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## Legal Moralism or the Harm Principle? The Limits of Criminalization from the Perspectives of Feinberg and Mill

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### ABSTRACT

This article interrogates the proper limits of criminalization by staging a three-way dialogue between John Stuart Mill's Harm Principle, Lord Devlin's Legal Moralism, and Joel Feinberg's liberal "multi-principle" framework that supplements harm with the Offense Principle. Using normative legal research, the study focuses on the expanded legality clause in Article 1(2) of Indonesia's Law No. 1 of 2023 to illustrate how vague normative drafting enables moralistic overreach. Conceptually, Mill secures individual autonomy by permitting coercion only to avert harm to others; Devlin justifies penal law as a guardian of shared morality; Feinberg preserves Mill's core while narrowly authorizing regulation of grave, unavoidable public offense. Applied to Indonesian criminal law, especially the Pornography Law (Law No. 44/2008) and selected morality offenses in the 2023 Criminal Code, the analysis finds a persistent tilt toward legal moralism often masked in the rhetoric of "social harm," risking overcriminalization, majoritarian tyranny, and erosion of civil liberty. The article argues that Feinberg's calibrated model offers the most defensible liberal path for a plural society, reining in paternalism and moralism while allowing targeted regulation of severe public offense, provided courts deploy robust proportionality, evidentiary rigor, and clear statutory definitions. The policy upshot is twofold: tighten legality through precise offense definitions and rights-based proportionality tests, and adopt a presumption against criminalization for self-regarding conduct absent demonstrable third-party harm or grave, inescapable public offense.

### KEYWORDS

Criminalization;  
Harm Principle;  
Legal Moralism;  
Offense Principle;  
Legality



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## INTRODUCTION

At the heart of criminal law philosophy lies an eternal tension that shapes the character of every legal system: the tug-of-war between protecting individual freedoms and justifying the use of coercive state power.<sup>1</sup> The fundamental question, “What behaviors should the state criminalize?” is not merely a technical matter of legislation, but rather an in-depth investigation into the limits of authority, the nature of individual autonomy, and the ultimate goals of a political community. Every criminal law enacted is an explicit or implicit statement about where society draws the line between actions that can be tolerated and actions that are considered so destructive that they warrant the most severe sanctions the state can impose. The decision to criminalize an act is the most intrusive intervention the state can make in the lives of its citizens, as it carries with it the threat of deprivation of liberty, property, and even life itself. Therefore, the justification for such action must be based on principles that are coherent, rationally defensible, and consistent.

From the struggle to find these justifying principles, two main traditions of thought have emerged as competing poles in Anglo-American legal discourse and beyond. Each offers a fundamentally different vision of the relationship between law, morality, and freedom. On one side is the liberal tradition, which emphasizes the Harm Principle. Rooted firmly in the utilitarian thinking of John Stuart Mill, this principle serves as a bulwark for individual autonomy. It argues that the only legitimate reason for the state to restrict an individual's freedom is to prevent the harm that person causes to others.<sup>2</sup> In this view, the state has no business regulating actions that only affect the actor themselves (self-regarding acts), no matter how unwise or immoral those actions may be in the eyes of the majority. Individual freedom is the norm, and state intervention is an exception that requires very strong justification.

On the other hand, there is a tradition that can be classified as moral communitarianism, expressed through Legal Moralism. This principle, most famously articulated by Lord Patrick Devlin, provides a broader justification for state intervention. He argues that criminal law can and should be used to uphold fundamental public morality.<sup>3</sup> According to this view, society is united by shared moral bonds, and actions that damage the moral fabric of society, even if carried out privately and not directly harming other individuals, pose a threat to the very existence of society itself. Here, the priority shifts from individual autonomy alone to the preservation of social cohesion and shared values.

Amidst this debate between two extremes, an American legal philosopher emerged, Joel Feinberg, who could not easily be placed on either side. Feinberg was not a legal moralist; he was a liberal committed to Mill's basic premises. However, he also realized that the Harm Principle in its classical form had significant limitations and ambiguities. Through his monumental work, *The Moral Limits of the*

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<sup>1</sup> Steven Debbaut, “The legitimacy of criminalizing drugs: Applying the ‘harm principle’ of John Stuart Mill to Contemporary Decision-Making” (2022) 68 Int J Law, Crime Justice 1–12.

<sup>2</sup> Khan Academy, “Liberty and the harm principle,” (2023), daring: <<https://www.khanacademy.org/partner-content/wi-phi/xd226e27a:untitled-278/xd226e27a:liberty-and-the-harm-principle/v/liberty-and-the-harm-principle>>.

<sup>3</sup> R F Galvin, “Limited Legal Moralism” (1988) 7:2 Crim Justice Ethics 23–36, daring: <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/limited-legal-moralism>>.



Criminal Law, Feinberg undertook an ambitious project to reform and expand the liberal framework. He sought to create a more sophisticated and nuanced system of limiting principles, capable of addressing difficult cases where the Harm Principle alone seemed inadequate, without resorting to potentially repressive legal moralism.<sup>4</sup> By introducing the Offense Principle as a carefully calibrated supplement, Feinberg attempts to rescue liberalism from its own weaknesses.

The main thesis of this article is as follows: Although Mill's Harm Principle provides an essential foundation for a free society, its inherent ambiguity regarding the concept of "harm" opens the door to interpretations that can erode that very freedom. Conversely, Devlin's Legal Moralism, while capturing popular intuitions about the relationship between law and morality, carries an inherent risk of "tyranny of the majority" that is unacceptable in a pluralistic society. This analysis argues that Feinberg's multi-principle framework, which introduces the Offense Principle as a controlled supplement, offers the most sophisticated and philosophically defensible middle ground for setting the boundaries of criminalization in modern society. However, the application of this framework itself remains challenging and demands a high degree of judicial wisdom. The relevance and tension between these principles will be critically explored in the context of Indonesian criminal law, a legal system that has historically shown a strong tendency toward legal moralism, often at the expense of individual autonomy.

## METHOD

This study employs a doctrinal (normative) legal research design embedded with philosophical analysis to interrogate the proper limits of criminalization through the lenses of Mill's Harm Principle, Devlin's Legal Moralism, and Feinberg's multi-principle framework (harm plus offense). The inquiry combines a statute approach, focusing on Indonesia's Criminal Code (Law No. 1 of 2023), the Pornography Law (Law No. 44 of 2008), and related regulations with a conceptual approach that clarifies harm, offense, paternalism, legality, proportionality, and mens rea, and a philosophical reconstruction comparing the three theories to derive normative criteria; limited comparative references to foreign doctrines are used only where they sharpen conceptual boundaries. Primary materials comprise statutes, constitutional provisions, and authoritative judicial decisions; secondary materials include monographs, peer-reviewed articles, and law commission reports; tertiary materials (dictionaries/encyclopedias) provide definitional support. Using purposive sampling, the study selects morality-adjacent provisions (e.g., decency, public order, pornography, consensual adult conduct) most prone to tension between harm, offense, and moralism, and collects data via a transparent document study with recorded databases, keywords, and inclusion/exclusion criteria.

Analysis proceeds qualitatively and interpretively (hermeneutic), operationalizing a harm test (non-consensual, rights-affecting third-party harm), an offense test (grave, unavoidable public offense per Feinberg), and flags for moralism/paternalism; each provision is coded for legality clarity (*lex certa*),

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<sup>4</sup> Gergely Ferenc Lendvai, "Take a Ride on the Nightmare Bus! – An Invitation to the Discourse on Offensive Expressions and an Homage to Joel Feinberg," (2024), daring: *Const Discourse* <<https://constitutionaldiscourse.com/take-a-ride-on-the-nightmare-bus-an-invitation-to-the-discourse-on-offensive-expressions-and-an-homage-to-joel-feinberg/>>.



justificatory basis, mens rea structure, proportionality (suitability–necessity–balancing), and enforcement risk (overbreadth/selective enforcement), then compared in a matrix mapping against Mill–Devlin–Feinberg to identify convergence, divergence, and policy implications. Validity is strengthened through triangulation across sources, an auditable chain-of-evidence (search strings and inclusion logs), peer debriefing/logic checks, and a reflexivity statement acknowledging normative commitments; ethics issues are minimal because no human subjects are involved and sources are represented accurately with explicit disclosure of interpretive assumptions. Key limitations include reliance on available translations and published jurisprudence, the illustrative (not exhaustive) nature of comparative references, and the theory-laden character of normative conclusions tied to Indonesia’s constitutional context. The outputs comprise a coded table of target provisions, a theory-to-law mapping, and policy recommendations to tighten legality, curb overcriminalization, and calibrate offense-based regulation.

## RESULT & DISCUSSION

### I. Comparative Analysis: Weighing Individual Freedom and Collective Interests

Based on the thinking of John Stuart Mill, Lord Patrick Devlin, and Joel Feinberg, there has been a clear evolution in the philosophy of criminal law boundaries. This journey began with Mill's elegant but ambiguous Harm Principle, a single principle designed to maximize individual freedom. It was then challenged by Devlin's Legal Moralism, which prioritized the moral cohesion of society over individual autonomy. Finally, it was refined by Feinberg's complex multi-principle framework, which seeks to preserve the core of liberalism while acknowledging the need to regulate extreme forms of non-harmful social disruption. Each approach offers a different lens through which to view the dilemma of criminalization, highlighting different values and leading to different conclusions.

To clarify the fundamental differences and similarities between these three approaches, the following comparative table presents a systematic analysis across key dimensions. This table serves as a concise analytical summary, enabling a quick understanding of the main points of contention and how each theory approaches the issue of criminalization differently. It provides an important foundation before moving on to practical application in case studies.

**Table 1: Comparison of Principles Limiting Criminalization**

<b>Dimension</b>	<b>Harm Principle (Mill)</b>	<b>Offense Principle (Feinberg)</b>	<b>Legal Moralism (Devlin)</b>
Main Justification	Preventing clear and direct harm to the interests of others that	Preventing serious, profound, and unavoidable offense. <sup>6</sup>	Upholding shared moral values that are considered essential to prevent

<sup>6</sup> Lendvai, *supra* note 4; Also see Philosophy of Law, “Feinberg on Offense,” (2007), daring: <<https://pages.pomona.edu/~mjg14747/034-2007/offensiveness.shtml>>.



	can be considered a right. <sup>5</sup>		social disintegration. <sup>7</sup>
Moral Status	Personal and consensual morality are beyond the reach of the law (not the law's business). <sup>8</sup>	Morality is irrelevant; focus on the unpleasant mental state caused by wrongful behavior. <sup>9</sup>	Immorality, as measured by the disgust of ordinary people, is a <i>prima facie</i> basis for criminalization. <sup>10</sup>
Focus on Protection	Individual interests and rights. <sup>11</sup>	Individual sensitivity to deep and unwanted psychological shocks in public spaces. <sup>12</sup>	"Moral fabric" or moral structure of society (societal moral fabric). <sup>13</sup>
Scope of Intervention	Very narrow: only actions that harm others. Paternalism is rejected. <sup>14</sup>	Broader than Mill: includes behavior that is highly offensive in public, but narrower than moralism. <sup>15</sup>	Very broad: potentially covering all actions considered immoral by the majority, even those committed in private. <sup>16</sup>

<sup>5</sup> Fiveable Content Team, "7.2 Mill's concept of liberty and the harm principle," (2025), daring: <<https://fiveable.me/political-philosophy/unit-7/mills-concept-liberty-harm-principle/study-guide/2l7XxDN1liLAnVVy>>.

<sup>7</sup> Galvin, *supra* note 3; Also see John Stanton, "The Limits of Law" in *Stanford Encycl Philos* (Stanford University, 2022).

<sup>8</sup> Jessica Hurwood, "Application of the Hart-Devlin debate to the ideas and arguments raised in 'Legalising assisted dying would be a failure of collective human memory and imagination'" (2019) 1:2 Student J Prof Pract Acad Res, daring: <<https://www.northumbria-journals.co.uk/index.php/sjppar/article/view/872/1267>>.

<sup>9</sup> Philosophy of Law, *supra* note 6.

<sup>10</sup> Hurwood, *supra* note 8.

<sup>11</sup> Wikipedia, "Harm principle," (2025), daring: <[https://en.wikipedia.org/wiki/Harm\\_principle](https://en.wikipedia.org/wiki/Harm_principle)>; Also see Sandra J Peart, "Mill's Harm Principle: A Study in the Application of 'On Liberty'" (2023) *Essent Sch Ser Fraser Inst* 1-6, daring: <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1388&context=jepson-faculty-publications>>.

<sup>12</sup> Lendvai, *supra* note 4; Also see David van Mill, "Freedom of Speech," (2002), daring: *Stanford Encycl Philos* <<https://plato.stanford.edu/archives/spr2012/entries/freedom-speech/>>.

<sup>13</sup> Hurwood, *supra* note 8.

<sup>14</sup> Fiveable Content Team, *supra* note 5; Also see The University of North Carolina, "Part 6: The Case for Drug Use," daring: <<https://web.uncg.edu/dcl/courses/viceCrime/m6/part6.asp>>.

<sup>15</sup> Philosophy of Law, *supra* note 6.

<sup>16</sup> Jens Damgaard Thaysen, "Defining Legal Moralism" (2015) 16:2 *De Gruyter* 179-201.



Key Risks	A definition of “harm” that is too narrow (allowing abuse) or too broad (becoming repressive). <sup>17</sup>	The subjectivity of “offense”; potential for abuse to censor unpopular expression. <sup>18</sup>	Majority tyranny; oppression of minorities and non-conformist lifestyles; moral stagnation. <sup>19</sup>
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This table visually shows how each theory balances competing values. Mill places a heavy emphasis on freedom, allowing intervention only in cases of clear harm. Devlin, on the other hand, gives significant weight to collective morality, even at the risk of sacrificing individual freedom. Feinberg attempts to navigate a middle path, expanding the basis for intervention beyond harm to include severe offense, but at the same time building strong guardrails to prevent it from sliding toward pure moralism.

To understand the practical implications of these abstract principles, it is essential to apply them to contemporary issues that are often the subject of debate regarding criminalization. The following analysis will explore how each of the three philosophical frameworks—Mill’s Harm Principle, Devlin’s Legal Moralism, and Feinberg’s Harm/Offense framework—would approach four controversial areas of law.

a. Pornography Law

The debate over pornography is a classic battleground between liberalism and moralism.

1) Harm Principle Perspective (Mill): The Millian approach would be highly skeptical of a general ban on pornography. The focus is on demonstrable and specific harms. Therefore, the Harm Principle would readily justify the criminalization of child pornography, as its production inherently involves the abuse and exploitation of children, which constitutes severe harm.<sup>20</sup> It can also be used to combat exploitation or coercion of adults in the pornography industry. Radical feminist arguments, which claim that systematically degrading pornography causes harm to women’s subordination in society, will face a heavier burden of proof under the strict Millian standard, although it is theoretically possible if a strong causal link can be demonstrated.<sup>21</sup> However, for pornography that is produced and consumed by consenting adults in private, without any proven coercion or direct harm, the Harm Principle would struggle to find grounds for prohibition.<sup>22</sup>

<sup>17</sup> Wikipedia, *supra* note 11.

<sup>18</sup> Mill, *supra* note 12.

<sup>19</sup> National Endowment for the Humanities, “Alexis de Tocqueville on the Tyranny of the Majority,” daring: <<https://edsitement.neh.gov/curricula/alexis-de-tocqueville-tyranny-majority>>; Wikipedia, “Tyranny of the majority,” daring: <[https://en.wikipedia.org/wiki/Tyranny\\_of\\_the\\_majority](https://en.wikipedia.org/wiki/Tyranny_of_the_majority)>.

<sup>20</sup> Suzanne Ost, “Criminalising fabricated images of child pornography: a matter of harm or morality?” (2010) 30:2 Leg Stud 230–256.

<sup>21</sup> Caroline West, “Pornography and Censorship” in *Stanford Encycl Philos* (2004).

<sup>22</sup> Thomas C Arthur, “The Problems with Pornography Regulation: Lessons from History” (2019) 68:5 Emory Law J 867–907, daring:



- 2) Legal Moralism Perspective (Devlin): This is the most common justification for anti-pornography laws. From this perspective, pornography should be criminalized not because it causes specific harm, but because it is considered inherently immoral. It is seen as damaging to individual character, threatening traditional family values, degrading human sexuality, and contrary to religious teachings.<sup>23</sup> Whether or not there are identifiable victims is irrelevant; the act itself is considered a violation of the moral order of society and is therefore punishable.
- 3) Harm/Offense Perspective (Feinberg): Feinberg's framework will result in a more nuanced approach. He would agree with Mill that the private consumption of pornography by adults should not be prohibited, as it causes no harm or offense to third parties who disagree. However, the Offense Principle would provide a strong basis for prohibiting the display of pornography in public spaces. Displaying explicit images in places where people, including children, may be exposed to them accidentally and without consent could be considered a cause of serious and unavoidable offense, thereby justifying regulation.<sup>24</sup>

b. Narcotics Policy

The war on drugs is often based on a mixture of arguments about harm and morality.

- 1) The Harm Principle Perspective (Mill): Mill's principle directly challenges the criminalization of personal drug use. Because this principle rejects paternalism, the argument that the state should ban drugs to protect users from damaging their own health will be rejected outright.<sup>25</sup> The focus will shift exclusively to harm to others. Therefore, actions such as driving under the influence of drugs or committing crimes to fund addiction can and should be criminalized.<sup>26</sup> However, many Millian adherents will go further, using utilitarian arguments to claim that prohibition itself causes more harm than drug use. The black market created by prohibition fuels gang violence, corruption, the spread of disease through unsterile needles, and overdoses due to unregulated products. From this perspective, legalization and strict regulation would be a better policy to minimize overall harm.<sup>27</sup>
- 2) Legal Moralism Perspective (Devlin): Here, drug use is viewed as a classic "victimless crime" that must be prohibited on moral grounds. Drug use is considered a self-indulgent act that corrupts character, demonstrates moral weakness, and damages the "social fabric."<sup>28</sup> This argument is often rooted in

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<[https://scholarlycommons.law.emory.edu/elj/vol68/iss5/2?utm\\_source=scholarlycommons.law.emory.edu%2Felj%2Fvol68%2Fiss5%2F2&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarlycommons.law.emory.edu/elj/vol68/iss5/2?utm_source=scholarlycommons.law.emory.edu%2Felj%2Fvol68%2Fiss5%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages)>.

<sup>23</sup> Michael Joel Kessler, "A Puzzle about Obscenity" (2017) 4:1 A J Philos Theol Appl Ethics 5–30, daring: <<https://de-ethica.com/article/download/1778/1084/5286>>.

<sup>24</sup> *Ibid.*

<sup>25</sup> Debbaut, *supra* note 1.

<sup>26</sup> Kyle J Lucas Mr, "Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use?" (2014) 7:1 Hilltop Rev 33–44, daring: <<https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1082&context=hilltopreview>>.

<sup>27</sup> Debbaut, *supra* note 1.

<sup>28</sup> *Ibid.*



work ethic and self-discipline, viewing drug use as a rejection of social responsibility. From this perspective, the state has an obligation to use criminal law to prevent its citizens from falling into moral depravity, regardless of whether they directly harm others or not.<sup>29</sup>

- 3) Harm/Offense Perspective (Feinberg): Feinberg would largely agree with Mill in rejecting the criminalization of personal use. However, the Offense Principle may be relevant in some contexts. For example, public drug use that results in highly disruptive behavior or a highly unpleasant odor (such as the strong smell of marijuana in an enclosed space) could be regulated under the Offense Principle if it meets the standards of seriousness and unavoidability.<sup>30</sup> This would not justify a total ban, but it would justify restrictions on where and how it is used.

c. Hate Speech Regulations

This is one of the most challenging areas for liberal theories of freedom of expression:

- 1) The Harm Principle Perspective (Mill): Mill would be very reluctant to restrict any form of speech, no matter how offensive. He believed in the power of counterarguments to defeat bad ideas. The only clear exception is if the speech constitutes “a positive instigation to some mischievous act.”<sup>31</sup> A classic example is shouting that corn merchants are starving the poor to an angry mob gathered in front of the merchant's house.<sup>32</sup> In this case, the speech directly and immediately created a risk of physical harm. However, for more general hate speech, which spreads racist or discriminatory ideas but does not immediately incite violence, Mill would likely argue that it should be countered with more speech, not censorship.
- 2) Legal Moralism Perspective (Devlin): Hate speech can easily be prohibited under legal moralism. It can be argued that it is fundamentally immoral and contrary to society's basic moral beliefs about equality, human dignity, and respect for fellow citizens. Such speech is considered to undermine social bonds and promote hatred, which is a threat to the moral order.
- 3) Harm/Offense Perspective (Feinberg): This is where Feinberg's framework shows its analytical strength. The Offense Principle is particularly relevant to addressing hate speech. Feinberg would distinguish between different types of hate speech. Targeted racial slurs shouted directly at someone's face (targeted vilification) can be considered a very serious cause of offense, a “psychic assault” that violates a person's right to be treated with a minimum level of civil decency in public spaces.<sup>33</sup> In such cases, the Offense Principle may justify restrictions. For more diffuse forms of hate speech, such as racist pamphlets, Feinberg's balancing test would apply, taking into account factors

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Mill, *supra* note 12.

<sup>32</sup> Libertarianism, “On Liberty is not merely a political text explaining the intricacies of how the state ought to act. It is a love letter to the individual virtues of intellectual curiosity, tolerance, and open-mindedness,” (2020), daring: <<https://www.libertarianism.org/columns/introduction-john-stuart-mills-liberty>>.

<sup>33</sup> Logan Drake, “Free to Hate: Can We Justify Curbing Hateful Speech?” (2018) 3 UReCA NCHC J Undergrad Res Creat Act 1-8, daring: <<http://digitalcommons.unl.edu/ureca/3>>.



such as social value (which may be very low), the degree of offense, and the audience's ability to avoid exposure.<sup>34</sup>

d. The Euthanasia Debate

The issue of euthanasia or medically assisted suicide highlights the conflict between individual autonomy and collective moral values:

- 1) Harm Principle Perspective (Mill): This principle provides strong support for the individual's right to choose euthanasia. For a mentally competent adult suffering from a terminal illness with unbearable suffering, the decision to end one's life is the ultimate self-regarding act. Prohibiting this action in the name of patient protection is a form of paternalism that Mill explicitly rejects.<sup>35</sup> Because such actions do not harm others (assuming consent is freely and informedly given), the state has no jurisdiction to intervene. Individual autonomy to determine one's own path in life—and the end of one's life—is paramount.<sup>36</sup> However, a counterargument could be made that legalization could cause indirect harm to society, such as weakening respect for life or creating subtle pressure on parents and the sick to choose death.<sup>37</sup>
- 2) Legal Moralism Perspective (Devlin): Legal Moralism strongly opposes the legalization of euthanasia. Its argument is based on the principle of the sanctity of life as a fundamental and absolute moral value in society.<sup>38</sup> From this perspective, human life is an inviolable gift, and the deliberate act of ending life, regardless of circumstances or individual consent, is inherently wrong. Criminal law, in this view, has the duty to uphold this fundamental moral value and protect life from all threats, including from the individual's own choices.
- 3) Harm/Offense Perspective (Feinberg): Feinberg would most likely align with Mill in supporting the right to euthanasia based on the principles of autonomy and prevention of harm (in this case, harm from prolonged suffering). The Offense Principle does not seem relevant here, as the act itself is usually performed privately and is not designed to offend the public. The debate from Feinberg's perspective would center on whether there is significant harm to third parties that could justify restrictions, such as potential exploitation or psychological impact on medical professionals.

## II. Reflections in the Context of Indonesian Criminal Law

The philosophical debate between the Harm Principle and Legal Moralism is not merely an academic exercise; it has profound and real implications for criminal justice systems around the world, including in Indonesia. Analysis of legislation and legal discourse in Indonesia reveals a strong tendency toward legal moralism, often at the expense of liberal principles of individual autonomy. Two notable examples of legislation illustrate the dominance of the moralistic approach in Indonesian

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<sup>34</sup> Lendvai, *supra* note 4.

<sup>35</sup> Lauren Wharton, "Should Euthanasia be legalised in England and Wales? Interpreting John Stuart Mill's Harm Principle" (2019) 1:1 Student J Prof Pract Acad Res 28–38, daring: <<https://www.northumbriajournals.co.uk/index.php/sjppar/article/view/795/1173>>.

<sup>36</sup> *Ibid.*

<sup>37</sup> Hurwood, *supra* note 8.

<sup>38</sup> Suresh Bada Math & Santosh K Chaturvedi, "Euthanasia: Right to life vs right to die" (2012) 136:6 Indian J Med Res 899–902, daring: <<https://pmc.ncbi.nlm.nih.gov/articles/PMC3612319/>>.



criminal law: Law No. 44 of 2008 on Pornography and Law No. 1 of 2023 on the New Criminal Code (*KUHP Baru*).

- a. Pornography Law: This law is a prime example of legislation based on Devlin's Legal Moralism logic. Its explicit stated purpose is to “realize and maintain an ethical, noble society that upholds the values of the One Almighty God” and protect public morality.<sup>39</sup> The definition of “pornography” is very broad, covering “images, sketches, illustrations, photographs, writings, sounds, moving images, animations, cartoons, conversations, body movements, or other forms of messages through various forms of communication media and/or public performances, which contain obscenity or sexual exploitation that violates moral norms in society.”<sup>40</sup> The focus on “violations of decency norms” rather than directly provable harm reflects Devlin's logic, not Mill's. As a result, this law has been widely criticized for threatening freedom of expression, art, local culture, and privacy rights by criminalizing behavior based on subjective and often conservative standards of morality held by the majority.<sup>41</sup>
- b. New Criminal Code (Law No. 1/2023): Although it is a modernization of the colonial-era Criminal Code, the new Criminal Code expands the scope of criminal law into the private sphere in a manner that directly contradicts the Harm Principle. Articles on “indecent acts,” such as the prohibition of cohabitation or living together without marriage (Article 412) and adultery (Article 411), which have been expanded in scope, are clear examples. Although these offenses are complaint-based (requiring a report from a specific party, such as a spouse or parent/child), the fact that the state imposes criminal sanctions for consensual sexual relations between adults in the private sphere is a manifestation of legal moralism.<sup>42</sup> The justification often given for these articles is not the prevention of harm to third parties, but rather the protection of “public decency,” “the institution of marriage,” and “religious norms,” all of which are moral arguments.<sup>43</sup>

More than just specific articles, the broader discourse surrounding criminal law in Indonesia often reveals what could be called a “pseudo-syncretism” between the Harm Principle and Legal Moralism. Legislators and supporters of moralistic laws often use the language of “social harm” or protection of the “public interest” to justify their positions, which at first glance sound like harm-based justifications.<sup>44</sup> However, upon closer analysis, the “losses” referred to are often not concrete and verifiable setbacks as imagined by Mill or Feinberg. Instead, these ‘losses’ are abstract and immaterial, such as damage to the “morals of the nation,” threats to the

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<sup>39</sup> Wikipedia, “Pornography Act (Indonesia),” daring: <[https://en.wikipedia.org/wiki/Pornography\\_Act\\_\(Indonesia\)](https://en.wikipedia.org/wiki/Pornography_Act_(Indonesia))>.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Amelia Enggarsasi, *Analisis Kebijakan Kriminal Tindak Pidana Kumpul Kebo dalam RUU KUHP Tahun 2012* Universitas Lampung, 2013) [unpublished].

<sup>43</sup> Afwan Faizin et al, *Pertanggungjawaban Pidana Pelaku Prostitusi On Line di Indonesia (Telaah Terhadap Pendekatan Cyber Crime pada Tingkat Penyidikan dan Pengadilan di DKI Jakarta, Jawa Barat, Jawa Timur, dan Sulawesi Selatan)* (Jakarta: Pusat Penelitian dan Penerbitan (PUSLITPEN) LP2M UIN Syarif Hidayatullah Jakarta, 2020).

<sup>44</sup> *Ibid.*



“Eastern personality,” or violations of “religious values.”<sup>45</sup> In this discourse, violations of majority morality are considered a real social loss. This is not an application of the Harm Principle, but rather Legal Moralism “disguised” as language of loss.

This phenomenon creates significant communication challenges in legal debates in Indonesia. Critics who argue from a purely liberal perspective, demanding concrete evidence of harm, may fail to understand that for many policymakers and segments of society, threats to the collective moral order are the most tangible and important harms. This creates an often discordant dialogue, in which both sides operate under different basic assumptions about what constitutes “harm” and what the true purpose of criminal law is.

In the Indonesian socio-political context, liberal principles such as the Harm Principle face serious challenges. Indonesian society, which historically and culturally emphasizes communal values, social harmony, and morality derived from religion, often prioritizes collective interests over radical individual autonomy.<sup>46</sup> The idea that individuals have absolute sovereignty over their own bodies and minds, as long as they do not harm others, can be considered foreign or even dangerous to the established social order. Therefore, any effort to promote criminal law reform that is more oriented towards individual freedom must grapple not only with legal arguments, but also with deep cultural and philosophical assumptions about the relationship between the individual and society.

## CONCLUSION

The journey through the philosophical landscape of the boundaries of criminalization reveals an intellectual narrative that moves from simplicity to complexity. It begins with John Stuart Mill's Harm Principle—a single, elegant, and powerful principle designed as the primary shield for individual freedom against the tyranny of the state and the majority. This principle then faces a fundamental challenge from Lord Devlin's Legal Moralism, which proposes an alternative vision in which criminal law functions as the guardian of collective morality, considered the glue of social existence. The fierce debate between H.L.A. Hart and Devlin sharpened the battle lines, with Hart convincingly dismantling the logical and empirical weaknesses of the social disintegration thesis. However, Hart's intellectual victory did not completely resolve the issue, as Mill's Harm Principle itself still contained ambiguities that could be exploited. Finally, Joel Feinberg, through careful and systematic analysis, offers the most comprehensive framework to date. By retaining the liberal core of Mill's work but supplementing it with a carefully calibrated Offense Principle, Feinberg seeks to create a system that protects individual freedom without neglecting the need for civil order in a pluralistic society.

The main lesson from this journey is the rejection of absolutism. No single principle—be it the Harm Principle, the Offense Principle, or Legal Moralism—can

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<sup>45</sup> Wikipedia, *supra* note 39.

<sup>46</sup> Anisa Delia Azmi, Rahmatullah Ayu Hasmiati & Rio Arif Pratama, “Analisis Yuridis Perbandingan Penegakan Hukum Terhadap Kasus Pemalsuan Data Dalam Uu ITE (Studi Putusan Nomor 68/pid.sus/2024/pn. bjm dan nomor 764/pid.b/2016/pn.jkt.sel)” (2024) 8:9 Action Res Lit 2762-2773, daring: <<https://arl.ridwaninstitute.co.id/index.php/arl/article/view/527>>.



be mechanically applied to resolve all complex criminalization dilemmas. Each has its strengths and weaknesses.

- a. The Harm Principle remains a vital and irreplaceable starting point for any society that values freedom. It establishes a strong presumption in favor of individual autonomy and places the burden of proof on the state to justify any intervention. However, in its purest form, it may be too simplistic to address the complexity of social harm and public nuisance in modern societies.
- b. Legal Moralism, although often in line with popular intuition, has proven to be too dangerous for diverse and pluralistic societies. Its potential to legitimize majority tyranny, oppress minorities, and hinder moral progress makes it an unacceptable basis for criminal law in liberal democracies.
- c. The Offense Principle offered by Feinberg provides a much-needed nuance. He acknowledges that there are forms of behavior that, while not technically “harmful,” are so disruptive that they require regulation. However, its application is highly dependent on subjective judgment and demands extraordinary judicial wisdom to prevent it from becoming a tool for censoring unpopular or unconventional expressions.

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