sensitive analysis was certainly only applied to symbolic conflicts and to other forms of political action whose very purpose is to achieve pure formal legal recognition. This certainly does not mean that all formal criminalization demands and decisions should be analyzed and judged in a similar way to symbolic criminalization. Current legal scholarship, however, has been much more successful in reconstructing and criticizing the political rationality of recent criminal policy that aspires to be of effect in social governance (Dubber, 2002; Garland, 2002; Goodman, Page, & Phelps, 2017; Loader & Sparks, 2013; Ramsay, 2012; Simon, 2007; Zimring, 2005). Following the same spirit, the article's contribution lies precisely in showing the differences in both the type of political rationality that is involved here as well as in the radical differences in the moral and political philosophical questions that are raised through this practice.

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