

Criminalization as Last Resort (*Ultima Ratio*)

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The idea of criminalization as last resort—ultima ratio regis—is a peculiar one. It is obviously not a constitutional principle. It is rather a principle of legislative ethics, a principle that legislators seem to care little about. Nevertheless, it is evoked in all respectable textbooks and treatises. Related ideas are the subsidiarity of criminal law and the fragmentary character of criminal law.

The ultima ratio principle cannot be discussed without some understanding of what sorts of legitimate arguments are relevant to decisions about criminalization. I will identify six different sorts of legitimate arguments: (1) blameworthiness (penal value); (2) need; (3) moderation; (4) inefficiency; (5) control costs; and (6) the victim's interests. I will then summarize these sorts of arguments in the form of three principles: (1) the penal value principle; (2) the utility principle; and (3) the humanity principle. In addition, a metaprinciple (in dubio pro libertate or in dubio contra delictum) will be mentioned. Finally, the ultima ratio principle will be distinguished from ideas of prospective proportionality and ideas of subsidiarity.

The conclusion of the discussion is that the ultima ratio principle has no independent normative function unless it is interpreted as a metaprinciple summarizing (sufficient penal value) reasons for criminalization.

I. THE PROBLEM

During the existence of human societies, almost always and almost everywhere, societal punishment has been justified by appeal to one or more of the following grounds:

- (the judgment of a priesthood that) God or the Gods want or demand it;
- the chief(tain), the ruler, the leader, the patriarch, the government, the king, the queen etc. wants it; or
- the people (normally a particular minority) want it.

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There might, of course, be other motives—explicit or secret—but let us leave that aside. As Radbruch has said: only as long as criminal justice was employed in the name of God or customary laws could we punish with a good conscience.¹

To the extent that we live in a social/liberal/conservative-democratic *Rechtsstaat*, we are not any longer allowed to use criminal punishment just because we want it, or because a god is said to want it, or because we have always done it, or because it seems to be a natural or an effective means to some end. The basic reason for this is that punishment involves hard treatment, inflicting harm that is often serious. Given that a state organization is justified only if it is largely to the advantage of the citizens, a punishment system and its design and contents must be justified by reference to convincing, rational (moral) reasons, including reasons that refer to some notion of the common good.

This sounds fine and wise—but is it true?

What we are talking about is restricting the power of democratically elected legislative bodies to legislate about the use of punishment. But how can that power be restricted? If there are to be legally binding restrictions, they require constitutional support (including international commitments), and courts whose task it is to ensure that the legislators do not exceed their constitutional competence—constitutional courts (generally), or ordinary courts (*ad hoc*), or international courts such as the European Court of Human Rights in Strasbourg.

Now even if there are considerable differences between different constitutions and thus between different countries, it is obvious that the constitutional restrictions actually imposed on legislators are not very far-reaching. The strongest protection seems to be provided by prohibitions against retroactive legislation and against allowing analogical application of existing laws to the detriment of the defendant. But you do not normally find, for example, legally binding prohibitions against criminal statutes that impose strict liability. The principle of legality (*nulla poena sine lege*) and the principle of culpability (*nulla poena sine culpa*) are often mentioned as the basic pillars of modern criminal law, but usually only the first of these is given any legally binding status in relation to the legislator.

When we say that the legislator “may not” do something specific, we therefore often mean that the legislator “should not” do it, and the obligation involved is not a legal duty but a moral duty. In the shadow of constitutions and treaties, there is a *criminal justice ethics* that might be seen as a part of the *Rechtsstaat* ideology that is assumed to hold sway in democratically governed countries—an ethics that should presumably consist of rational moral principles

¹ GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 132 (Konrad Zweigert ed., 9th ed. 1958).

that are apt for that ideology.² Rational moral principles, however, can hardly be more than summarizing generalizations of the good reasons that normally obtain from a moral point of view. This means, for example, that moral principles may be in conflict with each other and that they are provisional, in the sense that they permit justified exceptions. Precise moral rules are perpetually subjected to demands for marginal changes. Rational moral argumentation aims at balancing principles and application of principles; in John Rawls's felicitous phrase, we want to reach a "reflective equilibrium." In comparison with legal argumentation, moral argumentation is much more open; it is more like argumentation *de lege ferenda* than argumentation *de lege lata*. We cannot expect any criminalization principle to be unqualified and exceptionless.

The purpose of this paper is not to describe the extent to which legislators can be legally restricted, or to sketch the contents of a general criminal justice ethics. My discussion is limited to a tiny corner of such an ethics. It is often—in fact, very often—claimed that criminalization is the legislator's *ultima ratio*. Criminalization should be used as a last resort, as "uttermost means in uttermost cases."³

² Lech Gardocki, *Das Problem des Umfangs der Strafbarkeit in der polnischen Gesetzgebung, Rechtsprechung und Strafrechtslehre*, in MODERNES STRAFRECHT UND ULTIMA-RATIO-PRINZIP 17, 17 (Lüderssen et al. eds., 1990).

³ See generally ERNST-WALTER HANACK, EMPFIEHLT ES SICH, DIE GRENZEN DES SEXUALSTRAFRECHTS NEU ZU BESTIMMEN? GUTACHTEN FÜR DEN 47. DEUTSCHEN JURISTENTAG 34–36 (1968); WINFRIED HASSEMER, PRODUKTVERANTWORTUNG IM MODERNEN STRAFRECHT (1993); HANS-HEINRICH JESCHECK, BEITRÄGE ZUM STRAFRECHT 1980–1998 403 (Theo Vogler ed., 1998); HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 3 (5th ed. 1996); HEIKE JUNG, SANKTIONENSYSTEME UND MENSCHENRECHTE (1992); OTTO LAGODNY, STRAFRECHT VOR DEN SCHRANKEN DER GRUNDRECHTE: DIE ERMÄCHTIGUNG ZUM STRAFRECHTLICHEN VORWURF IM LICHT DER GRUNDRECHTSDOGMATIK DARGESTELLT AM BEISPIEL DER VORFELDKRIMINALISIERUNG 511–32 (1996); HEINZ MÜLLER-DIETZ, STRAFE UND STAAT (1973); WOLFGANG NAUCKE, STRAFRECHT: EINE EINFÜHRUNG 39–40 (8th ed. 1998); CLAUDIUS ROXIN, EINFÜHRUNG IN DIE GRUNDPROBLEME DES STRAFRECHTS 2–7 (1976) (with remarks by Seiji Saito); YOUNG-CHEOL YOON, STRAFRECHT ALS ULTIMA RATIO UND BESTRAFUNG VON UNTERNEHMEN 22–58 (2001) (probably containing the most informative analytical overview of the issues); STRAFRECHT—ULTIMA RATIO. EMPFEHLUNGEN DER NIEDERSÄCHSISCHEN KOMMISSION ZUR REFORM DES STRAFRECHTS UND DES STRAFVERFAHRENSRECHTS 13–15 (Peter-Alexis Albrecht et al. eds., 1992); Jürgen Baumann, *Strafe als soziale Aufgabe*, in GEDÄCHTNISSCHRIFT FÜR PETER NOLL 27 (1984); Wolfgang Frisch, *An den Grenzen des Strafrechts*, in BEITRÄGE ZUR RECHTSWISSENSCHAFT: FESTSCHRIFT FÜR WALTER STREE UND JOHANNES WESSELS 69 (1993); Bernhard Haffke, *Symbolische Gesetzgebung? Das Wirtschaftsstrafrecht in der Bundesrepublik*, in KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 165, 165–67 (1991); Winfried Hassemer, *Gründe und Grenzen des Strafansatzes*, in DIE STRAFRECHTSWISSENSCHAFTEN IM 21. JAHRHUNDERT: FESTSCHRIFT FÜR DIONYSIOS SPINELLIS 399 (2001); Arthur Kaufmann, *Subsidiaritätsprinzip und Strafrecht*, in GRUNDFRAGEN DER GESAMTEN STRAFRECHTSWISSENSCHAFT: FESTSCHRIFT FÜR HEINRICH HENKEL 89 (1974); Klaus Lüderssen, *Neuere Tendenzen der deutschen Kriminalpolitik*, in NEUERE TENDENZEN DER KRIMINALPOLITIK 161, 191–92 (Albin Eser & Karin Cornils eds., 1987); Manfred Maiwald, *Zum fragmentarischen Charakter des Strafrechts*, in FESTSCHRIFT FÜR REINHART MAURACH 9 (1972);

At the same time, it is quite often claimed that in practice this principle (or "thought") is not respected. Criminalization is regularly used as a first resort (*sola ratio*), partly because a new criminalization does not involve obvious immediate costs that have to be taken into consideration in the budget proposals of criminal justice authorities. As a result, we have to live with "criminal law inflation."

The purpose of this paper is to clarify the meaning and the role of the *ultima ratio* principle. I will, however, not go into what we should resort to before we resort to criminal law and punishment. I have never seen a comprehensive discussion of what should be the *prima ratio*, *secunda ratio*, and so on. But there must be a basic presumption that the State should not interfere at all. If interference is necessary, then aid, support, care, insurance and license arrangements should take precedence over coercive measures. If coercive measures are necessary, they need not consist in sanctions. If sanctions are necessary, private law sanctions might be preferable to administrative sanctions.

II. THE BACKGROUND

The *ultima ratio* principle has mainly been discussed in German legal literature,⁴ though I have also drawn on some Swedish literature in writing this article.⁵

A few paraphrases might help to clarify the issues. Roxin argues that the criminal law is not the only appropriate means by which to pursue the proper end of protecting legitimate values and interests (*Rechtsgüter*).⁶ On the contrary, the

Heinz Müller-Dietz, *Aspekte und Konzepte der Strafrechtsbegrenzung*, in Festschrift für Rudolf Schmitt 95 (1992); Thomas Vormbaum, 'Politisches' Strafrecht, in Zeitschrift für die gesamte Strafrechtswissenschaft 734 (1995).

⁴ But see Andrew Ashworth, *Principles of Criminal Law* 67–68 (3d ed. 1999). Against the background of a detailed discussion in chapter 2 of the circumstances under which criminalization is acceptable, Ashworth puts forward a *principle of minimum criminalization*: "This principle . . . is that the ambit of the criminal law should be kept to a minimum. . . . [T]he point is not so much to reduce criminal law to its absolute minimum, as to ensure that resort is only had to the criminalization in order to protect individual autonomy or to protect those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy [E]ven if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control." *Id.*; see also A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* 6–11 (2001).

⁵ Josef Zila, *I stället för straff: sanktionsavgifter som kriminalpolitiskt medel mot bagatellbrottslighet* (1992); *Varning för straff: om vådan av den nyttiga straffrätten* (Dag Victor ed., 1995); Petter Asp, *EG:s sanktionsrätt: ett straffrättsligt perspektiv* (1998); Nils Jareborg & Josef Zila, *Straffrättens påföljdslära* (2000), Nils Jareborg, *Allmän kriminalrätt* (2001).

⁶ In German legal scholarship, ideas and doctrines about *Rechtsgüter* have played a central role in the discussion of the legitimacy and limits of criminal law. Personally, I see the doctrines

whole arsenal of the legal order must be put to use, and criminal law is actually the last means of protection to be considered. It may only be employed where other means (e.g., private law litigation, administrative solutions, non-criminal sanctions, etc.) fail. That is why punishment is called the "*ultima ratio* of social policy," and why its task is defined as the "subsidiary" protection of *Rechtsgüter*. Criminal law protects only some *Rechtsgüter*, and its protection is sometimes selective rather than general (as with the protection of private property). This makes it appropriate to speak of the "fragmentary" character of criminal law.⁷

Stratenwerth explains the matter in the following way. Punishment is, as a rule, the State's severest intrusion into the personal rights of a human being. Therefore, it should be used only where other measures, in particular private law and administrative law measures, fail. We should therefore emphasize the fragmentary and subsidiary nature of criminal law.⁸

The most authoritative expression of an *ultima ratio* principle is found in a decision by the German Constitutional Court, the *Bundesverfassungsgericht*, the so-called First Abortion Case of February 25, 1975. The Court described the principle in somewhat less absolute terms than is usual; it also oscillated between a putative duty to criminalize and a putative duty not to criminalize, though it seemed to be primarily interested in the former issue, since the decision was that the criminalization in question was warranted.⁹ My present interest, however, is not in the issue whether or when there could be a legal duty to criminalize (it would not of course follow from there being no duty not to criminalize that there is a duty to criminalize).¹⁰

The authors and authorities I have so far referred to mention "*ultima ratio*," subsidiarity and the fragmentary character of criminal law. That the criminal law offers only fragmentary protection cannot have any independent normative

concerning *Rechtsgüter* as a blind alley; something must be wrong when almost 200 years of intensive intellectual activity seem to have resulted in more confusion than clarity. The literature is enormous. I refer only to the overview in CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL I: GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE 11-30 (3d ed. 1997); WINFRIED HASSEMER, THEORIE UND SOZIOLOGIE DES VERBRECHENS: ANSÄTZE ZU EINER PRAXISORIENTIERTEN RECHTSGUTSLEHRE (1973); KNUT AMELUNG, RECHTSGÜTERSCHUTZ UND SCHUTZ DER GESELLSCHAFT: UNTERSUCHUNGEN ZUM INHALT UND ZUM ANWENDUNGSBEREICH EINES STRAFRECHTSPRINZIPS AUF DOGMENGESCHICHTLICHER GRUNDLAGE (1972); Albin Eser, *Rechtsgut und Opfer: Zur Überhöhung des einen auf Kosten des anderen*, in Festschrift für Ernst-Joachim Mestmäcker 1005 (1996).

⁷ ROXIN, *supra* note 6, at 25.

⁸ GÜNTHER STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I: DIE STRAFTAT 40 (4th ed. 2000).

⁹ BVerfGE 39, 1 (46-47). See Heinz Müller-Dietz, *Zur Problematik verfassungsrechtlicher Pönalisierungsbote*, in § 218 StGB: DIMENSIONEN EINER REFORM 77 (Heike Jung & Heinz Müller-Dietz eds., 1983).

¹⁰ See X & Y v. The Netherlands, 28 Y.B. Eur. Conv. on H.R. 176 (1985), 8 Eur. H.R. Rep. 235 (1986); JUNG, *supra* note 3, at 72-76; STRATENWERTH, *supra* note 8, at 39.

importance.¹¹ It is a mere description of the fact that not all interests that are worthy of protection are, or could practicably be, protected by the criminal law. If, for example, all breaches of contract that involved economic harm were criminalized, the criminal justice system would probably be so overloaded that it would cease functioning. And that this is the case need have nothing to do with the existence of an *ultima ratio* principle or a subsidiarity principle.

What I want to accomplish in the remainder of this paper is very limited. All criminal law scholars talk about *ultima ratio*, but it is still somewhat unclear what the concept implies. So I want to clarify two things. The first concerns the relation between *ultima ratio* and subsidiarity: is there one principle or are there two (or even more) principles? The second concerns whether an *ultima ratio* principle or a subsidiarity principle has an independent normative importance, or whether it is simply implied by other principles. But I will not attempt to apply any *ultima ratio* or subsidiarity principle to current legislation.

My arguments rely on the assumption that punishment is a State's most intrusive means of enforcement in cases of illegal conduct. They do not rely on the far less plausible assumption that punishment is the worst thing a State can do to a citizen. As Naucke says, punishment counts as the severest State sanction.¹² As regards imprisonment there is no reason to doubt this.¹³ Loss of liberty is in itself grossly intrusive, and as a punishment it constitutes a clear expression of severe societal censure. In addition, incarceration often involves stigmatization and humiliation. If one disregards very short prison sentences, going to prison often affects family life and working life in ways that can never be repaired. Legislators try to make punishment less detrimental by using less intrusive alternatives to imprisonment, but from the perspective of criminalization in such cases the threat of punishment still concerns imprisonment, and it is criminalization we are talking about.

However, if the threat of punishment concerns fines, it is not possible to claim, without qualification, that punishment is the severest state sanction. In Sweden, for instance, administrative sanction fees are often more severe than punitive fines (despite the fact that the procedural safeguards are weaker). But the issues here are complicated by the use of imprisonment as a back-up sanction in cases of unpaid fines, and sometimes penalty scales refer to imprisonment as a possible sanction only in order to make it possible to use pre-trial detention and other security measures.

¹¹ The expression was coined by Karl Binding, who regarded the fragmentary character of criminal law as "a serious deficiency of criminal law." YOON, *supra* note 3, at 84; *see also id.* at 34–35. According to NAUCKE, *supra* note 3, at 62–63, the fragmentary character of criminal law is a result of the central position of the legality principle.

¹² NAUCKE, *supra* note 3, at 39.

¹³ I leave capital punishment aside.

To make the discussion meaningful I thus assume that punishment means imprisonment (or some other, even more severe, penalty), but also, of course, that one lets punishment remain the most intrusive coercive state measure as a response to illegal conduct (that we do not, for instance, contemplate concentration camps). This assumption accords with the criminal law of most countries.

III. CRIMINALIZATION ARGUMENTS

There are many sorts of reasons acceptable in a *Rechtsstaat* for and against criminalization in particular cases. I will mention the six sorts that I regard as the most important ones.

A. *Blameworthiness (Penal Value)*

One obvious reason for criminalizing a kind of conduct is that it is blameworthy, i.e., it deserves the censure that punishment expresses. How strong a reason this provides will depend on the degree of blameworthiness, the “penal value” of that conduct. The measure of blameworthiness of any kind of conduct depends partly on what values and interests have been infringed or threatened, and partly on whether the conduct involves actual infringement (harm), or creates a danger of such infringement, or is related to such infringement in some more distant way (for instance, a breach of a safety rule). But it also depends on the guilt or culpability exhibited by the actor in her conduct. An intentional act is more reprehensible than a negligent act; the motives behind the conduct also make a difference; and not everyone has the same ability to act as a fully responsible agent.

In Swedish law, a distinction is made between concrete penal value (the penal value of a concrete act or omission) and abstract penal value (the penal value of a type of act or omission). Of course, criminalization concerns types of acts or omissions, and at least in principle the penalty scale attached to a crime-type is meant to indicate the abstract penal value of the range of conduct criminalized. There is reason to emphasize that in assessing penal value, regard should *not* be paid to aggregated harm: the aggregated losses of shoplifting are enormous, for example, but this does not make shoplifting a serious crime. The relevant harm, danger or dangerousness is the one mentioned in the legal definition of the crime.

B. *Need*

A particular measure is needed if an intended result cannot be achieved by less intrusive or costly means. To justify an instance of criminalization on the grounds that it is needed thus presupposes that an equivalent or adequate protection of the values and interests in question cannot be achieved in other ways, for instance through other forms of legislation.

Assessing whether there is a need, i.e., whether a particular measure is necessary for reaching a particular goal, can be unproblematic in concrete situations. But the goals that criminalization is supposed to serve are vague and hazy; they lack concreteness.¹⁴ The (maybe widespread) existence of some conduct is regarded as a societal problem. The goal is to diminish the prevalence of such conduct to an acceptable level. But there is little knowledge about what can be achieved through particular pieces of criminalization. And what is an "acceptable" level? It can also take a long time to find out whether criminalization really is needed.

On the other hand, it might be quite easy to foresee that other control and sanction systems would be more effective. One could, for instance, argue that there is no need for criminalization when the class of potential offenders is quite limited and fairly easy to determine—and therefore easy to control individually, which is the case in some areas of economic criminality.

So the "need" argument cannot be very persuasive, as long as the pursued goal is defined in terms of the general prevention of undesirable conduct. It is of course possible that no decent alternative is available, but the argument is most powerful in its negative form, when it can be said that there is *no need* for criminalization.

What other needs could be legitimate? It has become more and more usual to justify (or at least defend) criminalizations, and especially more severe criminalizations, by appeal to the supposed need to make it unequivocally and publicly clear that some sort of conduct is unacceptable and reprehensible. As Hassemer points out, this is a matter of employing criminal law as an instrument of popular pedagogy, in order to "sensitize" the people. No attention is paid to the crucial question of whether it is appropriate or fair to use punishment for this purpose—the message is all that counts.¹⁵ In my view, measures based on such "expressive general prevention" corrupt the criminal justice system, and I abstain from further comments.¹⁶

C. *Moderation*

The "moderation" argument only provides reasons against, and not for, criminalization. Even if a type of conduct is judged to be to some extent reprehensible or blameworthy, punishment (in the form of imprisonment or of a

¹⁴ GÜNTHER JAKOBS, STRAFRECHT: ALLGEMEINER TEIL: DIE GRUNDLAGEN UND DIE ZURECHNUNGSLEHRE 49 (2d ed. 1990). Jakobs remarks that every conflict "is manageable" if one changes the goals and transfers the costs (in a wide sense) to others.

¹⁵ HASSEMER, *supra* note 3, at 8.

¹⁶ Cf. ASHWORTH, *supra* note 4, at 24–26, 67–68.

non-custodial alternative) may appear excessive or indefensibly intrusive (in German literature one encounters the phrase “excess prohibition” in this context).¹⁷

The moderation argument has, however, two aspects. A response may appear exaggerated in relation to the measure of blameworthiness of the type of conduct. If so, we are dealing with a *retrospectively* directed type of *proportionality* that is internal to the penal system. In such cases, the conduct-type is not, compared with other conduct-types, serious enough to be criminalized, or not serious enough to be punished by imprisonment; here the moderation argument works within the blameworthiness argument, and limits its scope. Such arguments about retrospective proportionality, however, have their main importance in the context of sentencing, not of legislation.

A response may also appear excessive in relation to the purpose or goal that is to be achieved. If so, we are dealing with *prospective proportionality*. In a *Rechtsstaat*, the proportionality principle should constrain all administration, and in particular the police law. It is a basic principle of European Union law.

If a demand for moderation is taken as a demand for prospective proportionality, it is in practice difficult to distinguish between a need argument and a moderation argument. This is due to the fact that it is hardly possible to pinpoint a determinate goal for any specific instance of criminalization.

D. *Inefficiency*

If arguments concerning efficiency are to be something other than arguments about needs, they can hardly be of interest unless they are arguments against criminalization—arguments that criminalization would be unjustified because it would not be an efficient means to whatever end is to be served. Even so, inefficiency arguments and no-need arguments overlap to some extent. Examples of relevant factors that imply inefficiency are that the risk of detection is very small (and will perhaps decrease further if the conduct in question is criminalized); that the offense must be defined in a way that makes it very difficult to apply the provision; that the offense definition must include elements that are difficult to prove; and that criminalization is so manifestly at odds with public opinion that it will be disregarded or might even contribute to undermining respect for the criminal justice system.

E. *Control Costs*

Another kind of reason *for* criminalization is that alternative, less intrusive, sanctions or other measures (for instance payment for abstaining from some conduct) require significantly greater resources. Conversely, a reason *against*

¹⁷ LAGODNY, *supra* note 3, at 179–253.

criminalization can be that the criminal justice system neither has nor will get the resources needed to cope with the load that criminalization will involve (if it is taken seriously). Secondary effects can also be relevant. For example, criminalizing possession or use of something may lead to a raised price level in an illegal market, which in turn may lead to increased criminality against property and even to the emergence of enterprise-like organized crime. Another sort of control cost is that scarce resources are used for punishment instead of for urgent care.

F. *The Victim's Interests*

One consequence of some kinds of conduct being criminalized is that it will normally be much easier for a victim to be vindicated and compensated, since the victim does not have to take responsibility for investigation and legal proceedings. Sometimes it is in the interest of the victim to keep a conflict free from public interference, but this may be more relevant to prosecutorial rules than to the question of criminalization.

IV. CRIMINALIZATION PRINCIPLES

The superficial presentation of different sorts of criminalization arguments offered in the previous section can be made even more abstract. It can be summarized in three criminalization principles:

- (1) *The penal value principle.* Conduct that is not significantly blameworthy should not be criminalized. The higher the (abstract) penal value, the stronger the reasons for criminalization. This principle covers arguments concerning blameworthiness and those concerning retrospective proportionality within the system.
- (2) *The utility principle.* Under this principle one must assess the weight of arguments concerning need, control costs and inefficiency. There is reason to stress that such an assessment—whether a criminalization does more good than harm—must be very uncertain.¹⁸
- (3) *The humanity principle.* Under this principle one must assess the weight of arguments concerning moderation (mainly prospective

¹⁸ Attention is paid to the difficulties by MÜLLER-DIETZ, *supra* note 3, at 35–36; Gardocki, *supra* note 2, at 18–19; PETER LEWISCH, VERFASSUNG UND STRAFRECHT: VERFASSUNGSRECHTLICHE SCHRANKEN DER STRAFGESETZGEBUNG 227–28 (1993); and STRATENWERTH, *supra* note 8, at 40, who mentions that the existence of a criminalization can be used as an alibi by a legislator who is not interested in finding out whether there are better alternatives.

proportionality), the victim's interests and some sorts of control costs.

The arguments for and against criminalization mentioned in Part III are relevant not only to the question of criminalization itself, but also to the question of how severe any criminalization should be. The summary offered here in the form of three principles makes this even more evident. It is also evident that the humanity principle must be enlarged upon when it is applied to questions about severity. Issues concerning acceptable repression levels and relative penal value judgments are at least as important as the issue of criminalization, but here only the latter issue is addressed.

Hanack argues that, just as a judge may not convict someone without proof of his or her guilt, the legislator may not criminalize a particular kind conduct without evidence that criminalization is necessary.¹⁹ The judge is subject to the principle *in dubio pro reo*. For the legislator a parallel principle is proposed—*in dubio pro libertate* (as opposed to *in dubio pro lege*).²⁰ It is, however, far from clear what this implies. Does it imply a requirement of “strength of evidence” along with a requirement of “burden of proof”?

In choosing between alternatives, we normally choose the one that appears to be the best when all reasons for and against have been taken into account. It is rational to abstain from choosing what appears to be the best alternative only when one is not quite certain, and a misjudgment would have very serious consequences. The proposed principle hardly implies more than that one should be convinced that the reasons for criminalization are clearly weightier than the reasons against—not that the reasons have to be such that it would be unreasonable to doubt that criminalization is warranted. (Many German criminal law theorists talk about “necessity” or “need” to use punishment. But these are relative terms, and as mentioned above, the relevant goals are very indeterminate. In practice, it is impossible to check retrospectively whether a certain instance of criminalization was needed.)

V. PROPORTIONALITY AND *ULTIMA RATIO*

In the judgment referred to above in Part II,²¹ the *Bundesverfassungsgericht* refers to the principle of proportionality—the requirement of *Verhältnismässigkeit*. In Germany, this requirement has constitutional status.²²

¹⁹ ERNST-WALTER HANACK, ZUR REVISION DES SEXUALSTRAFRECHTS IN DER BUNDESREPUBLIK 37 (1969).

²⁰ MÜLLER-DIETZ, *supra* note 3; HASSEMER, *supra* note 6, at 194–220. Vormbaum, *supra* note 3, at 747, speaks more to the point about *in dubio contra delictum*.

²¹ See *supra* text accompanying notes 9–10.

However, as mentioned in Part III, the principle has two aspects. One could also say that there are two different proportionality principles: one retrospective and one prospective. The first concerns the relation between the penal value of some conduct and the severity of the penalty. The principle is breached if the penalty is too severe or too lenient. The other concerns the relation between means and goal. The principle is breached if the means are excessively burdensome, intrusive or otherwise costly, given the significance of the interest we have in achieving the goal.

What a court or legal writer means by "*Verhältnismässigkeit*" is not always obvious. I will not embark on any exegesis here, but I have an impression that sometimes both principles are referred to,²³ sometimes the retrospective and sometimes the prospective. (Occasionally, it seems that the principle of *Lex Talionis* has been dusted off, i.e., that one is to directly compare the harm caused by the conduct with the harm inflicted through the penalty.)

What interests us here is the relationship between proportionality and *ultima ratio*. If an *ultima ratio* principle is derived from a proportionality requirement, it has no independent normative function. This seems to be Roxin's standpoint. He refers, by the way, explicitly to the prospective proportionality principle.²⁴

VI. SUBSIDIARITY AND *ULTIMA RATIO*

What is the relationship between the *ultima ratio* principle and the notion of "subsidiarity" (that the task of the criminal law is merely to provide "subsidiary" protection for the interests that the law recognizes and protects)?²⁵ First of all, we have to distinguish between at least five different interpretations of "subsidiarity."

(1) According to Vormbaum, the subsidiarity of criminal law has nothing to do with the *ultima ratio* principle. Criminal law protects, not *any* interests or values, but only *legitimate* interests or values. The legitimacy of an interest or a value (a *Rechtsgut*) depends on whether it is *already* recognized as such by the legal order—before criminal law comes into play. So the subsidiary character of criminal law is a matter of definition.²⁶

Vormbaum's conception of subsidiarity, however, is not plausible. *Rechtsgüter* are abstract phenomena that can be construed and manipulated with

²² BVerfGE 19, 348; see HANS D. JARASS & BODO PIERROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 436–37 (Jarass) (3d ed. 1995). The position of the principle is similar in Austria. See LEWISCH, *supra* note 18, at 194–230.

²³ LEWISCH, *supra* note 18, at 194–230.

²⁴ ROXIN, *supra* note 6, at 25–26; see also NAUCKE, *supra* note 3, at 83–84; STRATENWERTH, *supra* note 8, at 40; YOON, *supra* note 3, at 36–40.

²⁵ See *supra* text accompanying notes 7–8.

²⁶ Vormbaum, *supra* note 3, at 757.

considerable freedom. And why could not a certain interest or value be protected only by criminal law, in which case its recognition as a legitimate *Rechtsgut* would not be prior to the criminalization?

(2) Brandt also regards subsidiarity as something different from *ultima ratio*. In his opinion, the subsidiarity principle does not have constitutional status, but it is still an important basic principle of a "social State."²⁷ State organs should not interfere at all unless the offender, the offender and the victim, or the local community within which a crime is committed, cannot solve the problems or otherwise reach an acceptable settlement on their own. If State organs intervene they should primarily employ social aid, care, service or other support. Punishment should be the last measure used.²⁸

I will not discuss the validity of such a subsidiarity principle, since it deals with State power exerted *within* the realm of what has already been criminalized. It does not deal with whether criminalization is warranted.²⁹

(3) Roxin and Jakobs, among others, seem to regard the subsidiarity principle as identical with the prospective proportionality principle.³⁰ If this is so, what was said above in Part V is applicable. Such a subsidiarity principle has no independent normative function.

(4) The conclusion is the same if the subsidiarity principle is seen as derived from the totality of the criminalization principles outlined in Part IV above. The subsidiarity principle (and the *ultima ratio* principle if it is taken to duplicate the subsidiarity principle) collapses into the principle of *in dubio pro libertate*.

(5) Finally, a subsidiarity principle (and consequently, also, an *ultima ratio* principle) could be taken to declare that criminalization is warranted only where one has, in a societal experiment, *empirically tested* other solutions and found them wanting—not "sufficiently" effective. Now and again it is asserted that criminalization is warranted "when there is no other help."³¹ As Gardocki points out, however, it is unrealistic to demand empirical tests.³² It does, of course, quite often happen that a kind of conduct is criminalized because other measures have failed to be sufficiently effective. But, then, the legislator is hardly eager to test

²⁷ EWALD BRANDT, DIE BEDEUTUNG DES SUBSIDIARITÄTSPRINZIP FÜR ENTPÖNALISIERUNGEN IM KRIMINALRECHT 135 (1988).

²⁸ *Id.* at 152.

²⁹ See JAKOBS, *supra* note 14, at 49. Jakobs objects to the thought of using (relatively less intrusive but preventatively more effective) confiscation of assets for crimes committed by rich people and imprisonment for crimes committed by others.

³⁰ ROXIN, *supra* note 6, at 25–26; JAKOBS, *supra* note 14, at 48–49. While Jakobs does not at all use the expression "ultima ratio," BRANDT, *supra* note 27, at 142, 144, seems (like Roxin) to regard the *ultima ratio* principle as equivalent to the prospective proportionality principle.

³¹ Baumann, *supra* note 3, at 35; NAUCKE, *supra* note 3, at 39.

³² Gardocki, *supra* note 2, at 18.

other non-penal responses. In any case, it can hardly be argued that the core of the criminal law lacks legitimacy since other means of social control have not been tested.

Therefore, the conclusion must be that ideas about the subsidiarity of criminal law either are irrelevant to our problem or lack independent normative status or function.

VII. VOLTE-FACE

The *ultima ratio* principle: Is it an overstrung version of the principle of *in dubio pro libertate*? The *ultima ratio* principle: Is it a principle without independent normative function?

Frequently the *ultima ratio* principle is said to entail that criminalization should be used *only* as “uttermost means in uttermost cases.” Taken literally this is obviously unrealistic. If legislators lived up to the principle of *in dubio pro libertate* there would be no ground for complaint.

Suppose we delete the word “only” and look at what we could do with the phrase “uttermost means in uttermost cases” in a principled way! The *ultima ratio* principle has always been regarded as a principle *against* criminalization—as stating a necessary condition. If it is instead taken to state a sufficient condition, it will be transformed into a principle *for* criminalization.

If such a change is made, the principle will be used as a *metaprinciple* relating to the handling of the three criminalization principles mentioned in Part IV above. Therefore, “in uttermost cases,” i.e., where the penal value is very high, the penal value principle prevails. Murder, aggravated rape, armed robbery, aggravated assault, aggravated espionage, torture, etc.: in such cases the utility principle and the humanity principle are put aside in deciding whether criminalization is called for (but of course the humanity principle retains its importance as regards the repression levels of the whole system). One could say that in the worst cases, the principle *in dubio pro libertate* is short-circuited since there is no room for *dubio*.

This *ultima ratio* principle has an independent normative function. The other, more familiar, *ultima ratio* principle, has none. To me, this principle appears to be realistic. The other one does not. To me it also appears to be normatively acceptable (given that a criminal law system is acceptable at all). If the criminal code contains a list of secular sins, there is nothing peculiar with some sins being worthy of unconditional condemnation. The scope of the principle should, however, be fairly limited. The difficult task is not to show that the principle is warranted, but to keep it within strict boundaries, i.e., to give the humanity and utility principles the weight they deserve.