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Aniceto Masferrer *Editor*

Criminal Law and Morality in the Age of Consent

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Aniceto Masferrer
Editor

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Editor
Aniceto Masferrer
Faculty of Law
University of Valencia
Valencia, Spain

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Contents

Criminal Law and Morality Revisited: Interdisciplinary Perspectives

Aniceto Masferrer

Abstract The relationship between morality and criminal law must constantly evolve to meet the needs of changing times and circumstances. Social changes and new situations require new answers. This chapter will take the famous 'Wolfenden Report' (1957) as a starting point for reviewing the interaction of criminal law and morality, in the context of the broader relationship between politics, law and morality. Moral laws and civil laws have different limits and practical purposes, as is made clear in the writings of Aristotle, Thomas Aquinas and Spanish scholastics such as Francisco de Vitoria, Domingo de Soto and Francisco Suárez. Modern philosophers such as Descartes, Hobbes, Rousseau, Kant, and Mill also raise important issues concerning the relation between law and morality. This chapter will draw the line between and explain the inescaple connections between criminal law and morality.

The controversial relationship between morality and politics, and morality and law has been studied for more than two thousand years. Yet, it has never been definitively solved and most likely will never be. Law belongs to human culture, which touches upon a dynamic reality: relating nature to freedom and to culture. If such relations are not clearly understood, as it is the case today, then the same is true of the relation between morality and law.

This issue was very much a subject for debate in the wake of the 'Wolfenden Report' (1957), published by the British Parliament's *Committee on Homosexual Offences and Prostitution* chaired by Sir John Wolfenden.[1] This well-known text called for decriminalising consenting homosexual relationship among adults, brought

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A. Masferrer (✉)
Faculty of Law, University of Valencia, Valencia, Spain
e-mail: aniceto.masferrer@uv.es

[1]Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution.* London: Her Majesty's Stationery Office, 1957; it was reprinted in the

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a fierce debate in its wake. But beyond the specific recommendations of the 'Wolfenden Report', the discussion revolved more generally around the relation between criminal law and morality,[2] with Patrick Devlin and Herbert L.A. Hart as the main protagonists.[3]

The Report was notably ambiguous concerning this complex relation. On the one hand, it pointed out that "[u]nless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[4] On the other hand, the Report recognised that the purpose of criminal law went beyond the mere protection of life, freedom and property: "Its function […] is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others…".[5]

The Report was right to recommend the decriminalization of homosexual behaviour between consenting adults in private,[6] but it did not provide a coherent, theoretical framework on the relation between criminal law and morals. There is no doubt that not all immoral behaviour—or sins—should be criminalized: sins and crimes are not the same, as the moral and legal orders differ. It follows that Human law should never attempt to forbid all vices.

The relation between criminal law and morality derives from the relation between politics, law and morality, whose provinces are different. Moral laws and civil laws have different limits and practical purposes. The sphere of moral law is much broader than civil law, which means, for example, civil laws should never concern themselves with the criminal thoughts a person may have inasmuch as they do not go beyond that, i.e. any kind of external act. As to practical purposes, civil laws have their own ethical-practical rationality, which affects not only the reasoning process but also the realm to which it applies.

Moral law—or natural law—is the light of the intellect, or practical reason—that directs the acts of everyone in accordance with the purpose—or *telos*—of human life, namely, happiness. Moral laws are supposed to distinguish good from evil and provide the principles that enlighten human behaviour and lead humans to their perfection and to a life of virtue. Moral laws or natural laws affects the whole moral order, as far as it is naturally knowable to unaided human reason.[7] Natural law is

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US with the title *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution*. New York: Stein and Day (1963).

[2]Chesser (1958), Berg (1959).

[3]Devlin (1959, 1962, 1965) and Hart (1963, 1965).

[4]Wolfenden Report, § 62 (I am using the text quoted by Devlin (1989)).

[5]Wolfenden Report, § 13.

[6]In 2003 the US Supreme Court struck down the sodomy law in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory (Lawrence *v.* Texas, 539 U.S. 558).

[7]Thomas Aquinas, *Summa theologiae*, 1–2, q. 19, a. 4, ad 3: "Although the eternal law is unknown to us according as it is in the Divine Mind: nevertheless, it becomes known to us somewhat, either

simply moral law as far as it is knowable by natural human reason and it refers to all moral virtues, regulating their rational structure, and also forbids all vices.

Civil law does not cover the same range as moral law since it only establishes what is politically necessary and opportune, and it punishes only what is necessary from a strictly political point of view (which Aquinas called the "common good of justice and peace"), and to which today we could add "liberty". It is clear that not everything natural moral law commands or prohibits must also be commanded or prohibited or even criminalised by civil or positive law.[8] Thus, while moral laws measure all human acts, civil laws just order the community with respect to the common good.

The legal-political domain is different but not opposed to, or at odds with, the practical reasoning of morality. The formal object, however, is different since it seeks to guarantee human life in a social community and this requires avoiding anything that, by threatening social peace, liberty and justice, could make coexistence unbearable. For that to be possible, the first requirement is security granted by the state to protect vulnerable people from violence exerted by either powerful individuals or the state itself. For that to be possible, the state has the "monopoly on violence", a Max Weber category whose origins can be traced back at least to Thomas Hobbes and Jean Bodin.[9] The state's use of legitimate force through passing and applying coercive laws is justified to guarantee the survival and security of individuals, and both goods (survival and security) constitute the first content of the aforementioned "common good".[10]

Hence, while moral laws regulate individual behaviour seeking the good in the acts themselves, civil laws regulate relations between individuals seeking the common good. Civil laws do not seek to promote the moral perfection of individuals, but rather to guarantee security and provide as much as possible the conditions for a peaceful, free and fair society, in which individuals could be happy and develop good lives making their own choices. If the purpose of moral and civil laws is different, the reasons why behaviour might be immoral (contrary to moral or natural law) or illegal (contrary to civil or especially criminal law) are also different. For example, while moral laws forbid any kind of lie, civil laws prohibit only those lies that could cause real damage to someone considered relevant enough for the whole of society, because they threaten social order as well as safe and peaceful coexistence.

Thus, civil laws should never sanction or even punish behaviours for the exclusive reason of being gravely immoral. In other words, constitutional states should never use their coercive power sanctioning civil laws to enforce a moral order or to force

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by natural reason which is derived therefrom as its proper image; or by some sort of additional revelation."

[8] Rhonheimer (2013a, b), 282.

[9] Weber (1919); of the English translations available, I am using *Weber's Rationalism and Modern Society* (translated and edited by Tony Waters and Dagmar Waters), New York: Palgrave Books, 2015, pp. 129–198; Jean Bodin, *Les Six livres de la République* (1576); Thomas Hobbes, *Leviathan* (1651).

[10] Here I am following Martin Rhonheimer's line of reasoning (1995), 271–334; I am using the English version: Rhonheimer (2010), ch. 7.

individuals to lead their lives according to a particular morality. For example, if any state approves a law criminalising abortion, this should not be to avoid immoral actions or help individuals lead a virtuous life, but rather to protect those whose lives would be gravely threatened by this (abortion), and also to protect pregnant women from social pressure in general or from particular individuals (e.g. partner or relatives). Therefore, the reasons for criminalising this behaviour should not be moral, but legal-political (although this realm should not necessarily be seen as opposed to morality).[11] The protection of human life through civil law is a political and legal duty, and the reasons why some forms of violence or threats against life are criminalised should also be political and legal, although this would also entail the use of other kinds of arguments (e.g. biological, anthropological, ethical and sociological, etc.).

These ideas are in line with a vein of thought that generally runs from Aristotle to Thomas Aquinas, although they did not envisage civil laws in the same terms. Aristotle maintained that civil laws should be formative or educational, leading individuals towards a virtuous life.[12] He envisaged law as the best state tool for public control and education the best for the individual.[13] Thus, legislating was the best option for people willing to help others to be better as humans.[14]

Christian thought, however, made a distinction between divine and human laws, giving rise to a dualism whereby the purpose of morality and civil laws was different—albeit not necessarily opposed. In this vein, Irenaeus of Lyons, for example, defended security as the main goal of civil laws, so "men may not eat each other up like fishes."[15] Following this line of reasoning, Augustin, when distinguishing between the earthly and the heavenly city, clearly stated their different goals: how the former seeks, above all, "an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's

[11] See Rhonheimer (2013b), Why Is Political Philosophy Necessary, 1–35.

[12] Aristotle, *Nicomachean Ethics* X, 9, 3rd paragraph (I am using the version available at https://classics.mit.edu/Aristotle/nicomachaen.html): "But it is difficult to get from youth up a right training for virtue if one has not been brought up under right laws."

[13] Aristotle, *Nicomachean Ethics* X, 9, 7th paragraph: "For public control is plainly effected by laws, and good control by good laws; whether written or unwritten would seem to make no difference, nor whether they are laws providing for the education of individuals or of groups-any more than it does in the case of music or gymnastics and other such pursuits."

[14] Aristotle, *Nicomachean Ethics* X, 9, 9th paragraph: "And surely he who wants to make men, whether many or few, better by his care must try to become capable of legislating, if it is through laws that we can become good.".

[15] See, for example, Irenaeus of Lyons, *Adversus haereses* [Against Heresies] V, 24, 2 (I am using the version available at https://www.newadvent.org/fathers/0103.htm): "Earthly rule, therefore, has been appointed by God for the benefit of nations, and not by the devil, who is never at rest at all, nay, who does not love to see even nations conducting themselves after a quiet manner, *so that under the fear of human rule, men may not eat each other up like fishes*; but that, by means of the establishment of laws, they may keep down an excess of wickedness among the nations" (emphasis is mine).

wills to attain the things which are helpful to this life."[16] Consequently, Christians are called to live under, "diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace."[17]

Thomas Aquinas inherited this Christian legacy, and unlike Aristotle, maintained that civil laws should not primarily attempt to lead individuals towards virtue and moral good. According to him, peace was the main purpose of political communities and civil laws:

> "Now note that the end of human law is distinct from the end of divine law. For the end of human law is temporal peace within the political community (*temporalis tranquillitas civitatis*), and human law achieves this end by curbing exterior acts that involve evils capable of disturbing the peaceful state of the political community. By contrast, the end of divine law is to lead a man to the end of eternal happiness…".[18]

Thus, Thomas Aquinas' way of thinking, like the Committee that drafted the "Wolfenden Report", was that human law should never try to forbid all vices:

"Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like".[19]

This means that, according to Thomas Aquinas, the relation between divine and civil law was asymmetric, and the latter should not entirely follow the former. He even argued that this was not a defect of civil law but something proper to its own realm and disposed by divine law:

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[16] Augustine, *De civitate Dei* [The City of God] XIX, 17 (I am using the version available at https://www.newadvent.org/fathers/1201.htm): "The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's wills to attain the things which are helpful to this life. The heavenly city, or rather the part of it which sojourns on earth and lives by faith, makes use of this peace only because it must, until this mortal condition which necessitates it shall pass away. Consequently, so long as it lives like a captive and a stranger in the earthly city, though it has already received the promise of redemption, and the gift of the Spirit as the earnest of it, it makes no scruple to obey the laws of the earthly city, whereby the things necessary for the maintenance of this mortal life are administered; and thus, as this life is common to both cities, so there is a harmony between them in regard to what belongs to it.".

[17] Augustine, *De civitate Dei* [The City of God] XIX, 17: "This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace. It therefore is so far from rescinding and abolishing these diversities, that it even preserves and adopts them, so long only as no hindrance to the worship of the one supreme and true God is thus introduced.".

[18] Thomas Aquinas, *Summa theologiae*, 1–2, q. 98, a. 1 (I am using an English version available at https://www3.nd.edu/~afreddos/summa-translation/TOC-part1-2.htm).

[19] Thomas Aquinas, *Summa theologiae*, 1–2, q. 96, a. 2.

> "Human law is said to permit certain things not in the sense that it approves of them, but rather in the sense that it is incapable of directing them. However, there are many things directed by God's law that cannot be directed by human law, since there are more things subject to a higher cause than to a lower cause. Hence, the very fact that human law does not intrude into matters that it cannot direct flows from the order of the eternal law."[20]

However, he added that one thing is that civil law neither regulates nor forbids everything contained in divine law, but another to approve what is explicitly condemned by divine law (e.g. you shall not kill).[21] Furthermore, Aquinas explained that the asymmetry between divine law and civil law was not a sign of civil law's imperfection, but a manifestation of its own nature: that was different from divine law.[22] In this manner he distinguished between crime and sin.[23]

In fact, Western medieval and early modern legal traditions show that it was uncommon to criminalise behaviours merely because they were immoral acts or a sin, despite the fact that the distinction between crime and sin was not properly enforced in the context of some Christian territories governed by absolutist monarchs—who might have intently resorted to some medieval ideas.[24] However, this reality does not allow us to sustain, as some scholars apparently do, that until the Enlightenment there was no distinction between crime and sin.[25]

Aquinas' criterion to elucidate which immoral acts—or sins—should be regulated as a crime by civil law, was the common good. In his view, political power could approve laws to criminalize behaviours if they were—directly or indirectly—against the common good. After stating that "human law does not prohibit all the vices" and "does not command the acts of all the virtues," he states the following:

> "…human law does not issue commands concerning all the acts of all the virtues; instead, it commands only those acts which can be ordered toward the common good either (a) immediately, as when certain acts are done directly because of the common good, or (b) mediately,

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[20] Thomas Aquinas, *Summa theologiae*, 1–2, q. 93, a. 3, ad 3.

[21] Thomas Aquinas, *Summa theologiae*, 1–2, q. 93, a. 3, ad 3: "It would be different if human law were to approve of things that the eternal law condemns." Note that this text is the response to argument 3 cited below. Thomas Aquinas only argues against the affirmation that, because the human law does not prohibit everything the divine law does, not every human law is derived from the eternal law. Aquinas argues that exactly the fact that human law is not able to prohibit everything that is prohibited by divine law, does not contradict its being part of the eternal law, but only that it cannot perfectly reach (*assequi*) it.

[22] Thomas Aquinas, *Summa theologiae*, 1–2, q. 93, a. 3, ad 3: "Thus, it does not follow from this that human law does not flow from the eternal law; rather, all that follows is that human law does not perfectly measure up to the eternal law." There is no need to be a believer to grasp the consistency of Aquinas' argument and understand it. Moreover, the concept of eternal law in fact is not theological, but philosophical. The concept of divine law (revealed, divinely posited law) is not "theological" either. The concept of revelation can be grasped philosophically. It is only the belief in divine law, that is, the believe in the factual existence of a revealed of divinely posited law, which seems to me to be on the theological level because it presupposes faith.

[23] See Gilby (1958).

[24] See Carlyle (1903–1936); Arqulliere (1955).

[25] See Masferrer (2017c), 299–321; Masferrer (2017b), 693–756.

> as when the lawmaker commands certain acts pertaining to good discipline through which citizens are formed in such a way that they might conserve the good of justice and peace."[26]

For Thomas Aquinas, states can pass laws commanding "certain acts pertaining to good discipline," only if such external behaviour is really needed for the preservation of justice and peace, and not because it would constitute a moral good for individuals. He defended the view that political communities and civil laws are not required to seek the moral good of individuals but the common good of the whole society, namely, preserving social peace and justice. It is not the task of civil law to make good men, but preserve the conditions to guarantee social peace and justice. That is the common good of the society and hence the main goal of civil law, unlike moral law that concerns itself with moral good and the perfection of each individual.

In this regard, Spanish scholasticism developed Aquinas' ideas on the relation between divine law, natural law and civil law.[27] Francisco de Vitoria,[28] Domingo de Soto[29] and Francisco Suárez,[30] among others, developed his distinction between natural law and human law (or civil law), particularly Soto and Suárez, who, in their

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[26]Thomas Aquinas, *Summa theologiae*, 1–2, q. 93, a. 3.

[27]Thomas Aquinas, in his *Summa theologiae*, when tacklig the quaestiones of legal argument (Prima Secundae, Q. 90–114), distinguished and dealt with the four *leges* (*aeterna*, q. 93; *naturalis*, q. 94; *humana*, q. 95–97; *divina*, q. 98–114).

[28]Francisco de Vitoria, *Comentarios a la Secunda Secundae de Santo Tomás*, Salamanca, 1952, t. VI, *Quaestio nonagesimasexta* ('De potestate legis humanae'), *Articulus secundus* ('Utrum ad legem humanam pertineat omnia vitia cohibere') (In I, 2 *De lege*, *Quaest*. XCVI, art. II), p. 430: "Utrum ad legem humanam pertineat omnia vitia cohibere. Respondet quod non, et est notanda ratio. Non enim est quam multi putant. Quia enim leges ponuntur imperfectis oportet quod possint ferre. *Ratio quam dant aliqui est quia ea non turbant pacem reipublicae.* Non curant leges ut fornicatio, etc." (emphasis is mine); on I, 2 *De lege*, *Quaest*. XCVI, art. III ('Utrum lex humana praecipiat actus omnium virtutum'), p. 430, Vitoria made no comment at all; "Ut autem lex humana sit iusta et possit obligare, non sufficit voluntas legislatoris, sed oportet quod sit utilis reipublicae et moderata cum ceteris" (*Obras de Francisco de Vitoria. Relecciones*, ed. por T. Urdánoz, Madrid: Teológicas, BAC, 1960, n. 16, p. 183).

[29]Domingo de Soto, *De iustitia et iure*, Salamanca, 1553 (1st ed.), t. I ('De legibus'), Liber I, Quaest. VI, Art. II; I use the following edition: *Tratado de la Justicia y del Derecho* (trans. by Jaime Torrubiano Ripoll), Madrid: Editorial Reus, 1922, Vol. I, Lib. I, Ques. VI: 'Del poder de la ley humana', art. 2: 'Si es propio de la ley humana refrenar todos los vicios', pp. 139–143; see also Lib. I, Ques. VI: 'Del poder de la ley humana', art. 3: 'Si la ley humana manda los actos de todas las virtudes', pp. 143–146.

[30]Francisco Suárez, *Tractatus de legibus ac deo legislatore*: in decem libros distributus…, Conimbricae: Apud Didacum Gomez de Loureyro, 1612, Liber III ('De lege positiva humana secundúm se, et prout in pura hominis natura expectari potest, quae lex etiam civilis dicitur'), cap. I-XXXV, pp. 116–213); Liber V ('De varietate legum humanarum, et praesertim de penalibus, et odiosis'), cap. I-XXXIV, pp. 270–367; I use the edition (both in Latin and Spanish) entitled *Tratado de las Leyes y de Dios legislador*, Madrid: Instituto de Estudios Políticos, 1967, vols. I–III; see, for example, Lib. I ('De natura legis in communi'), cap. 3 ('De necessitate, et varietate legum'), n. 18: "…necessitas manat ex eo, quod lex naturalis vel divina generalis est, et solum complectitur quaedam principia morum per se nota, et ad summum exteoditur ad ea, quae necessaria et evidenti illatione ex illis principiis consequuntur; praeter illa vero multa alia *sunt necessaria in republica humana ad eius rectam gubernationem et conservationem*; ideo necessarium fuit, ut per humanam rationem aliqua magis in particulari determinarentur circa ea, quae per solam rationem naturalem

famous *De Iustitia et Iure* and *Tractatus de legibus ac deo legislatore*, respectively, dealt with the matter quite extensively. Following in Aquinas' footsteps, they maintained that the purpose of civil law was the common good, and the first was social peace and justice.[31]

Aquinas' category of "common good" for a political community was based upon an idea of nature—and human nature—that came from Aristotle and was both universal and teleological.[32] Both traits of nature were not admitted by nominalists, the mainstream scholastics from fourteenth century onwards.[33] For them, universals—or concepts—were not real, only individual; hence, human nature does not exist, only individual persons do. William Ockham and Joannes Buridanus stated that not all nature had a purpose, only that with self-awareness or a conscience. In other words, only God had ends, not nature itself. This idea gave rise to the emergence of mechanicism.[34] Descartes—like Leibniz and Wolff—developed this idea and, under Platoon's influence, rejected the Aristotelian unity of human nature by distinguishing between *res cogitans* and *res extensa*. The dualism between nature and reason, in which nature was commonly understood from a mere physicist perspective, permeated the whole modern thought.

All modern state theories worked from a non-teleological interpretation of nature. For example, in the case of Thomas Hobbes and Jean-Jacques Rousseau the original

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definiri non possunt, et hoc sit per legem humanam, et ideo fuit valde necessaria"; Lib. I ('De natural egis in communi'), cap. 3 ('De necessitate, et varietate legum'), n. 20: "Tandem vero haec positiva lex in civilem et ecclesiasticam distinguitur: quam divisionefti philosophi non agnoverunt, quia supernaturalem finem et specialem potestatem ignorarunt. Et ideo apud illos idem est lex humana, quae civilis, quam temporalem solet Augustinus appellare. *Est enim illa, quae ad civitatis politicam gubernationem, et ad temporalia iura tuenda, et in pace ac iustitia rempublicam conservandam ordinatur. Unde leges civiles circa haec temporalia bona seu corporalia versantur*"; Liber II ('De lege aeterna, at naturali, ac iure gentium'), cap. I-XX, pp. 98–194; Liber III ('De lege positiva humana secundúm se, et prout in pura hominis natura expectari potest, quae lex etiam civilis dicitur'), cap. I-XXXV, pp. 195 ff. (emphasis is mine).

[31] Domingo de Soto, *Tratado de la Justicia y del Derecho*, Lib. I, Ques. VI: 'Del poder de la ley humana', art. 3: 'Si la ley humana manda los actos de todas las virtudes', pp. 143–146, p. 145: "En suma, *la ley humana sólo prescribe aquellos deberes que atañen al bien común*, o de suyo y próximamente, como tomar las armas para la guerra pública: o indirectamente (como dicen), como lo que toca a la buena enseñanza, por la cual se *preparan los ciudadanos al bien de la justicia y de la paz*"; Francisco Suárez, *Tratado de las Leyes y de Dios legislador*, Lib. I ('De natura legis in communi'), cap. 3 ('De necessitate, et varietate legum'), n. 19: "Et ex utroque licet amplius rationem explicare. Nam in hoc fundatur, quod *homo est animal sociabile, natura sua postulans vitam civilem et communicationem cum aliis hominibus, et ideo necesse est ut recte vivat, non solum ut privata persona est, sed etiam ut est pars communitatis*, quod ex legibus uniuscuiusque communitatis maxime pendet. Deinde oportet, ut unusquisque non tantum sibi, sed etiam aliis consulat, *pacem et iustitiam servando, quod sine convenientibus legibus fieri non potest. Item necesse est, ut ea, quae ad commune bonum hominum seu reipublicae spectant, praecipue custodiantur, et observentur*: singuli autem homines et difficile cognoscunt id, quod expedit ad commune bonum, et raro illud per se intendunt; et ideo necessariae fuerunt leges humanae, quae communi bono consulerent, ostendedo quid agendum sit propter tale bonum, et cogendo, ut fiat" (emphasis is mine).

[32] On this matter, see González (1996), 85–125.

[33] See the works by Carpintero (2004, 2006, 2013).

[34] See González (1996), 127 ff., particularly 131–132.

"state of nature" was conceived as something opposed to the social dimension of man, and as a temporal reality, something that existed just in the beginning, being fortunately overcome through the social contract.[35] For Hobbes, as opposed to Aristotle—who defined man by nature for his political character—, the legitimacy of the state comes from its duty to preserve the survival and security of individuals. Isolated individuals living in an unbearable environment of violence, the state of nature (*homo homini lupus*), decide out of fear to enter into a contract whereby they renounce their right to self-defence and transfer their whole power and rights to a sovereign.[36] In short, men become free and secure by abandoning their original nature or state of nature.

Unlike Aristotle, Rousseau thought that individuals—or human beings—could be either men or citizens, and presented the notions of nature and reason (or freedom or history) as incompatible. As Spaemann pointed out, the root of this incompatibility lies in the non-teleological notion of nature.[37] For Rousseau, man is by nature an individual without language and society, so their socialization implies leaving nature behind.[38]

Although Immanuel Kant sought to overcome the reductionisms of mechanicism and empiricism, he neither prevailed over dualism nor brought back the teleological notion of nature. In his treatise on anthropology, he made a distinction between the physiological and pragmatic perspective: while physiological knowledge revolves around what nature did with man, pragmatic knowledge focuses on what man can or should do through his free will.[39] As can be seen, nature is presented as disconnected to human freedom, almost as much as it was in Hume's thought when he rejected the connection between what things are and what things ought to be, or, in other words, when claiming the impossibility of coherently moving from descriptive statements (what things are) to prescriptive ones (what things ought to be).[40]

This thought paved the way to historicism, so relevant in the nineteenth century. In this vein of thought, Wilhelm Dilthey, for example, stated that "what is man, only

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[35] See Spaemann (1992), 102.

[36] Masferrer, Talavera (forthcoming, 2021).

[37] Spaemann (1989), 34–37; González (1996), 148.

[38] Spaemann (1989), 35–36.

[39] Kant (1798; cited by Spaemann, 1989, 23).

[40] David Hume, *A Treatise of Human Nature* (1739), III, part I, section I: "In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, o *ought not*, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason."

history tells him."[41] The dichotomy between *res cogitans* and *res extensa* contributed to the emergence of thinkers who focus on the former—like Sartre for whom man has an unrestricted freedom—,[42] or others who focus on the latter, like Charles Darwin or Richard Dawkins who mainly define and characterize man for his physical or biological dimension.[43] It goes without saying that there were other philosophers or thinkers who brought human dualism to its extreme consequences: Friedrich Nietzsche and Sigmund Freud are probably the most representative figures whose influence is still undeniable today.

The Aristotelian, and particularly Thomist, categories that distinguish moral law from civil law collapse if considered from three perspectives: (1) human nature does not really exist or, if it does, it only refers to *res extensa*, being somehow an obstacle for man to grow as a person and develop his own free choices; (2) human freedom is not the product of human nature but just its mere physical substratum, being unconceivable that man might act freely thanks to his nature; and (3) human nature has no teleological dimension that enables human reason to grasp the purpose and the limits of his life and his free choices.

If human nature refers, above all, to the physical or biological aspect of man, then it is more than reasonable that, as Moore argued, animal behaviour cannot serve as a model of human behaviour.[44] Without a teleological conception of human nature, the meaning of the common good becomes impossible. The idea that there cannot be a common good at all because men do not share anything else other than a *res extensa* that restricts *res cogitans* which is supposed to be unrestricted freedom not subject to previous natural instances, have important consequences not only in the legal realm, but also in the social sciences in general, and particularly in moral theology, moral philosophy, political philosophy and social ethics. These ideas, for example, contributed to the emergence of wrong interpretations of Thomas Aquinas' moral philosophy.[45]

In law this philosophical doctrine has had consequences, both in the spheres of public law and private law. To begin with, two different notions have replaced the 'common good', namely, "public interest" and "public utility".[46] In addition, the meaning of some interdisciplinary legal notions such as "good morals" or "public

[41] Wilhelm Dilthey, *Gesammente Werke*, B. VIII, p. 224 (cited by Spaemann, 1989, 25).

[42] Franz Adler argues that the influence of phenomenologist epistemology led Sartre to think that "[m]an chooses and makes himself by acting. Any action implies the judgment that he is right under circumstances not only for the actor, but also for everybody else in similar circumstances" ("The Social Thought of Jean-Paul Sartre", *American Journal of Sociology* 55, 3).

[43] Richard Dawkins (1978), 145 and VIII—cited by Spaemann, 1989, 27–28—, affirms, for example, that "a mother is a machine for the optimal propagation of her genes", and that "we are machines for survival, robots blindly prepared for the conservation of those selfish molecules that we call genes".

[44] Moore (1983), § 28 (cited by González, 1996, 190–191).

[45] On this matter, see Rhonheimer (1987, 2006).

[46] Douglass (1980), 103–117; MacIntyre (1990), 344–361; Simm (2011), 554–562; Strang (2005), 48–74.

morality",[47] that were so relevant for centuries, have become notably devoid of meaning because they are not compatible with a legal system lacking a good that is common to all individuals who share the same nature.

If there is no common good, freedom becomes an absolute value,[48] and the purpose of civil law changes radically, turning into a tool of the state to mediate different and even antagonist individual choices, sometimes regardless of its negative impact on the whole social community. In addition, in order to protect such absolute individual freedom, states adopted Mill's "harm principle", whereby political power only can exercise its power over individuals, "against his will, (…) to prevent harm to others."[49] As Mill pointed out, the only reason for interfering with liberty was self-protection.[50] Without harm, the state should not interfere with individual choices. Sexuality becomes a paradigmatic area of individual choices in which state should not interfere.[51] If sexuality has no human purpose and moral value beyond to what is given to it by individuals, states should not interfere with it and furthermore confer legal protection under the umbrella of the right to privacy or even financially benefit some options, regardless of the social consequences of some sexual models. This new sexual paradigm adopted by states and legally implemented has radically changed some areas of law.

Many private law institutions have gone through radical transformations. Marriage is, most probably, one of the most important ones. The reason is easily understandable: if *res extensa* (or nature) is inferior to *res cogitans* (reason), and reason means moral autonomy not subjected to any previous instance, personal choices should not be restricted by physical conditions (masculinity, femininity), possible natural consequences of physical unions (children), and even less so by moral duties of loyalty or faithfulness. This explains why civil laws have admitted, and even facilitate, divorce, same-sex marriage,[52] in vitro fertilization. Only cultural circumstances explain why other forms of personal union are not yet admitted, such as incestuous marriages, polygamy (including both polygyny and polyandry). In fact, polyamory has been spreading notably in the last decade. The worst consequences of this change affect the most vulnerable part of families, namely, the children.

In the sphere of public law, relevant transformations have affected constitutional law and criminal law. Touching on both legal fields, the notion of human dignity,

[47] Legarre (2001), 268–277.

[48] John S. Mill, *On Liberty* (1859; I'm using the online version available at https://www.bartleby.com/130/), Introduction, n. 13: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."

[49] Mill, *On Liberty*, Introduction, n. 9: "That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

[50] Ibid.

[51] Kuby (2012, 2017) and Stanton (1992).

[52] From a historical perspective, see Dahan (2012), 75–108.

which appeared in the legal realm after the Second World War and whose origins and historical development were connected to human nature,[53] collapsed, becoming a useless concept.[54] As has been noted, Kant's attempt to affirm a "secular" dignity, based on autonomous freedom and on the ability to autonomously compose one's life, was a failure.[55]

The permanent creation of new "human rights" has gravely affected the substance and credibility of the current human rights system,[56] particularly when some of the new rights have become the most important ones, having primacy over the traditional fundamental rights such as freedom of conscience, freedom of speech, religious freedom and freedom of association, among others, and leaving vulnerable people unprotected.[57] In this vein, the right to privacy has gradually become the bulwark to protect the new so-called "sexual and reproductive rights".[58] Some states grant financial benefits to those who are willing to go through surgery to change their sex, but do not provide any support for those who would like to change from homosexuality. Furthermore, some laws prescribe sanctions for those who, unsatisfied with their sexual orientation, dare to seek help from a doctor.[59] Sex became a civil liberty paradigm.[60]

In the realm of criminal law, the replacement of the "common good" with the "public interest" or "public utility" affects an important legal category, namely, the legally protected good which is linked to human dignity and constitutes the cornerstone of criminal law. Both human dignity and legally protected goods are the most relevant notions of criminal law and have moral implications. *Velis nolis*, criminal law cannot be fully separated from morality. Most criminal policies and reforms generally entail moral options and by necessity have moral implications. For example, the Western tendency to replace the category (generally reflected in a rubric in criminal codes) 'Crimes against honesty' by another "Crimes against sexual freedom" has moral implications and shows a moral option: what is criminalised is not a conception of moral honesty that might be considered relevant for a peaceful society, but violence to someone in order to have a sexual relation against his/her real will, or

[53] Masferrer (2016), 221–256 and Masferrer (2019b), 203–213.

[54] Macklin (2003), 1419–1420.

[55] Carpintero (2016), 97–116, particularly 102; see also Carpintero (2012, 2013a).

[56] Masferrer (2017a), 331–358.

[57] Masferrer, García-Sánchez (eds.) (2016).

[58] On how the meaning and the purpose of the right to privacy radically changed to cover individual autonomy, see Sandel (1989), 521–538; Sandel (1996); Sandel (2005), 122–144, particularly 124–133; see also Wheeler (2015), ch. 4; Masferrer (2018), 813–841.

[59] LGBTI laws approved in many jurisdictions forbidding individuals who seek medical treatment concerning his/her sexual orientation follow the 18th Principle of "Yogyakarta Principles", that is a 2006 document drafted to be used as "a universal guide to human rights which affirm binding international legal standards with which all States must comply" (available at https://yogyakartaprinciples.org/); on this document, see Kuby (2017), ch. V, 127–155.

[60] Wheeler (2015) and Masferrer (2020).

without violence but through some kind of abuse (age, parenthood, educator, tutor, etc.).[61]

The decriminalization of abortion is the logical outcome of UN, EU and national states' policies promoting "sexual and reproductive rights".[62] If "safe sex" is considered a right, it would be illogical to criminalize the natural consequence of some kinds of sexual behaviour when contraceptive means fail or for whatever other reasons. In addition, sexual behaviour belongs to the individual's privacy and this realm is legally or constitutionally protected (right to privacy), thus its criminalisation would be incoherent. Thus states should guarantee the so-called "right to consequence-free sexual intimacy".[63] Despite all this, it is undeniable that the decriminalization of abortion is a moral decision with relevant moral, sociological, legal and political consequences.[64] And again, the most vulnerable party of an abortion (e.g. the unborn child) is hardly protected.[65] Note that the primacy of hedonism and amusement might easily lead to different kinds of violence.[66] Abortion is probably the gravest case, but there are more: pornography is another one in which violence is most patent.

Laws regulating pornography have also undergone notable changes, today generally permitted. In the context of an increasingly erotic society, it is easy for millions of minors to be exposed to degrading images promoted by companies that run multi-million businesses online and disseminate indecent images that are contrary to a minimum standard of humanity and public morality.[67] While "public indecency" in general terms is forbidden in many jurisdictions,[68] it is not always clear what constitutes illegal public nudity and not infrequently laws are not effectively enforced.

Today nobody denies the relevance of "public ethics" or "public philosophy",[69] as the basis of moral behaviour in open societies. In other words, that which defines what is good and what is evil for multicultural communities. Public ethics is a basic moral pattern, universal and generalizable, constituted by values and prescriptions of conduct, which affects individuals as citizens. Thus, this public ethics includes those principles and rules which are necessarily so that the coexistence of individuals in a society can be described as fair. The basic normative content of this public ethics is

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[61] On the role of violence to crimes related to sexuality in the early modern age, see Juhel (2012), 111–146.

[62] Wheeler (2015), ch. 5; see also, for example, Fathalla (1992), 3–29; see also Kuby (2017), 103 ff. (on the UN policy), 157 ff. (on the EU policy).

[63] On this matter, see Mulder (2014).

[64] In Sandel's view, for example, "[t]he justice (or injustice) of laws against abortion and homosexual conduct depends, at least in part, on the morality (or immorality) of those practices" (Sandel 1989, 122).

[65] Masferrer (2019a), 361–408.

[66] Ballesteros (1981), 265–315, particularly 280–293.

[67] Legarre, Gregory (2017).

[68] For the US, for example, the U.S. Supreme Court declared the right of states to outlaw public nudity, arguing that states have an interest in "protecting societal order and morality," and that public nudity is not "free expression" protected by the First Amendment (*Barnes v. Glen Theatre*, 501 U.S. 560, 568, 1991).

[69] On this matter, see Sandel (2005).

human dignity and human rights. In this sense, law and morals are united in "public ethics" as a basis of civil law and criminal law.

According to the liberal ideal whereby,"individuals find their good in different ways, and many things may be good for one person that would be no good for another",[70] there is "no *social entity* with a good that undergoes some sacrifice for its own good, (…) only individual people, different individual people, with their own individual lives,"[71] and "political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life."[72] Such a liberal ideal do not provide any consistent point of departure to ascertain a sound "public ethics" for society and the supposed state neutrality excludes what might be really good for society, that is, what socially matters, the intrinsic value or social importance (beyond individual choices). As Sandel pointed out, "[i]f the self is prior to its ends, then the right must be prior to the good."[73] Note that some liberals changed their view, such as John Rawls concerning the notion of "public reason"[74] and Ronald Dworkin regarding the relation between law and morals.[75] In this vein, Dworkin, after admitting that "morality and law" name departments of thought that are in principle distinct, though perhaps interdependent in various ways," suggested changing the traditional understanding as follows:

> "I want now to suggest that this traditional understanding, which encourages us to chart relations between two different intellectual domains, is unsatisfactory. We might do better with a different intellectual topography: we might treat law not as a separate from but as a department of morality. We understand political theory that way: as part of morality more generally understood but distinguished, with its own distinct substance, because applicable to distinct institutional structures. We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures."[76]

Treating "law not as a separate from but as a department of morality" implies recognizing that "[a]ll societies, whatever their virtue or lack thereof, must maintain some modicum of social order or they risk extinction,"[77] and that such order is necessarily moral. Morality implies duties, and rights as their consequence, and not the other way around, as liberals usually defend.[78]

The relationship between morality and criminal law must constantly evolve to meet the needs of changing times and circumstances. Humans cannot be detached from time and historical development. Social changes and new situations require

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[70] Rawls (1971), 448.

[71] Nozick (1974), 32–33.

[72] Dworkin (1978), 127.

[73] Sandel (2005), 147–155, particularly 153 (see *The New Republic*, 7 May 1984).

[74] Rawls (1997), 765–807; Rawls (1999, 2002).

[75] Dworkin (2006); on 'Law and Morals', see his 'Introduction' entitled 'Law and Morals', 1–35.

[76] Dworkin (2006), 34–35.

[77] Etzioni (1997), 10.

[78] Etzioni (1997), 19: "Civil libertarians are concerned with rights and not with duties; with entitlements and not with national service, tithes, and taxes. Above all, they oppose guidance by the government, and more indirectly by others, as to one ought to do."

new answers. In doing so, since the relation touches at least upon criminal law, legal philosophy and legal history, interdisciplinary approaches are always needed. This constitutes the contents of this book, which contains fifteen original contributions written by legal scholars from different European and American universities. The authors do not attempt to solve the complexity of the relation between morality and criminal law, but at least to express their criticism, offer proposals and stimulate further thought. If "[t]he principle of morality" is "to think well,"[79] thinking constitutes the first requirement.

That was the conclusion of a seminar I organized at the University of Valencia in September 2017 to commemorate the 60th anniversary of the abovementioned "Wolfenden Report", and the starting point of this book, which was devised within the context of that seminar. Many articles and book chapters have tackled the relation between criminal law and morality, but there are no books dealing specifically with the topic,[80] as there are books on the relation between law and morality in general. So, this book attempts to fill in this gap. Moreover, it does so by tackling the topic from an interdisciplinary perspective (criminal law, constitutional law, legal philosophy and legal history, among others). It is divided into three essential parts, dealing with the relation between criminal law and morality: Part I "Historical Perspectives"; Part II "Philosophical Perspectives" and Part III which touches on "Controversial Issues" such as abortion, pornography and euthanasia.

The historical content of Chapter "Criminal Law and Morality Revisited: Interdisciplinary Perspectives" illustrates the pertinence of approaching the relation between criminal law and morality from a historical perspective. It would otherwise be impossible to comprehend the current situation (even more so to provide possible criteria), ideas and arguments that might contribute to make criminal law more humane and just. The purpose of the chapter and Part I ("Criminal and Morality: Historical Perspectives") is to unveil some key historical factors that have configured the current criminal law and its relation to morality. In doing so, the authors' analyses are interdisciplinary, dealing with criminal law, legal history, legal philosophy and political philosophy.

In Chapter "The Rise of Ethical Reproach in Spanish Late Scholasticism", Harald Maihold deals with "The Rise of Ethical Reproach in Spanish Late Scholasticism." He argues that, according to modern criminal law doctrine, punishment was defined as a strong evil imposed by a sovereign for a guilt that was bound by an ethical reproach to the perpetrator. Heavy actions imposed by a sovereign can be found since the states of ancient history. Sin punishment and ethical blame, however, were unknown in the criminal law of those times. Then, in the heresy trials of the High and Late Middle Ages, self-understanding of criminal justice in practice was analogous to God's last judgment, and criminal justice was strongly based on the sacrament of penance. The idea of punishment was pinpointed also in theory not before the

[79] Pascal (1658), 232 (extracted from "What is Morality? Pascal's Heartfelt Answer", *Nordicum-Mediterraneum* (available at https://nome.unak.is/wordpress/09-2/c64-conference-paper/what-is-morality-pascal-s-heartfelt-answer/#_edn13).

[80] See, for example, Duff, Green (2011), but it did not touch directly upon our topic.

emergence of a peculiar literature on criminal law. Nevertheless, in canon law the notion of penalty still covered a wide range, beginning with penalties in the modern sense up to so-called "penalties" that could be imposed without any guilt but for certain reasons, for example medical and restorative penalties. Maihold explains that it only was in the sixteenth century, when Franciscan theologian Alfonso de Castro (1495–1558), one of the authors of the School of Salamanca, narrowed down the concept of penalty to its proper notion, defining it as an evil (or disease) that is to be imposed because of an own past sin of the perpetrator. In parallel to this, De Castro emphasized that by committing the criminal offence, the transgressor was not only bound to pay the penalty, but also "bound to blame": the one who broke a criminal law was burdened with sin. An ascertainment of the guilt-obligation of criminal law was a significant course setting for the ethical reproach which is addressed to the perpetrator by the modern criminal law. Criminal law did not only aspire to objective compensation by punishment, but also to a subjective state of the perpetrator: comprehension of their guilt, which was intended to speak to them as a moral person. For Maihold, the fact that an obligation in conscience was partially accepted even without a judicial conviction clearly shows that the ethical stigma was implied not only by condemnation, but now by the criminal threat itself. In its time, this can be understood as a response to the stress of conscience by the Protestant theologians, as an attempt to lead the religious deviance of the heretics relying on individual conscience back to ecclesiastical obedience by the authority of the criminal law.

Chapter "Liberties, Rights and Punishments in Modern Natural Law Liberty, Rights and Punishments", is by Manuel Rodríguez Puerto (University of Cádiz, Spain). The author explains that the arrival of modern legal conceptions did not lead to the strict separation of law and morals, but the moral consideration was influenced by an individualist point of view. The key to the arguments defended by the so-called school of modern natural law was to identify natural law, subjective right and liberty. The aim of the school of modern natural law was to defend a radical alternative to the scholarship of *ius commune*. *Ius commune* conceived law as the right solution of a controversy; and the right answer was induced from the human interrelationship arisen in the midst of social issues. Law was justified by the human necessities and the principles of natural law. This connection implied a close relation between morality and law in the foundation of legal order. The purpose of criminal law was to defend the fundamental legal goods rooted in objective principles. Rodríguez-Puerto shows how the School of modern natural law refused that objective conception of legal science. And the modern iusnaturalists rejected the strict connection between law and morals (from Thomasius onwards). But, finally, the key of their view of criminal law had a moral foundation because the purpose of this branch of law was to protect a human good: the natural liberty of the individuals.

In Chapter "Roman Dutch Criminal Law and Calvinism Calvinist Morality in De Criminibus (1644) of Antonius Matthaeus II" Janwillem (Pim) Oosterhuis (University of Maastricht, The Netherlands) touches upon the relation between crime and morality in the Calvinist sphere. "Roman Dutch Criminal Law and Calvinism: Calvinist Morality in *De criminibus* (1644) of Antonius Matthaeus II," he not only

shows the pervasiveness of Calvinism in criminal law in the early modern Dutch Republic, but also points out certain inherent ambiguities of Calvinism in Matthaeus' restatement of criminal law. Matthaeus' Calvinist conviction becomes particularly evident in the contested issues of criminal law. In discussion with Civil and Canon lawyers, but particularly also with other Reformed theologians and legal scholars, Matthaeus developed his own stance, on how to interpret and explain Roman criminal law and local customary criminal laws in light of the orthodox—Calvinist—religion. Matthaeus' consequent Calvinism can help to explain certain "modern" opinions, such as his rejection of torture as a means to extracting confessions. Due to the absolute primacy of divine will and law in *De criminibus*, the role of natural, practical reason remains quite limited. Indeed, although Matthaeus distinguished between moral and enduring laws with direct bearing on criminal law and religious prescripts without such direct consequence for the law, he failed to give any clear reason or criterion for such distinction. For criminal law, the enduring moral laws were to be found mainly in the Decalogue and the Mosaic Laws that explicated those commandments. According to Matthaeus, these enduring moral laws of the Decalogue corresponded with natural law. Basically, both Tables of the Decalogue, covering civil and spiritual morality respectively, should be upheld via criminal law. But in these commandments Matthaeus chose to strictly uphold some but was more lenient about others. Due to judicial discretion in the punishment of crimes, the teachings of Matthaeus could potentially have a far-reaching influence on such punishment. Importantly, Matthaeus did not equate all biblical teachings with enduring moral laws valid for the courts on earth. He notably refused to criminalize heresy. Indeed, for Matthaeus apparently many of the teachings of Jesus and the apostles concerned the conscience and what was right before the court of conscience. Matthaeus did not, however, provide a consistent reasoning for the underlying distinction between "private" and "public" morality. Despite a lack of theoretical clarity in distinguishing between divine and natural law, "public" and "private" morality, and enduring morals laws and religious prescripts, for Matthaeus in the end personal faith and dedication to God was distinct from law: the orthodox religion had to be taught, rather than imposed.

In Chapter "The Role of Nature in the Secularization of Criminal Law in Europe (17th–19th Centuries)" I analyse "The Secularization of Criminal Law in the Enlightenment" in order to ascertain and revise: Its Real Scope and Contribution." I show that some 17th-century contractualist legal philosophers such as Hobbes, Pufendorf and Locke, strove to separate criminal justice from religious, theological, or "moralist" arguments and founded it upon natural philosophy. In doing so, they resorted to nature, natural law and natural reason. Hence, they clearly distinguished between crime and sin. Enlightened authors adopted this legacy. In doing so, they did not defend a criminal law detached from morality, as if utilitarianism was the mainstream of the eighteenth-century criminal jurisprudence. Unlike Bentham, the majority of criminal law reformers such as Montesquieu, Beccaria, Rousseau, Voltaire and Kant, were not utilitarian, so most of them accepted both the social contract and laws of universal nature. This chapter also demonstrates that in Spain and France there was continuity on this matter with the nineteenth century. Some of the most important

nineteenth-century criminal lawyers resorted to—in as did most of the enlightened authors—nature, natural law and natural reason. In doing so, they defended the relation between criminal law and morality, and distinguished between crime and sin, rather than confusing or identifying these categories. Although both utilitarianism and legal positivism notably grew in France and Spain during the nineteenth century, they did not become the mainstream of criminal law jurisprudence until the twentieth century. I argue that perhaps those who today share a utilitarian conception of criminal law (nowadays undeniably the mainstream) are looking at the past anchored in the present, so they come to a false conclusion after misunderstanding enlightened criminal law jurisprudence.

In Chapter "Habits of Intelligence. Liberty of Expression and the Criterion of Harm in John Stuart Mill", Ignacio Sánchez-Cámara (University of Rey Juan Carlos, Spain) touches a central issue regarding the relation between criminal law and morality, namely, the "Habits of Intelligence. Freedom and no harm principle in "On liberty" by J. S. Mill." It contains an analysis of Mill's defence of liberty of expression and his Criterion of Harm as a principle to delimit the scope in which society can limit the freedom of people. Its contribution to the solution of some legal problems is also discussed. The aristocratic liberalism of Mill, despite its insufficient foundation and the difficulty of specifying the consequences of the harm criterion, constitutes a vigorous defence of individual freedom and a critique of the claim by democratic government who claim they are the holders of "spiritual power". Neither the people nor their representatives can impose what is right or wrong in the moral order, or the correct interpretation of the facts of the past, or even scientific or religious truth. Mill´s theses are a successful criticism of the criminalization of opinion crimes, such as the so-called hate crimes, that can lead to the destruction of freedom. The word can commit a crime, for example through insult, slander, perjury or inducement to crime, but not through the expression of judgements, opinions, criticisms or evaluations. Ultimately, the text deals with the philosophical foundations of criminal law with as regards freedom of expression.

Part II ("Criminal Law and Morality: Philosophical Perspectives") starts with Chapter "The Fundamentals of Ethics" in which Francisco Carpintero (University of Cádiz, Spain) touches upon the "Fundamentals of Ethics" from a philosophical and historical perspective. Carpintero holds that those who have been trained during the twentieth century are heirs to several overlapping ethical traditions, without normally being aware of the fragmentary and frequently incoherent nature of their ideas. In his chapter, the author shows the origin of the two main schools of Western philosophical thought: Nominalism and Thomism. Concerning the former, it was represented by John Duns Scotus and fully developed by Francisco Suárez. They did not admit that all the precepts of the Decalogue had an actual metaphysical consistency, but were just "modes" established in our reason. This means, for example, that one has to obey them because, once their knowledge is assumed, God's *lex imperans* orders it so. Through this path the Decalogue and Morals become a forever constituted *corpus* with a supposedly metaphysical nature. In this way Ethics becomes mere normativism and the question that arises is why every man has to obey the Decalogue. Thomism is the other tradition of thought. In Carpintero's opinion, this

school has been misunderstood from a historical perspective because there has been a tendency to interpret it through the light of Scholasticism left by Suárez. That was a serious mistake from which there was no going back. The author explains that Thomas Aquinas did not propose a rigid ethics which could be known axiomatically starting from some initial axioms. As Eisenhart explained at the beginning of the seventeenth century, the agility of Metaphysics clashes with the rigidity of Logics. But this explanation was liking preaching in the desert. In the chapter, Carpintero tries to expound once again what Thomas Aquinas explained in his time but it was unfortunately forgotten in History.

In Chapter "What is Perfectionism?", Francisco J. Contreras (University of Seville, Spain) analyses "What is perfectionism." In the relationship between morality and criminal law, there are two fundamental options, namely, perfectionism and libertarianism; here Contreras deals with the former. He explains that perfectionism is "the tenet whereby the state and the law may legitimately contribute to "making men good", that is, help them to choose what is morally right, to practise virtue, and thus to attain the good life. In contrast, antiperfectionism would be the philosophical approach which, as stated by Joseph Raz, "rejects the idea that the state has a right to impose a conception of the good on its inhabitants," meaning that political power "should be blind to the truth or falsity of moral ideals, or of conceptions of the good". Or, put another way, "governments must be neutral regarding different people's conceptions of the good." John S. Mill's famous "harm principle" typically reflects the antiperfectionist approach. After the introduction, Contreras' analysis works from Aristotle, Saint Augustin and Aquinas (1), and then tackles the Hart-Devlin debate (2), the discussion between liberals vs. communitarians (3), Joseph Raz's perfectionist liberalism (4), and finally the doctrine of Robert P. George and the role of government in the maintenance of moral ecology. Criticising the flaws' arguments of both Devlin and Hart, and rejecting the exclusionary disjunctive between antiperfectionist liberalism and anti-liberal communitarianism, Contreras praises Joseph Raz's perfectionist liberalism as an appropriate compromise approach. He concludes that "from Aristotle and Saint Augustin all the way to Joseph Raz and Robert P. George, an important tradition of thinking has upheld a claim which, however "bigot" it may sound in present times, is actually quite obvious: that law and state inevitably have a profound influence on a society's mores; and that, therefore, it is vital that such influence should be as healthy and positive as possible."

In Chapter "Build and Restore Good Human Relationships. Overcoming the Retributive Paradigm as a Key Issue for the Theory of Justice", Luciano Eusebi (Catholic University of Milan, Italy) submits to a moral and rational criticism the idea, so strongly rooted in our culture, that interprets justice in terms of correspondence between behaviours and, generally, between every plural reality (every *duality*) as implying, at least, a potential conflict. This is a perspective—icastically represented by the image of the scale—according to which, once a negative judgment has been made against a certain, individual or collective human reality, this would legitimize the mutually negative action towards that reality: for its damage, its defeat, its exclusion from the weft of solidarity bonds and many times, as happened in the course of history, for its very elimination. If the law, as the author observes, has worked to limit

the consequences of such a vision, nevertheless it has not succeeded in getting rid of it. For instance, the essentially retributive modalities that have characterized, until today, the infliction of sanctions provided by the criminal justice systems respond to a pattern of human relationships with far more extensive repercussions than the limited field of the fight against crime. This has an impact on international relations, in the way of understanding political confrontation, in economic rapports and even in personal ties. It is the same scheme, after all, that has legitimized over the centuries the classic theories of a "just" war, which need to be overcome if, faced with weapons of possible total destruction, we want to guarantee a future for mankind. The alternative is found in a *project-oriented* justice, in accordance with the principles of restorative justice: so that the *negative for negative* logic will be overcome, pursuing, rather, the aim of returning to *make just and fair*, for everyone, relationships that have not been so. The retaliation of the evil does not reactivate, by itself, the good. Examples of such orientation are offered, in particular, with regard to conceiving crime prevention and the evolutionary perspectives of criminal sanctioning systems.

In Chapter "Paternalism and Moral Limits of Criminal Law" Luigi Cornacchia (University of Università degli Studi di Bergamo, Italy) analyses the notion of paternalism. "Paternalism and moral limits of criminal law" deals with criticisms of the libertarian foundation of anti-paternalism, as being unable to protect the person in weakness. The liberal approach is grounded on the principle of moral relativism, but at the same time states that laws forbidding or even criminalizing activities that do not harm others are (absolutely) immoral law. Furthermore, the "individual-oriented" harm Principle, with its main principle of the respect for the "sanctity" of individual autonomy, makes it hard to constrain the expansion of criminal law. Most important, the protection of vulnerable human beings is not guaranteed by a simple procedural control on the validity of consent. It is the moral duty of criminal law to focus on the need for true protection of vulnerable persons from other's unexpressed insidious pressure and to avoid exploitation of those who are weak, old, ill or disabled. If it is right, the principle of respect for autonomy and the principle of care, which forms the basis of tutorial paternalism, are linked rather than antagonistic. Such conclusions seem to comply with the Wolfenden Report, which stated that "the law's function is…to provide sufficient safeguards against exploitation… of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". Cornacchia's chapter warns of the new despotic paternalism of the "best interest", established by experts in contempt of the principle of respect for autonomy, rooted in the technocratic "gold" standard of the quality of life.

In Chapter "Human Dignity and Legally Protected Goods in Criminal Law", Pedro Talavera (University of Valencia, Spain) deals with the relation between "Human Dignity and the Protected Legal Good." He argues that criminal law protects certain basic goods because they directly or indirectly are connected with the dignity of the person. However, in cases such as euthanasia, prostitution or surrogacy motherhood, the appeal to the dignity of the person is used, in the opposite sense, as the basis for decriminalization. In these cases, dignity is identified exclusively with the autonomy of the person and their capacity to dispose of all their goods, even if they are essential.

Thus, euthanasia is no longer conceived in terms of homicide or aiding suicide, but rather the discretionary disposal of life; prostitution as the discretional exercise of sexuality; surrogate motherhood, the discretional use of procreative capacity; experimenting with human embryos as discretional donations of biological material for science, etc. Dignity is no longer the basis for protecting basic goods and then becomes the basis for protecting the person's will. Dignity is something more than autonomy, therefore, the basic goods of the person are not absolutely discretional. There is within a person something that could be called an "ontological remnant of humanity", which can be attacked or harmed without necessarily harming a specific fundamental right (life, freedom, intimacy, honour, etc.). For Talavera, the "remnant of humanity", which refers to the ontological core of dignity (requirement of absolute respect), is covered and protected by the concept of "moral integrity". Moral integrity means the irrevocable requirement of all persons to be treated as such, and not degraded, debased or objectified; a requirement, which constitutes a fundamental legal good that merits protection under criminal law. And, this protection under criminal law, insofar as it is linked to the most intimate core of dignity, prevents certain conducts from being decriminalized regardless of changes in social morality or whether it includes the consent of those who perform them. For this author, there are actions, which can harm or undermine dignity, because they involve exploiting, objectifying, debasing, degrading or humiliating the person. For this reason, conducts such as prostitution (in which a person is exploited as a mere object of sexual pleasure) or surrogate motherhood (in which the woman's reproductive capacity is purchased) always constitute an attack on the moral integrity of the person, regardless of their consent, and in any case must be decriminalized.

In Chapter "From Eunomia to Paideia: The Educating Nature of Law", Vicente Bellver (University of Valencia, Spain), with the title "From *eunomia* to *paideia*: the educating nature of law," deals with the relationship between law and education from a philosophical-practical perspective. It begins by illustrating the notable similarities between both and then goes on to address two questions: (1) whether law should educate citizens in moral virtues; and (2) if the education of citizens should concern itself with reinforcing obedience to laws. As regards the first, it considers Aristotle's thinking on the educating role of law. For the second the author reflects on Rousseau's concept of "civil religion", as a kind of education that guarantees the submission of people to the laws of the state. According to professor Bellver both thinkers offer interesting, yet incomplete, proposals on these questions, so he attempts to compensate by recourse to two emblematic texts in the political and legal history of the world: The Universal Declaration of Human Rights and, more specifically, Pericles' Funeral Oration. Aristotle understood that law had to fulfil an educating function in moral, but failed to outline to what extent in order to avoid abuses. Rousseau understood that political society rests on pre-political bases, but his proposal for civil religion almost inevitably leads to an authoritarian regime. In Pericles' Funeral Oration one can find the limits so that law is able to correctly fulfil its educating role, as well as the religious pre-political bases which involve citizens in constructing a life in common. These pre-political bases generate a kind of civil

religion which appeals to the emotions without cancelling out the exercise of reason, and promotes subjecting the citizen to the law without having to renounce criticism.

Part III ("Criminal Law and Morality: Controversial Issues") starts with Chapter "From Crime to Right", entitled "From crime to right. The crisis of the title as reason of law," by Marta Albert (University of Rey Juan Carlos, Spain). The author questions whether a crime can turn into a right and discusses the process by which a crime becomes a subjective right. Partial decriminalization of the relevant conduct is the first step on the path to be considered as a right. An analysis of this legal technique shows how it is almost impossible to avoid injury to the legal asset protected by penal law. The article then focuses on the conception of subjective right that allows an understanding of the implementation of conducts deserving ethical reproach as legally enforceable: that is, the defence of the "right to do wrong". The path from crime to right is explained by these two phenomena. They also show us the "price" that theory of law is supposed it dues: the complete unintelligibility of subjective right as legal concept, due to the impossibility of differentiating itself from what is conceived as lawful or as a liberty. The author not only reveals the evident risks of this conception of subjective rights but also contributes to a better understanding of the concept of rights by underlining five ideas: (1) the need to relocate personal autonomy in the legal arena. The logos of the Law do not have to do with autonomy but with justice: giving to everyone his due (what he deserves), that is the very essence of Law; and (2) from the perspective mentioned above, some suggestions are made: (i) the revision of partial decriminalization as a legal technique, so it does not become the first step to the complete lack of protection of relevant legal asset; (ii) the clear distinction between what is not prohibited or what is explicitly allowed and what is legally enforceable. To have a right means to have a power over a third party, who becomes a new duty holder; and (iii) the consideration of subjective right in the perspective of the legal relationship where it comes on to the scene. In this relationship we can find not only the third-party duties, but also the existence of a just title. It is the reason why the bearer of the right is able to bind others. The legal definition of abuse or fraud of Law should be applicable, especially when rights begin to be used to violate the above-mentioned logos of the Law: to give to each person what is truly owed to them.

Chapter "The Role of the Criminal Law in Regulating Pornography" touches upon pornography. With the title "The Role of Criminal Law in Combatting Pornography," Gerard V. Bradley (University of Notre Dame, USA) argues that anyone can now see how the affordability, accessibility, and anonymity of the Internet has produced an explosion of pornography in countries across the globe. In his view, it is no longer an exaggeration to say that most of us live in "pornified societies". And there is a growing body of peer-reviewed social scientific evidence, which shows that the fall-out of this explosion includes many malignant effects on valuable relationships (especially including marriage) and on overall psycho-sexual health. "Pornification" is, in other words, a serious threat to human well-being. Anyone can see, too, that traditional means of trying to stymie pornography will no longer do: criminal prosecutions could never address more than an infinitesimal fraction of cases; moving sex

trades to a localized "combat-zone" cannot affect the Internet; interdicting the production and transport of pornography is impractical. Bradley thinks that new means of conceptualizing an organized social response, and of executing that response, are needed. Effective social control of obscenity in a porn-saturated society calls for a creative partnership among educators, pastors, and other culture-forming actors to *morally stigmatize* pornography as degrading and harmful. Public authority has an indispensable role to play in this partnership, for law powerfully shapes culture and thus shapes *us*—our actions, our attitudes, and our conception of right and wrong.

Chapter "Dignity at the End of Life and Decriminalization of Euthanasia" deals with other current controversial issue, namely, euthanasia. "Justice in the End of Life: Legal Issues around the Decriminalization of Euthanasia" by Jorge Nicolás Lafferriere (Catholic University of Argentine), affirms that human dignity is one of the central axes of the transformation carried out in criminal law. Lafferriere addresses the discussion around the proposals for the decriminalization of euthanasia in the light of dignity. The author argues that if dignity is identified with personal autonomy exclusively, the legal system faces important inconsistencies to be able to guarantee fundamental rights at the end of life. This is especially true in the case of unconscious people, who cannot make decisions. Neither does autonomy provide a strong reason to decide what is fair in the-end-of-life decisions. If dignity is approached from a utilitarian quality of life perspective, then problems arise in the legal consideration of euthanasia linked to determining the quality of life and when a life is "unworthy" of being lived. Applying a utilitarian criterion to legitimize euthanasia leads to the so-called slippery slope argument. There is an increase in the cases in which euthanasia is applied and a progressive trivialization of the causes legally admitted to put an end to life. For this reason, this article points out that only an ontological vision of dignity, as an inherent value of the person, can offer solid criteria to make legal decisions at the end of life.

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