The Meaning of Wrongdoing–A Crime of Disrespecting the Flag: Grounds for Preserving "National Unity"?

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I. PROLOGUE

> [W]e can say readily enough what a 'crime' is: It is not simply anything which a legislature chooses to call a 'crime.' It is not simply anti-social conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.[1]

1. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

Before launching into a detailed discussion on the question at stake—the meaning of wrongdoing—I shall first clarify, in a nutshell, the perplexing grounds on which this Article stands, thus outlining the legal problems I seek to engage in debate on, as well as providing a roadmap of the thesis I seek to articulate henceforth. I shall elaborate on this roadmap, addressing in depth each of the issues to be raised in this Part.

Underlying this Article is my assertion that in any constitutional democracy, for the legislature to validly classify conduct as a crime, the fundamental principles of criminal law theory—by which I mean the core principles of substantive criminal law on which every scholar of criminal law agrees, regardless the theory of criminal law he adheres to—must be met.

In addition, the argument will be made that courts of such regimes should be empowered to strike down criminal laws when they fail the following tests: (1) whether the particular criminal prohibition befits the values of constitutional democracy, (2) whether the prohibition serves a proper purpose, and (3) whether the criminalization is proportionate.

Debating the question on the constitutionality of the criminal prohibition against flag desecration, I argue that applying the principles set forth above shows that flag desecration cannot constitutionally be made a crime. Considering the question in the manner set out above is superior to the approach of the Supreme Court in *United States v. Eichman* for two reasons: (1) the question whether conduct can be made a crime is logically prior to the question whether commission of that crime is under certain circumstances protected as free speech, and (2) the *Eichman* decision itself fails to address the case of a person who physically destroys a flag without intending to communicate any message.

Conceptually and comparatively speaking, some constitutional democracies actually permit their courts to constitutionally scrutinize their criminal laws in the manner set out above. However, this is not the case in the United States, arguably because of: (1) the lack of constitutional text authorizing such scrutiny, and (2) the counter-majoritarian difficulty. In response to both reasons asserted, I argue the Due Process Clause and the reference to the concepts of "Crime" and "Criminal Prosecution" in the Sixth Amendment, could serve as a conceptual hook for locating clear language of substantive criminal law in the U.S. Constitution. In addition, I show how in other comparative jurisdictions, namely Canada, the Supreme Court has extended constitutional scrutiny over substantive criminal law even in the absence of a clear

language of substantive criminal law in the Charter of Rights and Freedoms. As for the arguable counter-majoritarian difficulty, I contend that legislatures cannot be relied on to protect those who are suspected of criminal activity or those who have been found guilty of such activity, for it is the legislature's incentive to over-criminalize.

Focusing the discussion on the criminal prohibition against flag desecration as such, I argue that such prohibition does not meet the fundamental principles of criminal theory for several reasons. First, the asserted "social protected interest" by such criminalization, as argued in *Eichman*, is preserving "national unity." The conduct of flag desecration does not constitute any serious threat to society, and does not even come close to any of the immoral conducts that might be regulated by criminal means; those which shock the man's mind; for an immoral conduct to become a crime there must be an intrinsic common quality by which to distinguish criminal from non-criminal. Second, fundamental principles of criminal law require clarity, certainty, and stability of criminal norms; this is also a notion of the Due Process Clause understood to require fair and just warning. In addition, respect towards others or towards ideas is not what criminal law seeks to achieve; criminal law by nature is a reactive system, it is not the law of "shall do," but the law of "shall not do." The criminal nature of flag desecration is surrounded by many doubts, which leads one to view such criminalization as treating the human being as an object, as well as a means of doubtful national unity. And, third because of its coercive nature, the criminal law must not be invoked except as a last resort, especially when less coercive means are available. I argue that the market-place of ideas is the most appropriate means of preserving national unity.

However, assuming that one may come up with an argument in which the prohibition against flag desecration meets the fundamental principles of criminal law, then, it is my view that such criminalization is not constitutional. Again, assuming that "preserving the physical integrity of the flag as such," as means of preserving national unity, befits the values of a constitutional democracy and it is even a proper purpose constitutional democracy may seek to achieve, I argue that preserving this purpose cannot be constitutionally justified if it limits constitutional rights, e.g., free speech and the right to liberty, in a disproportionate manner; and this is the case for the prohibition against flag desecration, for it does not meet the three sub-tests of the proportionality requirement. (1) Because of the coercive nature of criminal law, as well as the high constitutional protection that both the right to liberty and free expression (especially symbolic speech) enjoy, the government must explain the suggestion that criminal prohibition would guarantee a stop to desecration of the flag, and moreover, grant the flag special respect.

I doubt any reasonable ground for expecting the criminalization of flag desecration to be effective in achieving its objective of preserving "national unity." (2) Educational or administrative means are less intrusive means of achieving the asserted purpose of preserving national unity. And, (3) on the one hand, criminal punishment has a draconian and harsh nature; on the other hand, the damage that results from desecrating the flag is small. The cost of such criminalization exceeds the benefits gained from achieving the objective. The damage caused to the person upon such criminal prohibition outweighs the damage that may occur in the absence of such prohibition, and therefore such crime, being disproportionate, may not be constitutional.

Before I shortly elaborate on the issue of constitutionalizing substantive criminal law—thereby paving a smoother path toward addressing the constitutionality of the criminal prohibition against flag desecration—I shall first explain a final matter of methodology as to the kind of scrutiny that my thesis is calling for.

This Article calls for two successive forms of scrutiny by the court. In the first level of scrutiny, the court should engage in examining the compatibility of the criminalization with the fundamental principles of criminal law. These fundamental principles, as I shall later show, are constitutionally required—as part of e.g., the Due Process Clause and the Equal Protection Clause—and therefore, the court has the judicial power to engage in this kind of scrutiny. If the criminalization meets the set of fundamental principles that criminal law suggests, then the court should examine the constitutionality of this criminalization, in accordance with the constitutional rules I have set out above.

These are two separate kinds of scrutiny, and the court should employ both. The distinction between these levels of scrutiny lies in the different set of values each affords. While criminal law theory is concerned with preventing certain violations against the rights of others as individuals, the rights public as a society, and other important public interests, and thereby seeks to protect these rights and interests by limiting the individual's right to act as they freely wish, constitutional law theory provides the kind of balancing apparatus that criminal law is not concerned with. Constitutional law theory debates the individual's rights and their scope, as well as their right to exercise their liberty by peaceful means within the community, thus seeking to balance them against the rights of others to live in the community in peace.

To conclude on this issue, the rights of others, as individuals and as a whole, are formulated as the social protected interest that criminal law seeks to protect through criminal means, and it is with these rights that criminal law theory should be concerned in the first level of scrutiny. However, in the second level of scrutiny, an additional set of rights are brought into play; these are the rights of the individual, namely the actor, to exercise their constitutional rights—e.g., free speech, liberty, free exercise of religion. The second level of scrutiny requires balancing those rights with the rights of others.

II. CONSTITUTIONALIZING SUBSTANTIVE CRIMINAL LAW: A PALACE OF JUSTICE

Legal theory of criminal justice distinguishes between criminal law of procedure and substantive criminal law. While substantive criminal law is about the definition of crime and its prescribed punishment, the law of criminal procedure is the set of rules concerning the enforcement of substantive laws by the state.[2] As ends but not means, human beings, including criminals, enjoy human rights, especially the right to dignity. Constitutional law primarily protects human rights. Criminal law is correctly viewed as a draconian apparatus for limiting human rights. Criminalizing any act requires justification, for it is the basic premise that the individual is free to act in whatever manner he wishes unless a particular type of conduct is explicitly prohibited. This justification can be found in constitutional law, for constitutional law not only offers protection to human rights, but it primarily delineates the ambit of rights, thus striking an appropriate balance between rights and other important social interests. In principle, the legislature strikes this balance upon the enactment of any statute that limits human rights, primarily criminal laws. However, where the legislature does not strike such a balance, or where it strikes a disproportionate balance, it is for the judiciary to intervene in accordance with its power of judicial review.[3]

In American jurisprudence, the law of criminal procedure has always been viewed as an inherent part of constitutional law,[4] and thus has constantly been subject to constitutional scrutiny.[5] Unlike other western legal jurisdictions, e.g., Canada and Germany, in the American context,

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2. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 7 (1998).
3. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
4. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997).
5. For instance the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, and the Eighth Amendment.

constitutionalizing substantive criminal law has been a saga of hesitation.[6] Several scholars of criminal jurisprudence, led by George Fletcher,[7] Henry Hart,[8] Daniel Suleiman,[9] William Stuntz,[10] Joshua Dressler and Kent Greenawalt, have addressed this issue.[11] I too have inquired into this discussion in depth.[12] It has been said that the U.S. Supreme Court "is not likely ever to tangle" with substantive criminal law.[13] Underlying this criticism is the question: "[w]hat sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"[14]

The argument in American jurisprudence has been that the Constitution of 1787, including the Bill of Rights of 1791, provides no language of substantive criminal law; but rather spells out an array of constitutional safeguards for the law of criminal procedure,[15] and therefore no constitutional scrutiny may be extended over substantive criminal law. In fact, the only substantive issues to have received constitutional treatment are treason[16] and capital punishment.[17]

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6. Lambert v. California, 355 U.S. 225 (1957); Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968).

7. George P. Fletcher, *The Meaning of Innocence*, 48 U. TORONTO L.J. 157, 159 (1998).

8. Hart, *supra* note 1.

9. Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426 (2004).

10. Stuntz, *supra* note 4.

11. Joshua Dressler, *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507, 1532 (1999).

12. *See* Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking* Apprendi, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501 (2007). *See also* Apprendi v. New Jersey, 530 U.S. 466 (2000).

13. Fletcher, *supra* note 7, at 159.

14. Hart, *supra* note 1, at 431.

15. *See supra* note 5.

16. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.").

17. That is, the harshest sentences have to be reserved for the worst crimes. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86 (1958); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 232–34 (2002); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1071 (1964); Suleiman, *supra* note 9.

In another place, I have previously strongly rejected this kind of explanation, proposing accordingly that the Constitution includes an explicit language of substantive criminal law, for it is clear that when the Constitution speaks of "Crime" and "Criminal Prosecution," in the Sixth Amendment, it refers to the fundamental terminology of substantive criminal law. My view has been that the Court constantly neglects to inquire into the meaning of this obvious language of substantive criminal law.[18] This reluctance begs the question, why?, which I shall answer by considering three oft-cited cases in this context.

In *Lambert v. California*,[19] the Court declared the unconstitutionality, under the Due Process Clause of the Fourteenth Amendment, of a California law that made it a crime for convicted felons not to register with the police. Acknowledging that substantive criminal law can violate the Constitution, the Court held in the absence of knowledge of a duty imposed by the law, it is an infringement of due process to criminalize such an omission to fulfill a duty.[20] Later, in *Robinson v. California*,[21] the Court held that status offenses are unconstitutional by reason of their incompatibility with the Due Process Clause. However, realizing the perplexing meaning of status offenses, a few years later in *Powell v. Texas*,[22] the Court rejected the argument that public intoxication is a status crime, thus referring to "minimally acceptable criteria of criminal responsibility."[23]

The Court's reaction in *Powell* to the *Robinson* decision may faithfully explain the reason for the Court's reluctance to tangle with

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18. Wattad, *supra* note 12, at 526–30.

19. 355 U.S. 225 (1957). The Los Angeles, Cal., Municipal Code § 52.39 required registration with the chief of police for convicted felons. The defendant had no actual knowledge of her duty to register. The Court held that in the circumstances where no showing was made of the probability of such knowledge, applying the ordinance on the defendant was a violation of her right to due process of the law under the Fourteenth Amendment.

20. *Id.* at 226–30.

21. 370 U.S. 660 (1962). The Court struck down a California statute that was supposedly being imposed for actions and not for status. The Court held that the Due Process Clause requires at minimum that punishment be imposed for actions and not for status. Accordingly, the Court concluded that Cal. Health Safety Code § 11721, which made the status of being addicted to the use of narcotics a criminal offense, was unconstitutional.

22. 392 U.S. 514 (1968). *See also* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (at stake was an excessively vague statute, as an instance of cases that the Supreme Court, though incoherently, has committed itself to assessing, from time to time, the constitutionality of criminal statutes); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 35–45 (1960); Fletcher, *supra* note 7, at 158; George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968).

23. *See* Fletcher, *supra* note 7, at 158.

substantive criminal law. Eventually, what the Justices viewed as constitutional scrutiny of the substantive criminal law was regarded as an incompetent attempt, or a risky experience to be avoided. Obviously, the first step towards constitutionally scrutinizing substantive criminal law, in *Robinson*, opened a vast door to constitutional scrutiny of every state's substantive criminal law; a task that the Court—I can only assume—was unwilling to take. Whether this is true or not, it is my opinion that justice must be done, even at the cost of scrutinizing every state substantive criminal law.

In his well-articulated essay, Suleiman suggests several reasons for constitutionalizing substantive criminal law.[24] First, the Court has the authority to constitutionally scrutinize substantive criminal law, for this has been done in cases of capital punishment,[25] as well as in other cases where the Court has struck down state substantive criminal laws for their contradiction of fundamental principles.[26] Second, because of the nature of political processes, judges "are the best-positioned institutional actors to respond to injustice in the criminal law," since it is less likely that the legislators will be in favor of repealing criminal statutes.[27] And third, federalism does not imply that every jurisdictional variation is constitutional.[28] As correctly stated by Suleiman: "for the same reason the Court began regulating the substance of capital punishment in America—a concern for justice—it ought to establish minimum standards of criminal blameworthiness and proportionality."[29]

To conclude on this point, comparative studies shed light on the importance of constitutionalizing substantive criminal law, as well as provide counterarguments to the American reasoning behind the absence of the language of substantive criminal law in the Constitution. Furthermore, comparative studies elaborate on the meaning of justice that Suleiman is concerned with.

Relying on several cognate concepts of human dignity, article 7 of the European Convention on Human Rights of 1950 embodies, in general terms, the principle that only the Law can define a crime and prescribe a

24. Suleiman, *supra* note 9, at 453.
25. *See supra* note 17.
26. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).
27. Suleiman, *supra* note 9, at 454. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001).
28. Suleiman, *supra* note 9, at 456–57.
29. *Id.* at 458.

penalty (*nullum crimen, nulla poena sine lege*).[30] Legal philosophy distinguishes between two theories of law.[31] One term is "law," which expresses the idea of laws enacted by an authoritative body. The other term is "Law," which refers to the good and just law, which is binding because it is good and just.[32] Article 7 of the Convention refers to *Recht* in German, *droit* in French, and *derecho* in Spanish, namely "Law," but not to "law" (*Gesetz* in German, *loi* in French, and *ley* in Spanish).[33]

In the same manner,[34] in accordance with section 7 of the Charter of Rights and Freedoms of 1982, the Supreme Court of Canada has constitutionally scrutinized provisions of the Canadian Criminal Code of 1985 for their compatibility with "principles of fundamental justice."[35] The Court has rejected the argument that the Charter does not embrace anything beyond procedural safeguards,[36] reasoning that the task of the Court is not to choose between substantive or procedural content per se, but to secure for persons the full benefit of the Charter's protection[37] while avoiding adjudication of the merits of public policy.[38]

The Basic Law for the Federal Republic of Germany (Grundgesetz, GG) of 1949 demonstrates high sensitivity to the inviolable right to dignity (*Würde*)[39] and the right to personal freedom,[40] from which basic principles of criminal law and constitutional law are derived. The German Supreme Court in Constitutional Cases has expressed its position that if an act satisfies the requirements of definition, the question arises whether the act is wrongful. The principles for determining when conduct is wrongful may be derived from both statutory and non-statutory law. These principles can be derived by interpreting written norms with a view to the purpose and context of these norms, as well as the constitutional restraints higher principles impose on criminal law.[41]

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30. Achour v. France, App. No. 67335/01, Eur. Ct. H.R., § 41 (2006) *available at* http://www.echr.coe.int/; Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 18 (1993).

31. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11–42 (1996).

32. Wattad, *supra* note 12, at 518–19.

33. E.K. v. Turkey, App. No. 28496/95, Eur. Ct. H.R. 21 (2002) *available at* http://www.echr.coe.int/.

34. Constitution Act, 1982, pt. 1, § 11 (U.K.).

35. THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM (Jamie Cameron ed., 1996); MARILYN PILON, CRIMINAL TRIAL AND PUNISHMENT: PROTECTION OF RIGHTS UNDER THE CHARTER (rev. ed. 1993); DON STUART, CANADIAN CRIMINAL LAW, 14–15 (3d. ed. 1995); DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW (1991).

36. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (Can.) (Lamer, J.). *See* Kienapple v. The Queen, [1975] 1 S.C.R. 729 (Can.).

37. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 344 (Can.) (Dickson, J.).

38. *See* Curr v. The Queen, [1972] S.C.R. 889, 899 (Can.).

39. GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G.).

40. GRUNDGESETZ [GG] [Constitution] art. 2 (F.R.G.).

41. The Abortion Case of 1927, Reichsgericht [RG] [Federal Court of Justice] Mar. 11, 1927, 61 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 242 (F.R.G.).

Accordingly, the Court once held no act is criminal if the element of wrongfulness is negated by public or private law; it is constitutionally required that no punishment be imposed except on guilty people. And "Justice" requires that the punishment be appropriate to the guilt attributed to the offender.[42]

I now focus the discussion around the complex problem I purport to answer in this article. The discussion I have launched into bears upon one of the most fundamental problems in American jurisprudence regarding the criminalization of flag desecration for the sake of preserving national unity. As we shall see, constitutionalizing substantive criminal law has a bearing on understanding the nature of criminal wrongdoing.

III. INTRODUCTION

Is it constitutionally permissible to preserve the physical integrity of the flag by means of criminal justice? This is the question before us. The story usually told in the American jurisprudence is that if flag desecration constitutes expressive conduct, then flag desecration enjoys the protection of the First Amendment, making it unconstitutional to criminalize it. Two premises drive the story: first, the lack of constitutional protection to the American flag, and second, the constitutional protection symbolic speech has received under the First Amendment.

This is the kind of pure constitutional analysis that I seek to criticize in this Article; what sense does it make to discuss the constitutionality of a criminal prohibition, if it may not become a crime in the first place? This is not to suggest avoiding the constitutional discussion, but rather to propose a combined analysis, which tangles with fundamental principles of criminal law theory along with basic values of constitutional law. Accordingly, the first question that ought to be answered concerns the compatibility of a particular criminalization with the fundamental principles of criminal theory (punishable wrong), for if this kind of criminalization conflicts with fundamental principles of criminal law, then, as Suleiman puts it, the Court must strike it down,[43] as has been the case in many cases.[44] However, if the particular criminalization meets

42. German Border Guard Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 24, 1996, 95 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 96 (F.R.G.).

43. Suleiman, *supra* note 9, at 453.

44. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973).

the fundamental principles of criminal theory, the question then becomes one of constitutional law (constitutional crime). Constitutional law, at this stage, acts as a barometer that examines the severity or proportionality of the criminalization; for, as I explain further in Part V, not only ought criminalization be a means of last resort, but also it must be imposed with proportionality to the magnitude of the wrongdoing.

My proposal suggests an inquiry into the meaning of criminal wrongdoing, as well as the possible interaction between substantive criminal law and constitutional law. What is unique about this interaction is that although constitutional law and criminal law operate in contradictory directions—i.e., one protects rights and the other limits them—they both require treating all persons, including criminals, as ends rather than means. In the context of limiting human rights, constitutional law plays an important role. Considering the non-absolute nature of human rights, constitutional law strikes a balance between rights and other important social interests. It also guarantees that criminal law be not only a system of limiting human rights, but primarily a mechanism of human dignity, thus treating criminals as humans in the first place. I see constitutional law as concerned with a rights formula which consists of three divisions: (1) the recognition of a constitutionally protected right, (2) the ambit of the right, and (3) the limits that a state may impose on the right.[45]

In Plato's four dialogues on *The Trial and Death of Socrates*, discussing the criminal nature of murder with Socrates, Euthyphro's argues, "all the gods would be agreed as to the propriety of punishing a murderer."[46] The common law of England has always distinguished between *mala in se* offenses (because it is wrong as such),[47] and *mala prohibita* offenses (because the law says it is wrong).[48] This distinction can be of great help in approaching the constitutional nature of criminal law. Murder, for instance, is largely considered *mala in se*; killing a person is explicitly excluded from the constitutional right to liberty.[49] This is not the case for speech. There are forms of speech that have

45. AHARON BARAK, THE JUDGE IN A DEMOCRACY 82 (2006). *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 2 (2d ed. 1995).

46. PLATO, THE TRIAL AND DEATH OF SOCRATES: FOUR DIALOGUES 7 (1992).

47. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 57–58 (Wayne Morrison ed., 2001) (1769) [hereinafter 1 BLACKSTONE]; ANDREW P. SIMESTER & GORDON R. SULLIVAN, CRIMINAL LAW THEORY AND DOCTRINE 3 (2002).

48. YUVAL LAVE & ELIEZAR LEDERMAN, PRINCIPLES OF CRIMINAL RESPONSIBILITY 20 (1981); MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 37 (2002).

49. CrimA 4424, 4713, 4779/98 Selgado v. The State of Israel [2002] IsrSC 56(5) 529 (Isr.) (Cohen, J.).

no criminal characteristics per se, such as symbolic speech,[50] i.e., using symbols to convey meaningful messages.[51] This is not to say that words do not harm at all; as for instance is the view of feminist theorists led by Catharine MacKinnon, in which protecting pornography, for example, is nothing but protection of sexual abuse under the cover of protecting speech.[52] This is rather to argue, as I shall elaborate, that words might offend others, and that offense to others is not as serious as harm to others unless it amounts to extreme offense, and therefore less coercive means than criminal law must be considered to regulate offense against others. However, attributing criminal liability to forms of speech having no criminal characteristics per se requires strong justification, for it is the basic principle of every legal system that the individual is free to act by their free will, unless a particular act is expressly prohibited.

As provided in Part II, the importance of constitutional law in the context of crime and punishment may not be denied especially because of the draconian nature of criminal law, where human rights are most likely to be violated.[53] Constitutional law clarifies the fuzzy borders between acts that may be penalized and others that are subject to different kinds of social interventions. Not every act that could be criminalized should be; for a crime to be constitutionally justified, a constitutional balance must be drawn. Criminal punishment is imposed for the wrongdoing upon which a criminal has been found guilty. The guilt requirement is the justification for imposing criminal punishment upon the commission of a proven wrongdoing.[54] Criminal law is the set of rules that represents the right and wrong as established by social order, relying on the general acknowledgement of the community. A crime is the commission of wrongdoing to which a certain mental state is attached; crime is not the wrongdoing alone. The wrongdoing factor is the most important component of the definition of a crime, for it reflects the concept of right and wrong as recognized by the community, i.e., a

50. CHARLES KAY OGDEN, THE MEANING OF MEANING 23 (8th ed. 1956); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505–06 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Stromberg v. California, 283 U.S. 359 (1931).

51. James R. Dyer, Texas v. Johnson: *Symbolic Speech and Flag Desecration Under the First Amendment*, 25 NEW ENG. L. REV. 895, 908 (1991).

52. CATHARINE A. MACKINNON, ONLY WORDS 9, 12 (1993).

53. FLETCHER, *supra* note 2, at 7. *See also* The Abortion Case of 1975, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.).

54. Wattad, *supra* note 12, at 529–30.

criminal offense as an anti-social phenomenon. "The wrongness of the phenomenon lies in its anti-social harm to a legally protected interest . . . [and] . . . is the product of the anti-social nature of the act, and of the anti-social nature of the result."[55] However, the wrongdoing factor is not sufficient in itself to constitute a crime. Rather, it has to be committed under a recognized mental state. Criminal responsibility is based on the attribution of the commission of a crime (wrongdoing associated with mental state) to a person. Attribution captures the idea of holding the offender responsible for the crime.[56]

Inquiring into the meaning and the nature of criminal wrongdoing, I endeavor to understand the interrelationship between the function criminal law plays in limiting human rights, relying on the general acknowledgement of the community, and the role constitutional law fulfils in protecting human rights as well as striking a balance between protected human rights and other important social interests. My view is that understanding the meaning of human dignity, as well as its important contribution to the meaning of criminal wrongdoing, explains the urgent need to subject substantive criminal law to constitutional scrutiny.

To this end, I am not suggesting analyzing the notion of crime independently of the Constitution, but rather conjointly with both the Constitution and the fundamental principles of criminal theory. However, in doing so I argue for some methodological order, for it makes no sense, for instance, to discuss the constitutionality of a particular criminalization if this criminalization does not stand in accordance with fundamental principles of criminal theory, namely, if it is not a crime in the first place. The American saga of flag desecration elaborates on this position.

The American saga of flag desecration embodies questions that implicate an inherent interaction between fundamental principles of criminal law and other constitutional values. In *Texas v. Johnson*,[57] the U.S. Supreme Court held that criminalizing desecration of the United States flag is a violation of the constitutional right of freedom of speech. However, in *Street v. New York*, the Court avoided addressing the question of whether the act of flag burning as such is protected under the

55. KHALID GHANAYIM, THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSES IN CRIMINAL LAW, REFLECTIONS ABOUT NECESSITY, A THESIS FOR THE DEGREE DOCTOR OF LAW 2 (Under the Supervision of Professor Mordechai Kremnitzer, 2002).

56. Wattad, *supra* note 12, at 534.

57. 491 U.S. 397 (1989).

First Amendment as a form of symbolic speech.[58] Later, the Flag Protection Act of 1989, which was enacted to overturn *Johnson*, was also invalidated in *United States v. Eichman*, for being in violation of the right to freedom of speech. In both cases, the Court did not declare the Flag Protection Act invalid on its face. Underlying the Court's reasoning was the assumption that: "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."[59] The Court emphasized the constitutional importance of symbolic speech, but made no reference or allusion to criminal law theory. Thus, the Court neglected the principal question that concerns criminalizing certain acts. The Court restrained its analysis to the pure conventional constitutional premises of the First Amendment. However, the fact that a particular conduct is presumptively constitutionally protected does not automatically lead to the conclusion that the conduct may not be criminalized. Every person has the right to liberty and privacy, but that does not mean people are allowed to kill others or exercise abortion as they wish. Whereas the intentional cause of death of another person is excluded from the right to liberty, causing another's death under circumstances of self-defense is recognized as the exercise of the right to liberty and personal autonomy. Before launching a detailed inquiry as to whether a particular type of conduct is included in or excluded from a right, one must ask the question if the discussed conduct may be assigned as a recognized wrong. If this is the case, then the question becomes one of punishable wrongs, which must be resolved in accordance with the fundamental principles of criminal law theory. Only then is it possible to challenge the constitutionality of the particular criminalization. One could conceivably question the logic of this transition. In addition to the answer that Part V(C) will provide, I explain now as follows.

When the Court examines the constitutionality of the prohibition against flag desecration based on pure constitutional analysis, it is the Court's assumption that legislators are free to make any act a crime unless the particular criminalization violates a constitutionally protected right. However, this is exactly what I sought to explain in Part II, namely that the Court's reluctance to constitutionalize substantive criminal law is based primarily on the assumption that legislators are free to make any

58. Michael A. Henderson, *Today's Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment*, 41 S.D. L. REV. 533, 555 (1996); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 515 (1991).

59. United States v. Eichman, 496 U.S. 310, 319 (1990).

act a crime in the first place. Many criminal jurisprudence scholars largely criticize this is the kind of assumption, arguing for the subjection of substantive criminal law to constitutional scrutiny. The basic constitutional assumption we must acknowledge is that a person is free to do whatever he wishes. That is, criminal law, viewed as the law of limiting rights and freedoms, is the exception but not the rule. This constitutional assumption begs the question then, not of the unconstitutionality of a particular criminalization, but rather that which concerns the fundamental principles of criminal theory. These principles are usually neglected by legislators in the course of articulating any criminal prohibition, for they are more likely to be driven by policy considerations than principles of criminal theory, as correctly viewed by Suleiman, who argues that "legislators have little incentive to repeal criminal statutes or decrease punishments for criminal behavior,"[60] and Stuntz, who posits that legislators' main concern is to appease voters on issues of crime.[61] However, there are cases where legislators acknowledge principles, and not just policy considerations, to articulate a crime in complete accordance with the fundamental principles of criminal law. In the latter cases, all we know is that criminal theory allows for such criminalization, but nothing should be implied as to the constitutionality of the crime, for such criminalization might be violating human rights in a manner contradictory to the nature of the constitutional protection that a particular right enjoys. In these cases, constitutional analysis is urgently required to strike balances of proportionality for instance, or to delineate the limits of the power of criminal law in regulating human behavior within the bounds of the constitutional protection that the right enjoys.

Driven by analytical, theoretical, and comparative methodologies, I seek in this article to shed light upon a number of different issues and perplexing fields. In Part IV, following a discussion on the development of symbolic speech theory within the First Amendment, I present the American story of flag desecration, and the Court's methodology in approaching the question of the constitutionality of criminal prohibition of flag desecration. In addition, I provide an analytical critique of the Court's reasoning. However, to achieve this end, I first set out the touchstone cases on free expression, which led to the development of the theory of symbolic speech as a constitutionally protected right by the First Amendment. These cases constitute the main starting point for every discussion, by the Court, on the constitutionality of the criminal prohibition against flag desecration. In the context of flag desecration, addressing these cases serves to delineate the grounds of my argument,

60. Suleiman, *supra* note 9, at 454.
61. Stuntz, *supra* note 27.

according to which the Court has constantly neglected criminal law theory and focused instead on the classic constitutional analysis of the First Amendment.

In Part V, I formulate a theory of criminal law, inquiring into the meaning of criminal wrongdoing and the underlying premises of conflicts and interrelations between constitutional law and substantive criminal law. This inquiry relies on the bedrock principle of human dignity, which underscores both criminal law and constitutional law, according to which persons, including criminals, must be treated as ends but not means, under which they are the subject of the law rather than its object. Part V sets forth the basic pillars of criminal law theory, as well as those of constitutionalizing substantive criminal law. Finally, in Part VI, I focus the discussion on the prohibition against flag desecration, arguing that flag desecration may not be criminalized according to the fundamental principles of criminal theory, and even if it may be so criminalized, such criminalization may not be constitutionally justified. As provided in Part II. and on which I elaborate in Part V, constitutionalizing substantive criminal law requires a deeper understanding of criminal law theory, rather than simply declaring an ad hoc crime to be unconstitutional under conventional constitutional analysis. Constitutionalizing substantive criminal law requires an understanding of the fundamental principles of criminal theory in the constitutional context. It must not be done through a dichotomy; it is not a pure story of constitutional law, nor is it a pure discussion of substantive criminal law. Rather, it is a synthesis of both criminal law and constitutional law.

What makes an act socially, morally, or ethically wrong may not always make it criminally punishable. Criminal law is not only a system of rights deprivation, it is primarily a mechanism of imputing highly condemnatory stigmas, and therefore must be preserved for the most serious of wrong actions (the minimal principle); those which are characterized by high levels of immorality or serious harm or danger to the society as a whole and the public order. Only in this way may we protect human dignity.

IV. *DE LEGE LATA*: UNCONSTITUTIONAL CRIME—PURE CONSTITUTIONAL ANALYSIS

Before addressing the American *de lege lata* regarding the question on the constitutionality of the criminal prohibition against flag desecration, I will first set out the basic principles of the American jurisprudence on

free expression, as well as the development of the theory of symbolic speech.

A. Dignifying Free Speech

Many democratic countries regard the right to freedom of expression as a fundamental right.[62] National and international courts have played an indispensable role in protecting the right to freedom of expression and have created a set of important principles and a body of rich jurisprudence aimed at enlarging the right to freedom of expression.[63] This is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[64] However, none of these leading democracies have regarded freedom of expression as absolute.[65] In the American context, the right to freedom of

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62. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937); Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 976 (Can.); RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 584 (Can.); HCJ 73, 87/53 "Kol Ha'am" Co. Ltd. v. Minister of Interior, [1953] IsrSC 7(2) 871, 876–78 (Isr.); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 713 (2d ed. 1985); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1055 (6th ed. 2000).

63. WALTER BAGEHOT, THE METAPHYSICAL BASIS OF TOLERATION (1874); FRANCIS CANAVAN, FREEDOM OF EXPRESSION PURPOSE AS LIMIT (1984); ZECHARIAH CHAFEE JR., THE BLESSINGS OF LIBERTY (1956); ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941); HAROLD JOSEPH LASKI, LIBERTY IN THE MODERN STATE (1930); HAROLD JOSEPH LASKI, AUTHORITY IN THE MODERN STATE (1919); LEONARD W. LEVY, LEGACY OF SUPPRESSION (1960); JOHN LOCKE, A LETTER CONCERNING TOLERATION (1690); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948); JOHN STUART MILL, ON LIBERTY (1859); JOHN MILTON, AREOPAGITICA (1644).

64. The Sunday Times v. The United Kingdom (No. 2), 217 Eur. Ct. H.R. (ser. A) at 25 (1991). *Accord* Vogt v. Germany, 323 Eur. Ct. H.R. (ser. A) at 20 (1995); Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 13 (1986); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 18 (1976). *See also* Human Rights Act, 1998, arts. 2(1), 3, 4, 8 (U.K.).

65. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 8, 1987, 75 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 108 (F.R.G.); Lüth, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.); RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 34 (2000); Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL OF RTS. J. 305, 327 (1999); Cyril Levitt, *Under the Shadow of Weimar: What are the Lessons for the Modern Democracies?*, *in* UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES (Louis Greenspan & Cyril Levitt eds., 1993). *See* Volksverhetzung [Incitement to Hatred], 130 StGB, BGBl. I 1985, § 965 (F.R.G.); Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 1356 (Can.); Irwin Toy Ltd., 1 S.CR. at 970, 976 (Can.); HCJ 806/88 Universal City Studios Inc. v. Films and Plays Censorship Board [1989] IsrSC 42(2) 22, 34–35 (Isr.).

expression has been the main concern of the American Bill of Rights.[66] "The First Amendment appears to speak in absolutist terms."[67] The U.S. Supreme Court has interpreted the First Amendment to mean that government can rarely, and only for the most compelling reasons, invoke its power to regulate speech.[68]

Three classic rationales have been recognized for protecting freedom of expression. The first is the desire to expose the truth. Freedom of expression must be ensured to allow for different views and ideas to compete with each other. From this competition—and not from the regime's dictate of a single truth—the truth shall surface and emerge.[69] The second rationale is the need for human self-fulfillment.[70] The spiritual and intellectual development of man is based on his ability to freely formulate his world views.[71] The third rationale for protecting freedom of expression is that it is a prerequisite for democracy. Free voicing of opinions and the unrestricted exchange of ideas among people is a *conditio sine qua non* for the existence of a political and social regime in which the citizen can weigh, without fear, what is required, to the best of his understanding, for the benefit and welfare of both the public as well as the individual, and how to ensure the continued existence of the democratic regime and the political framework in which it operates.[72]

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66. Schenck v. United States, 249 U.S. 47 (1919).

67. NOWAK & ROTUNDA, *supra* note 62, at 1063. *See also* RANDALL P. BEZANSON, SPEECH STORIES: HOW FREE CAN SPEECH BE? 1 (1998); Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L. J. 877, 894 (1963).

68. KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 16 (1995).

69. This rationale concerns the social interest of revealing the truth. Dennis v. United States, 341 U.S. 494 (1951); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 129, 139 (F.R.G.); HCJ 4804/94 Station Film Co. Ltd. v. The Film Review Board, [1997] IsrSC 55(5) 661 (Isr.).

70. This rationale is concerned with the private interest of providing every man with the security to give expression to his personal characteristics and capabilities, to develop his ego to the fullest extent possible, and to state his mind, so life may appear to him worthwhile. ERNEST BARKER, REFLECTIONS ON GOVERNMENT 14–19 (1942).

71. Cohen v. California, 403 U.S. 15 (1971); Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 21 (1992); MOON, *supra* note 65, 27–28.

72. This rationale concerns the political interest of protecting democracy. Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 1336 (Can.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 6, 1979, 50 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 234 (F.R.G.); Lüth, Jan. 15, 1958 BVerfG, 7 BVerfGE 198; HCJ 372/84 Klopfer-Nave v. Minister of Education and

Recent studies have considered human dignity and equality as possible justifications for freedom of expression.[73] The core meaning of dignity is that social order must reflect recognition of the equal worth of all persons.[74] Dignity expresses at least the basic meaning of equality.[75] Dominantly among other scholars, Ronald Dworkin, as well as Kent Greenawalt,[76] have argued that the government may not discriminate between citizens by permitting some views and denying others. Equality demands that everyone have a chance to influence, and that everyone's opinion be given a chance for influence.[77]

B. Freedom of Expression & Symbolic Speech: An American Innovation

No one pretends that actions should be as free as opinions.[78]

In 1919, Oliver Wendell Holmes, Jr. observed, in *Schenck v. United States*, that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[79] Under the First Amendment, Holmes said, "the character of every act depends upon the circumstances in which it is done."[80] American constitutional jurisprudence suggests a spectrum of expressions that enjoy the constitutional protection of the First Amendment.[81] The

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Culture, [1984] IsrSC 38(3) 233, 238 (Shamgar, C.J.) (Isr.); Emerson, *supra* note 67, at 885–89.

73. CrimA 4463/94 Golan v. The Penitentiary Service, [1996] IsrSC 50(4) 136 (Isr.); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 195–213 (1977); Frederick Schauer, *Speaking of Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178, 179 (Michael J. Meyer & William A. Parent, eds., 1992). *Cf.* Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957 (2007).

74. Other meanings might be: (1) respect of physical identity and integrity, and (2) respect of intellectual and spiritual identity and integrity.

75. GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 106–07 (2001). *Cf.* SUSANNE BAER, WÜRDE ODER GLEICHHEIT 216 (1995); MACKINNON, *supra* note 52, at 71–110.

76. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 27–28, 33–34 (1989); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 153 (1989).

77. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 78, 200 (1996); RONALD DWORKIN, *supra* note 73, at 200; Michael C. Dorf, Review Essay, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 160 (1997);

78. Mill, *supra* note 63, at 63.

79. Schenck v. United States, 249 U.S. 47, 52 (1919).

80. *Id.*

81. New York v. Ferber, 458 U.S. 747, 758 (1982); Miller v. California, 413 U.S. 15, 24 (1973); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE:

classic protected expression is political speech;[82] others are *inter alia* commercial,[83] artistic, literary, and symbolic expressions.[84] The degree of constitutional protection differs between types of speech, depending on the extent to which the speech is intrinsically related to the development of the person's dignity and the fulfillment of his personal potential. Symbolic speech is a recent development of the twentieth century that lies in the theoretical recognition that there are types of conduct that may convey messages, and thereby extends the protection afforded by the First Amendment beyond written or spoken words.[85] One can express attitudes and beliefs through countless means besides speech in the form of speaking or writing.[86] Conduct which is communicative in nature is often only referred to as "symbolic speech" or "expressive conduct"[87] if the actor deliberately attempts to communicate a message and his action conveys that message to observers.[88]

FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985); LESLIE STEPHEN, THE SUPPRESSION OF POISONOUS OPINIONS (1883); PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE 36, 70, 115 (1999); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507 (1999). *See also* Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 (Can.); HCJ 5432/03 SHIN, Israeli Movement for Equal Representation of Women v. Council for Cable TV and Satellite Broadcasting [2004] IsrSC 58 65 (Isr.) (Dorner, J.); JOSEPH ELIOT MAGNET, CONSTITUTIONAL LAW OF CANADA: CASES, NOTES AND MATERIALS 629, 672 (5th ed. 1993).

82. Schenck, 249 U.S. 47 (1919); Kruger v. Commonwealth (1997) 190 C.L.R. 1, 112–21(Austl.); Levy v. Victoria (1997) 189 C.L.R. 579 (Austl.); 2 LASKIN'S CANADIAN CONSTITUTIONAL LAW 1030, 1038 (Neil Finkelstein ed., 5th ed. 1986); Douglas-Scott, *supra* note 65, at 315.

83. Bigelow v. Virginia, 421 U.S. 809 (1975); Breard v. Alexandria, 341 U.S. 622 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943); Valentine v. Chrestenson, 316 U.S. 52, (1942); Rocket v. Royal College of Dental Surgeons of Ontario [1990] 2 S.C.R. 232 (Can.); Ronal Rotunda, *Commercial Speech and the Platonic Ideal: Libre Expression et Libre Enterprise, in* FREEDOM OF EXPRESSION AND THE CHARTER 320, 337 (David Schneiderman ed., 1991); Lorraine E. Weinrib, *Does Money Talk? Commercial Expression in the Canadian Constitutional Context, in* FREEDOM OF EXPRESSION AND THE CHARTER 336, 339 (David Schneiderman ed., 1991).

84. DAVID S. BOGEN, BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT 88 (1984).

85. BEZANSON, *supra* note 67, at 93; Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 30 (1973).

86. Ute Krüdewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT'L & COMP. LAW 679 (2002).

87. Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 (1967); Brown v. Louisiana, 383 U.S. 131, 142 (1966); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); Thornhill v. Alabama, 310 U.S. 88, 105 (1940); Stromberg v. California, 283 U.S. 359, 369 (1931).

88. GREENAWALT, *supra* note 68, at 21.

The story of criminalizing arguably symbolic speeches in American jurisprudence began in 1931, when the Court in *Stromberg v. California*[89] recognized for the first time that non-verbal expression may invoke the First Amendment, holding that a conviction for displaying a red flag in opposition to the government violated free speech principles.[90] *West Virginia State Board of Education v. Barnetter*[91] confirmed this principle when the Court held that West Virginia's requirement that students in public schools salute and pledge allegiance to the flag was unconstitutional.[92] The Court explicitly recognized that saluting the flag was a form of symbolic speech.[93]

As to the scope of the constitutional protection accorded to symbolic speech, the Court in *Cox v. Louisiana*[94] overturned the convictions of a group of black segregation protesters who had been charged with obstructing public passage, criminal conspiracy, disturbing the peace, and picketing before a courthouse. Although the Court recognized the communicative value of the protester's actions, i.e., carrying signs and singing, including the anthem, it held their convictions violated the First Amendment, refusing to treat non-verbal speech in an identical fashion to "pure speech."[95] In *United States v. O'Brien*,[96] the Court set boundaries for the protection of expressive conduct, declaring that conduct containing both speech and non-speech elements may properly be regulated if the restrictions on the speech elements are merely incidental to an important government interest in regulating the non-speech elements.[97] Moreover, the Court held that a restriction on non-verbal expression does not violate the constitutional guarantee of freedom of speech if: (1) the restriction is within the government's constitutional powers; (2) the purpose of the governmental action is to pursue a legitimate governmental interest; (3) the interest asserted is unrelated to restricting expression; and (4) the limitation that results is narrowly tailored to meet the

89. 283 U.S. 359 (1931).

90. *Id.* at 369. California Penal Code 403(a) (1919) provided, in relevant part: "Any person who displays a red flag, banner, or badge . . . as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony." *Id.* at 360–61.

91. 319 U.S. 624 (1943).

92. The West Virginia requirement was challenged by a number of students and their parents. The students, who were Jehovah's Witnesses, refused to salute the flag for religious reasons. *Id.* They were expelled for their failure to comply with the requirement. *Id.* at 629–30.

93. *Id.* at 632.

94. 379 U.S. 536 (1965).

95. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

96. 391 U.S. 367 (1968).

97. United States v. O'Brien, 391 U.S. 367, 376 (1968). The Court upheld the conviction of anti-Vietnam activist who had publicly burned his draft card.

governmental interest (the "O'Brien test").[98] In the final case of that period, the Court in *Tinker v. Des Moines*,[99] struck down a school regulation which forbade the wearing of black armbands in protest against American involvement in Vietnam. This decision was grounded in the premise that a restriction based upon a non-speech interest is not justifiable in the absence of a threat of "material and substantial" interference with the non-speech interest.[100] The Court found the threat to non-speech interests was not sufficiently vital to warrant the restriction; therefore, the restriction was unconstitutional.[101] Wearing armbands constituted symbolic speech, and the school regulation that forbade the action clearly failed the third part of the O'Brien test.

Having set out the ground on which the theory of symbolic speech has evolved in the American jurisprudence, I will now focus the discussion on the American saga of criminalizing flag desecration. I shall address the touchstone cases, through which the U.S. Supreme Court has debated this issue.

C. Flag, Flag, and Flag: A Story of Symbolic Speech

> You might ask mockingly: 'A flag? What's that? A stick with a rag on it?' No sir, a flag is much more. With a flag you lead men, for a flag, men live and die. In fact, it is the only thing for which they are ready to die in masses, if you train them for it. Believe me, the politics of an entire people ... can be manipulated only through the imponderables that float in thin air.[102]

Does the flag have its own dignity, protection and meaning regardless of the government or the policy of the state? Or, is it a rectangular piece of cloth, which on its own lacks any meaning? Symbolism is a primitive but effective way of communicating ideas.[103] The use of an emblem or flag to symbolize a system, an idea, an institution or responsibility, is a

98. *Id.* at 377.
99. 393 U.S. 503 (1969).
100. Nimmer, *supra* note 85, at 42–43.
101. Tinker v. Des Moines, 393 U.S. 503 (1969).
102. Theodore Hertzel, the founder of modern Zionism, wrote these words to a German friend who had questioned the significance of flags. ROBERT TUSTIN GOLDSTEIN, SAVING "OLD GLORY": THE HISTORY OF THE AMERICAN FLAG DESECRATION CONTROVERSY ix (1995) (omission in original).
103. Dyer, *supra* note 51, at 896.

shortcut from one mind to another.[104] The flag has caused sagas for many nations,[105] notably the United States of America, where a complete theory of symbolic speech has been developed. I will shortly discuss the lack of a comprehensive theory of symbolic speech in comparative jurisdictions.

The Canadian Supreme Court has not resolved a "symbolic speech" case under the Charter, but it would only be plausible for the Court to hold that Section 2(b) of the Charter does not apply if the accused could show that his "activity supports rather than undermines the principles and values upon which freedom of expression is based."[106] In the same manner, the Supreme Court of Israel has not yet received a case challenging the constitutionality of the criminal prohibition against violations of physical integrity of the flag.[107] However, on the only occasion the Israeli Court has had to express its opinion about offensive words against the flag, Justice Mishael Chashin expressed his view, in *obiter dictum*, that the flag is constitutionally protected, as it represents the collective dignity of all people.[108]

The mode of expressive conduct which has garnered the most attention in recent years has been expression utilizing the American flag.[109] The U.S. Supreme Court has decided a number of important cases, and concluded that the use of the flag to convey particular messages may constitute expressive conduct that enjoys the full protection of the First Amendment.[110] I address these cases in order, thus paving the way toward centralizing the discussion on the compatibility of criminal prohibition of flag desecration with fundamental principles of criminal theory. It is my view that the Court, sitting in these cases, adhered exclusively to conventional constitutional analysis, thereby avoiding any tangle with substantive criminal law as an inherent part of constitutional scrutiny.

The controversy surrounding the use of the flag as a means of expressive conduct began in the late 1960's, when in response to the slaying of a civil rights leader, Sidney Street burned his personally owned flag while talking out loud to a group of people, saying "[w]e

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104. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); BEZANSON, *supra* note 67, at 189; GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 143 (1993).

105. On the history and the meaning of flags, see generally I. Bennett Capers, *Flags*, 48 HOW. L. J. 121 (2004).

106. R. v. Keegstra, [1990] 3 S.C.R. 697, 730 (Can.); *See also* GREENAWALT, *supra* note 68, at 25.

107. Flag and Emblem Law, 5709-1949, 3 LSI 26 (1949) (Isr.); article 167 of the Israeli Penal Act of 1977.

108. HCJ 8507/96 *Urin* v. *The State of Israel*, [1997] IsrSC 51(1) 269 ¶ 7(Isr.).

109. FLETCHER, *supra* note 104, at 125.

110. Henderson, *supra* note 58, at 554.

don't need a damn flag."[111] The Court upheld the conviction, relying on the peripheral *Stromberg* ground,[112] namely the conviction could have been based on the defendant's contemptuous language about the flag rather than his act of burning it. The Court thus avoided "symbolic speech" analysis, i.e., the legitimacy of the state interest in preserving the flag as an unalloyed symbol of the country,[113] refusing to decide the issue regarding the constitutionality of criminalizing the act of burning the flag as an act of free speech. In the same vein, in *Smith v. Goguen*,[114] the Court again avoided "symbolic speech" analysis, striking down a Massachusetts flag desecration statute, which made it a criminal offense to treat "contemptuously" the flag of the United States, relying on the doctrine of vagueness, which requires that all criminal prohibitions must provide fair notice to persons before making their activity criminal.[115] Finally, in *Spence v. Washington*,[116] at stake was a conviction for affixing peace symbols made from black masking tape on a personally owned flag, in violation of a statute that makes it a crime to attach any mark upon the flag. In a narrow holding, the Court overturned the conviction, emphasizing the flag was privately owned, it was displayed on private property, and there was no evidence of any risk of breach of the peace. Notably, the Court left open the possibility that there could be a legitimate state interest in preserving the flag as an "unalloyed symbol of our country."[117]

In August 1984, Gregory Lee Johnson burned the American flag during a Dallas protest march, while the protests chanted: "America, the red, white and blue, we spit on you."[118] Johnson was charged with desecration of a venerated object in violation of the Texas Penal

111. Street v. New York, 394 U.S. 576, 579 (1969).
112. Stromberg v. California, 283 U.S. 359 (1931).
113. In Minersville School District v. Gobitis, 310 U.S. 586, 600 (1940), the Court upheld the expulsion of two children from a public school for failure to salute the flag. Three years later, the Court repudiated Gobitis, in West Virginia State Board of Education v. Barnette: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).
114. 415 U.S. 566 (1974).
115. Colautti v. Franklin, 439 U.S. 379 (1979); NOWAK & ROTUNDA, *supra* note 62, at 1070–71.
116. 418 U.S. 405 (1974).
117. Spence v. Washington, 418 U.S. 405, 412–14 (1974).
118. Texas v. Johnson, 491 U.S. 397 (1989).

Code.[119] In defense, Johnson challenged the constitutionality of the Texas statute relying on "symbolic speech" analysis. The Court first held that Johnson's flag-burning was "conduct ['sufficiently imbued with elements of communication' to implicate the First Amendment."[120] The Court then considered and rejected the State's argument that under *O'Brien*[121] it ought to apply the deferential standard with which the Court had reviewed Government regulations of conduct containing both speech and non-speech elements where "'the governmental interest is unrelated to the suppression of free expression.'"[122] The Court reasoned that the State's asserted interest in preserving the flag, as a symbol of nationhood and national unity, was an interest related "to the suppression of free expression" within the meaning of *O'Brien*, because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message."[123] Therefore, the Court subjected the statute to "the most exacting scrutiny,"[124] concluding that the State's asserted interests could not justify the infringement of the demonstrator's First Amendment right. It was the Court's view that "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters [but] . . . to persuade them that they are wrong."[125]

Johnson was a major case. However, a revision of the federal law on flag desecration, which arguably could withstand constitutional scrutiny, deflected the effort to amend the Constitution. In 1989, Congress passed the Flag Protection Act, which was designed to overcome the content based holding of *Johnson* with content neutral wording, providing, in relevant part:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.[126]

The idea underlying the Flag Protection Act was that the definition of the crime is removed as far as possible from focusing on communicative acts. In the first judicial response to the Act, the Court, in *United States*

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119. TEX. PENAL CODE ANN. § 42.09 (1989): "[a] person commits an offense if he intentionally or knowingly desecrates . . . [a] national flag," where "desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."
120. Texas v. Johnson, 491 U.S. 397, 406 (1989) (citation omitted).
121. 391 U.S. 367 (1968).
122. Johnson, 491 U.S. 407.
123. *Id.* at 410.
124. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
125. *Id.* at 419; *see also* Whitney v. California, 274 U.S. 357, 377 (1927).
126. 18 U.S.C.A. § 700 (Supp. 1990).

v. Eichman, considered whether the conviction for violating the Flag Protection Act is consistent with the First Amendment.[127] The Government contended that the Flag Protection Act is constitutional because, unlike the statute addressed in *Johnson*, the Act does not target expressive conduct on the basis of the content of its message. The Government asserted an interest in "protecting the physical integrity of the flag under all circumstances" to safeguard the flag's identity as the unique and unalloyed symbol of the Nation.[128] While the Texas statute expressly prohibited only those acts of physical desecration "that the actor knows will seriously offend" onlookers, the Federal Protection Act prohibited only those acts of desecration that cast contempt upon the flag.

The *Eichman* case involved circumstances of knowingly setting fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government's domestic and foreign policy. Affirming the ruling in *Johnson*, the Court held that there was no essential difference between the new Congressional statute and the Texas statute that had already been declared unconstitutional. Although the Flag Protection Act contained no explicit content-based limitation on the scope of prohibited conduct, it was nevertheless clear that the Government's asserted interest is related to the suppression of free expression, and concerned with the content of such expression. Notably, the Court added:

> Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act goes beyond this by criminally proscribing expressive conduct because of its likely communicative impact.[129]

In 1995, the House of Representatives overwhelmingly approved a proposed constitutional amendment, which provided: "Congress and the states shall have the power to prohibit the physical desecration of the American flag." However, this attempt was unsuccessful; the Senate rejected the proposed amendment because the campaign for constitutional amendment was viewed as an effort to undermine the Bill of Rights.[130]

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127. 496 U.S. 310, 319 (1990).
128. United States v. Eichman, 496 U.S. 310, 315 (1990).
129. 496 U.S. 318 (1990). In dissenting, Justice Stevens asserted what I view as a very extreme example, according to which the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment. *Id.* at 323.
130. FLETCHER, *supra* note 104, at 126–27.

Examining these cases leaves no doubt that the Court constantly avoided tangling with substantive criminal law. At stake was a classic question of what makes conduct a crime, but the Court did not go beyond the classic and conventional pure constitutional analysis. Leading criminal law scholars have also given this criticism, as I shall shortly elaborate on in the next chapter.

D. "All That Fuss For Nothing": Constitutional Gaps & Theoretical Disabilities

The Court's methodology in approaching the flag-burning dilemma has been the subject of an extraordinary volume of scholarly writings, to the extent that one may not approach this issue without first sketching a panorama of the most commonly provided peculiar arguments. These are arguments that pay attention not only to theories of constitutional law, but primarily to fundamental principles of criminal law theory and its possible nexus to constitutional values.

In his influential book *Loyalty*, Fletcher contends that *Johnson* turned out to be an easy case, because the statute in question made flag desecration conditional on the likelihood that the act would cause "serious offense" to a hypothetical observer. Fletcher suggests that "[t]he foundations of the criminal law need reconstructing to recognize that we should express certain wrongs not as offensive conduct to individuals but as a violation of our certain collective sense of what is permissible in the public space."[131] Fletcher suggests the degree and depth of a consensus supporting the prohibition as one of several factors that would have to be considered in assessing public decency.[132] In this regard, Kent Greenawalt has correctly added that "so long as the flag is used extensively at public and publicized ceremonies that support government policies, any ideal of 'neutrality' for the national symbol is elusive, and a ban on desecration obliquely supports the status quo."[133]

The two critical examples are of great importance in illustrating my initial argument that the flag enigma[134] is a classic case primarily involving questions of the theory of substantive criminal law that clash with fundamental principles of constitutional law. For this, not only do constitutional and criminal theories have to be approached separately, but rather the interplay between both theories must be investigated.

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131. FLETCHER, *supra* note 104, at 146–47.
132. *Id.* at 147.
133. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE, *supra* note 76, at 160.
134. I borrow this expression from Krüdewagen, *supra* note 86, at 683.

Having put the discussion on the constitutionality of the criminal prohibition against flag desecration in order, thus setting out the grounds, including the leading Supreme Court cases, on which the American *de lege lata* has been delineated, pointing out the adherence of the Court to pure constitutional analysis, instead of tangling with the terminology of substantive criminal law, let us turn to the theoretical discussion. In Part V, I set forth my arguments on constitutional understanding of criminal theory. In Part VI, I will then step back and re-focus the discussion around the criminal prohibition against flag desecration.

V. CONSTITUTIONAL UNDERSTANDING OF CRIMINAL THEORY

> Law is not merely a system of enforceable rules where the rules might have any content whatsoever. The law establishes an ordering of men so as to reduce certain recognized evils. It involves an accommodation of the interests of human being that may come into conflict.[135]

It is wrong to argue that the American Constitution contains no language of substantive criminal law. The Sixth Amendment of the Constitution speaks of two complementary notions, namely, "Criminal Prosecution" and "Crime":

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the *crime* shall have been committed.[136]

American jurisprudence provides few cases that explore the meaning of Crime, paying no serious attention to the conceptual meaning of Criminal Prosecution.[137] However, words matter; a legal system is not a confederation of laws. In creating common law, unlike in creating enacted laws, the judge is a senior partner.[138] The terms Criminal Prosecution and Crime occupy a fundamental conceptual position in criminal law theory. Therefore, in my opinion, the Constitution does include language of the substantive criminal law. It is only a question of constitutional interpretation.

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135. HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 24 (1976).

136. U.S. CONST. amend XI (emphasis added).

137. John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 644 (1990).

138. BARAK, *supra* note 45, at xviii.

The concepts Crime and Criminal Prosecution challenge the conventional wisdom on the various segments of criminal law theory, such as: criminal punishment,[139] culpability,[140] guilt,[141] and dangerousness,[142] as well as the meaning of criminal wrongdoing, the act requirement,[143] mental disorder, justifications,[144] excuses and mitigation.[145] To this extent, substantive criminal law is an intrinsic concept of the American Constitution. Moreover, the Due Process Clause and the Equal Protection Clause have been among the most important pillars in developing the jurisprudence of criminal law. The Due Process Clause guarantees no criminal punishment may be imposed arbitrarily, if criminals are to be treated as ends and not means. In addition, the Equal Protection Clause requires that criminals, as humans, ought to be treated with dignity, thus enjoying equal worth.

Substantive criminal law declares what acts are crimes, punishable wrongs, and prescribes the punishment for committing them.[146] This article inquires into the meaning of criminal wrongdoing, since it makes no sense to understand the concepts of Criminal Prosecution and Crime, if we do not know what makes actions criminally prohibited in the first place.[147] However, to achieve this goal, I shall delineate a theory in two parts. First, I shall prove that the "wrongdoing" element is a constitutional requirement, inherent to all Criminal Prosecutions. And second, I shall inquire into the constitutional meaning of "criminal wrongdoing."

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139. FLETCHER, *supra* note 2, at 25; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1–28 (1968).

140. H.L.A. HART, *supra* note 139, at 162.

141. Wattad, *supra* note 12, at 525–48; 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 298 (2007).

142. Mohammed Saif-Alden Wattad, *Is Terrorism a Crime or an Aggravating Factor in Sentencing?*, 4 J. INT'L. CRIM. JUST. 1017 (2006).

143. FLETCHER, *supra* note 2, at 59; MICHAEL S. MOORE, ACT AND CRIME (1993); Douglas Husak, *Does Criminal Liability Require an Act?, in* PHILOSOPHY AND THE CRIMINAL LAW 60 (Antony Duff ed., 1998).

144. For example: GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988); Mohammed Saif-Alden Wattad, *Resurrecting "Romantics at War": International Self-Defense in the Shadow of the Law of War—Where Are the Borders?*, 13 ILSA J. INT'L & COMP. L. 205 (2006).

145. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1336 (1989); Douglas N. Husak, *Partial Defenses*, 11 CAN. J. L. & JURISPRUDENCE 167, 177 (1998).

146. JOHN C. KLOTTER, CRIMINAL LAW 2–3 (1983).

147. Wattad, *supra* note 12 (where the Article propose a complete theory of crime, guilt and punishment).

A. Why "Wrongdoing"? With Dignity Shall "Crime and Punishment"

> The human nature acts as a complete entity, with all that is in it, consciously or unconsciously, and though it may be wrong, it's nevertheless alive.[148]

The Right to dignity is the mother of all human rights, located up in the ivory tower.[149] However, not all constitutions explicitly accord protection to human dignity, e.g., Canada and the United States. One way of recognizing a constitutional right to dignity is through interpretation of the right to equality,[150] or through interpretation of the whole Bill of Rights.[151] Human dignity requires that a person be treated as the world unto himself, and an objective unto himself; a free agent, who is capable of developing his body and mind as he wishes.[152]

The American Constitution contains some cognate concepts of the theory of human dignity, among them the Due Process Clause and the Equal Protection Clause. Since its inception, through the lenses of the right to Due Process, the Court has been able to scrutinize the process by which criminal procedures and its substance are being undertaken. The Equal Protection Clause also provides certain premises for the right to dignity. The core meaning of dignity is that social order must reflect recognition of the equal worth of all persons. The guarantee of the right to dignity means a prohibition against humiliating a person by treating them as a means rather than an end.[153] Though it is permissible to differentiate between two persons on the basis of relevant considerations, sometimes this kind of differentiation is associated with stigmatic characteristics, in particular when it is based on ignoring distinctive human features related to the human ability to make rational and moral choices between right and wrong.

In the context of crime and punishment, the wrongdoing factor reflects the concept of right and wrong as recognized by the community,

148. FYODOR DOSTOEVSKY, NOTES FROM UNDERGROUND 27–28 (Mirra Ginsburg trans., 2005).
149. Williams J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439 (1986).
150. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 507 (Can.); BARAK, *supra* note 45, at 88.
151. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
152. BARAK, *supra* note 45, at 86.
153. ARISTOTLE, A TREATISE ON GOVERNMENT 141–95 (William Ellis trans., 1912) (322 B.C.).

denoting the moral quality of the act. A criminal offense is an anti-social phenomenon. "The wrongness of the phenomenon lies in its anti-social harm to a legally protected interest [and] . . . is the product of the anti-social nature of the act, and of the anti-social nature of the result."[154] Punishment is given for a wrong.[155] Punishment is an attempt to demonstrate to the wrongdoer that his act was wrong, not only to recognize the act as wrong, but to show him its wrongness by bringing to him the nature of what he has done to realize.[156] For a person to be treated as an end, and for a punishment to be justified at all, the criminal's act must be that of a responsible agent, namely, it must be the act of one who could have kept the law which one has broken. And at the sentencing stage, the punishment must bear some sort of relation to the act.[157] The threat of punishment is not only a conditional threat of a painful sanction, but also an official expression of how negatively different kinds of actions or omissions are judged.[158] Condemnation is the community's reaction to the violation of the social order, namely the violation of certain protected interests of the community. For the dignity of all criminals, the community may not denounce all criminals in the same manner, for if the community so does, not only does the community humiliate them as objects, but the community also violates their right to due process by imposing community condemnation so arbitrarily. This is what I consider to be constitutional punishment.[159]

B. The Meaning of "Wrongdoing"

With intelligence shall man distinguish between the true and the false.[160]

Criminal law must have moral connotation if criminal punishment is to have meaning. The state may not make any conduct a crime. Criminals are first and foremost human beings. As such, they enjoy the right to dignity.[161] Once you treat a human being as a means, rather than

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154. GHANAYIM, *supra* note 55, at 2.

155. SIMESTER & SULLIVAN, *supra* note 47, at 4; ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

156. ROBERT NOZICK, PHILOSOPHY EXPLANATIONS 366, 370 (1981).

157. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 160 (1968).

158. JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 4 (8th ed. 1996).

159. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW 140–41 (1999).

160. MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED 23–26 (Shlomo Pines trans., 1963).

161. FLETCHER, *supra* note 2, at 43; IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 46 (1949); Eckert Klein, *Human Dignity in German Law, in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171 (1984); Wattad, *supra* note 142, at 1027.

an end, you treat them as an object, rather than a subject, and this form of humiliation infringes human dignity. You humiliate a person by ignoring their ability as a human being to distinguish between what is right and wrong, you humiliate a person when you do not distinguish between intentional wrongdoings and accidental ones,[162] and you humiliate a person by ignoring a possibility of negating wrongdoing committed in circumstances of justification.[163] To treat a human being as a subject, you must consider the person to be capable of a rational choice, because when you treat a human being as an inanimate object, your responses to the human being are determined not by their choices, but yours, in disregard of or with indifference to theirs. In the context of speech offenses, this understanding becomes especially important. The suppression of certain views represents a kind of contempt for citizens, which is inherently objectionable and independent of its consequences, because it fails to treat citizens equally or with the dignity they deserve. Equal treatment of all citizens requires the enabling of all views to be expressed even, and especially, if they are the less favorable ones.[164]

With inelegance shall man distinguish between right and wrong, and with intelligence shall man distinguish between wrongs and punishable wrongs. Criminal liability is the most draconian form of condemnation by society, and may result in a sentence which amounts to a severe deprivation of the ordinary liberties of the offender.[165] H.L.A. Hart once asked why certain kinds of actions are forbidden by law and so made crimes or offenses.[166] Fyodor Dostoevsky has passionately expressed the view that society is morally justified in punishing people simply because they had done wrong.[167] It goes without saying that criminal law is not about the law of rights, but rather about the law of wrongs, namely about the prevention of the kind of negative actions against which society revolts. Criminalizing an act is to declare the act not merely an undesirable act but as one that must not be done, "to institute a threat of punishment to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it."[168]

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162. FLETCHER, *supra* note 2, at 59.
163. FLETCHER, *supra* note 144.
164. GREENAWALT, FREE SPEECH JUSTIFICATIONS, *supra* note 76, at 153.
165. ASHWORTH, *supra* note 45, at 3, 83.
166. HART, *supra* note 157, at 6.
167. FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Richard Pevear & Larissa Volokhonsky trans., 1993).
168. ASHWORTH, *supra* note 45, at 22.

The question remains, what kind of acts may the legislature criminalize?[169] Criminal law is the law of public wrongs,[170] those which endanger the common wealth and not just an individual person, *crimen publicum*,[171] or as called in old Roman law *delicta publica*.[172] Conceptually speaking, a crime is a violation of norms of correct conduct under a particular recognized mental state. Let us call the violation of norms of correct conduct wrongdoing; in which case a crime is the commission of wrongdoing to which a certain mental state is attached. A criminal offense is an anti-social phenomenon. "The chief concern of the criminal law is seriously anti-social behavior."[173] Criminal law is a mechanism of formal and normative recognition of social perceptions. Criminal liability carries the strong implication of "ought not to do;" which marks out the special social significance of criminal censure that requires a clear social justification. The wrongness of the phenomenon lies in its anti-social harm to a legally protected interest, and is the product of the anti-social nature of the act, and of the anti-social nature of the result.[174] Being punished for a crime is different from being regulated in the public. Even in the absence of other means of social control available to achieve the same ends, criminal prohibition must be the last means, and the alternative of doing nothing must still be considered.[175]

Criminal acts may be one of two basic types: (1) public wrongs, and (2) moral wrongs. The obvious starting point of any discussion of criminalization is the harm principle, which suggests that crimes are generally acts which have a particularly harmful effect on the public and do more than interfere with merely private rights.[176] In other words, "crime is crime because it consists of wrongdoing which directly, and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation for the

169. IMMANUEL KANT, THE METAPHYSICS OF MORALS 125 (1991).

170. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4–5 (Wayne Morrison ed., 1769) [hereinafter 4 BLACKSTONE]. Blackstone recognizes crimes as public wrongs, as distinguished from torts, which are private wrongs.

171. KANT, *supra* note 169, at 140.

172. 1 JOHN PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 16 (8th ed. 1892); J.W. CECIL TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 5–6 (16th ed. 1952).

173. ASHWORTH, *supra* note 45, at 1.

174. GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW CASES AND MATERIALS 147 (1973).

175. *See* SCOTTISH HOME DEPARTMENT, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 1957, Cm. 247, at ¶ 14. *See also* Shaw v. Director of Public Prosecutions, (1961) 2 All ER 446 (H.L.) (appeal taken from Crim. App.) (Eng.); The Abortion Case of 1975, Feb. 25, 1975 BVerfG, 39BVerfGE 1.

176. MILL, *supra* note 63, at 15. *Cf.* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 124 (1988).

party injured."[177] This has been articulated by John Stuart Mill, who formulated the harm principle as "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will;" namely preventing harm to others.[178]

However, there are offenses meant to punish conduct simply because it is wrong in itself.[179] In the early days, this concept was limited to the most outrageous and immoral acts, e.g., murder, robbery, rape etc., *mala in se*.[180] But the test of morality is obviously of no great help today, because many acts are prohibited on the grounds of social expediency, or at least not just because of their immoral nature, *mala prohibita*.[181] To demonstrate the problematic features of *mala in se* crimes, I shall consider some examples. The prohibitions against sodomy and obscenity have been justified by their arguably intrinsic wrongful natures. This has gradually changed as movements fighting for gay rights have sprung up. Another example concerns lying—which, although intrinsically immoral, standing in itself is not a crime. For lying to become a crime, it has to be associated with some extra features, such as lying in court under oath, which is a crime not because of the intrinsic wrong associated with lying, but rather because of the likely consequences of false judgment.

1. Basic Concepts on "Wrongdoing"

Coming to address *mala in se* offenses, fundamental principles of criminal law theory must be considered. There is intuitive appeal in the idea that criminal wrongs are typically more serious than their civil counterparts; sufficiently serious that the state is empowered to step in and regulate them directly. The public as a whole has an interest in their prevention and prosecution.[182] Community norms and views determine criminal prohibition.[183] The main purpose of the criminal law is to

177. SMITH & HOGAN, *supra* note 158, at 17. *See also* H.L.A. HART, LAW, LIBERTY, AND MORALITY 47 (1963); DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 231 (1987); Albin Eser, *The Principle of 'Harm' in the Concept of Crime*, 4 DUQ. L. REV. 345, 346 (1966).

178. MILL, *supra* note 63, at 9.

179. FLETCHER, *supra* note 104, at 129-30.

180. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 456, 458, 472, 473 (2000); SIMESTER & SULLIVAN, *supra* note 47, at 2; SMITH & HOGAN, *supra* note 158, at 18.

181. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences*, 46 EMORY L.J. 1533, 1570 (1997).

182. SIMESTER & SULLIVAN, *supra* note 47, at 2.

183. 1 SCHNEYEZ ZALMAN FELLER, CRIMINAL LAW 115 (Rute Gabizon ed., 1966).

prohibit conduct which a sufficiently strong part of the community feels or believes is harmful to its interests, its safety, its social stability, and which the community is shocked by. The general purposes of the provisions governing the definition of offenses in the American Law Institute's Model Penal Code section 1.02 might be taken as a statement of the proper objectives of the substantive law of crime in a modern legal system. The purposes are: (1) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests, (2) to subject to control persons whose conduct indicates that they are disposed to commit crimes, (3) to safeguard conduct that is without fault from condemnation as criminal, (4) to give fair warning of the nature of the conduct declared to be an offense, and (5) to differentiate on reasonable grounds between serious and minor offenses.

The question of criminalizing intrinsic wrongs has always challenged mankind. Deontologists argue that the fact that the wrongdoing is an action that does not respect the person's worth is what makes it wrong.[184] Jeffrie Murphy has elaborated on this view:

> One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications. They are ways a wrongdoer has of saying to us, 'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.' Intentional wrongdoing *insults* us and attempts (sometimes successfully) to degrade us—and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries.[185]

Among the principal legal problems of *mala in se* offenses is their uncertain nature. The meaning that should be given to a criminal legal norm is not fixed for eternity, but rather it is a part of life; and life changes.[186] "The life of law is renewal based on experience and logic, which adapt law to the new social reality."[187] Criminal norms must be of great level of clarity and certainty if it is to avoid vagueness. The Due Process Clause requires that all criminal prohibitions must provide fair notice to persons before making their activity criminal.[188] However, morality is intrinsically uncertain and debatable, and therefore for an immoral act to be criminalized it must have extra characteristics of outrageousness; this should be the immorality that shocks the man's mind and his conscious e.g., incest or obscenity. In addition, for these

184. KANT, *supra* note 169, at 140–45.
185. Jeffrie Murphy, *Forgiveness and Resentment, in*, FORGIVENESS AND MERCY 25 (Jeffrie Murphy & Jean Hampton eds., 1988).
186. BARAK, *supra* note 45, at 9.
187. *Id.* at 4; *cf.* OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881).
188. Colautti v. Franklin, 439 U.S. 379 (1979).

immoral acts to be criminalized, they must violate nearly universally shared views about morality.

It is, however, my view that morality can be enforced by criminal means, but not always. No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means. Immoral acts are indeed wrongs, but not necessarily punishable wrongs. There must be an intrinsic common quality to distinguish criminal from non-criminal.[189] It might be true that law and social morality will constrain much of the same behavior, but this does not mean that the law will enforce every aspect of morality.[190] Criminal law is a crude instrument, requiring findings of uncertain facts, with rules backed by a limited arsenal of coercive sanctions.

With logic shall man distinguish between right and wrong; what is right shall not be wrong, and what is wrong cannot be right. Right and wrong are, paradigmatically, contradictory concepts. In a constitutional democracy, e.g., the United States, Israel, South Africa, Germany, and Canada, legal norms are driven by the will of the people and for the will of the people. The laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. A total departure from morality will bring horrific consequences.[191] By nature, society suffers from diversity. In order to avoid any abuse of minority views by the majority, it is important to consider the will of society in light of higher values of constitutionalist nature, which guarantee that all members of society be able to exercise their rights in an equal manner, thus being treated with dignity, as ends rather than means.

However, there are many controversial conducts, and their classification between right and wrong is a matter of perspective. In this regard, I shall consider two important principles. First, what society views as a wrong is not necessarily a punishable wrong. For a wrong to be punishable, it must, first and foremost, meet fundamental principles of criminal law theory. Second, among the fundamental principles of the theory of criminal law are clarity, certainty, and stability; as a concept of due

189. P. J. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 3 (1962); SCHLOMO SHOHAM, THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIATION 47 (1970).

190. Kent Greenawalt, *Commentaries: Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710 (1995).

191. SCOTTISH HOME DEPARTMENT, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 1957, Cm. 247, at ¶ 14. *See also* 1 BISHOP, *supra* note 172, at 19.

process of law, as well as fair and just warning.[192] If doubt exists about the wrongful nature of a certain conduct, or about its criminal features, the actor must get the benefit of the doubt. The general prohibition against retroactive criminal legislation, ex post facto laws, provides some guidance in understanding this third consideration. The principle is also expressed in the Latin maxim *nullum crimen, nulla poena sine lege*, there is no crime, no punishment, without prior legislative warning.[193] The basic principle is that individuals have a right to know what the law is at the time they are said to violate it, and therefore the law, i.e., the criminal prohibition, has to be as clear as possible, as narrow as possible, and as definitive as possible. Individuals do not have a right to know that which could make utilitarian differences in their choice to engage in an action or not. Rather, they have a right to know that which could make a moral difference in their choice to engage in an action or not.

2. Notes on the "Social Protected Interest"

Society's observation has had a very significant role in the history of criminal law development, referred to as the "social protected interest."[194] The social protected interest concept is the legitimacy for every criminal prohibition. A conduct may not be criminalized solely because the legislature has decided so, unless the conduct, first and foremost, does not fit the general public consciousness and values.[195] Albeit, criminal law is not required to embrace all social views and conducts. The social protected interest has to be of great importance, to the extent that it may not be sufficiently protected except by the coercive tools of criminal law. In seeking to articulate a criminal prohibition, it is accordingly necessary to: first, locate the social protected interest; second, clarify the concrete substance of this social protected interest; and third, decide whether the particular social protected interest deserves and requires protection by criminal means, namely, examining less intrusive means, such as civil law and administrative law.[196]

3. Notes on the Harm Principle versus the Offense Principle

I have already addressed the harm principle as a primary basis for criminalizing certain actions. However, one must not confuse Mill's harm

192. FLETCHER, *supra* note 180, at 569–73.
193. FLETCHER, *supra* note 2, at 12.
194. P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 123–24 (12th ed. 1966).
195. KHALID GHANAYIM ET AL., LIBEL LAW–A CRIMINAL OFFENCE AND A CIVIL TORT: DE LEGE LATA DE LEGE FERENDA 25–28 (2005) (in Hebrew).
196. Eser, *supra* note 177.

principle[197] as a basis for penal legislation with the offense principle. Joel Feinberg has tried to account for our shared understanding of the conceptual distinction between the two principles.[198] In his view, the harm principle supports penal legislation as a means of preventing harm to other persons, in the absence of other means of equal effectiveness at no greater cost to other values. Unlike the harm principle, the offense principle suggests that: "[i]t is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted."[199] This conceptual distinction contributes to our understanding of the basic difference between the two principles as basis for penal legislation.

Not every offense to others causes harm, for offense is a less serious thing than harm.[200] As Fienberg explains, the word "offense" has two possible meanings; one refers to a miscellany of disliked mental states, and the other concerns those states only when caused by the wrongful conduct of others. In Fienberg's view, only the second meaning is intended in the offense principle to be parallel to the harm principle. That is, continued extreme offense can cause harm to a person "who becomes emotionally upset over the offense, to the neglect of his real interest. But the offended mental state in itself is not a condition of harm."[201]

Considering the nature of the harm principle as a basis for penal legislation, one may wonder if the offense principle can serve as a basis for such legislation. It has already been said that consequences of offense are not as serious as those of harm, and therefore, generally speaking, the law should not treat offenses and harms as if they are of the same degree of seriousness; for instance, in the event there exists other means of regulation, which afford the same degree of effectiveness, the law should avoid controlling offensiveness by means of criminal law.[202] This is not to suggest that criminal law should neglect offense to others altogether; however, other alternative effective means must be considered before adhering to criminal law, such as "licensing procedures that depend on

197. *See supra* text accompanying note 177.
198. 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 1–3 (1988).
199. *Id.* at xiii.
200. *Id.* at 2.
201. *Id.* at 3.
202. *Id.* at 25.

administrative suspension of license as a sanction."[203] I re-address the offense principle in Part VI(B)(4) using several concrete examples.

As I have initially provided, the fact that a particular criminal prohibition meets the fundamental principles of criminal law does not mean it is a constitutional prohibition. This has been my initial argument: A punishable wrong is not a valid crime unless it is constitutional. The constitutionality of any criminal prohibition is required in light of the coercive nature of criminal law. As I have already argued, constitutional law strikes a balance between constitutional rights and other important social interests. Criminal law is about limiting rights, but constitutional law is about their protection. Constitutional law guarantees that criminal law limits human rights in a proportionate manner. I explain this in depth in the following chapter.

C. Constitutional Criminalization

With regard to constitutional democracy, where values matter to the same extent as the notion of human rights, things become more complicated. The principles for determining when conduct "should" be wrong can be derived from both statutory laws (*Gesetz*) and non-statutory law (*Recht*).[204] This question must be resolved not only by reference to criminal law, but by reference to the entire Legal Order.[205] It is my view that even if a conduct satisfies the fundamental principles of criminal law theory, and therefore it could be a punishable wrong, the question is still: Should this particular conduct be a punishable wrong? These are two separate questions of could and should. However, the question remains: How is the should question to be answered and determined? For this, a constitutional theory has to be drawn. This question illustrates the importance of the urgent understanding of constitutionalizing substantive criminal law, as we shall shortly see.

Classifying certain types of conduct as wrongs undermines, confines, and infringes constitutionally protected rights, most notably the right to liberty and the right to dignity. This kind of infringement must be highly scrutinized, if it is to be justified. Constitutional scrutiny is the balance drawn between rights and punishable wrongs, and it reflects the inherent non-absolute nature of constitutional rights. I view the right to dignity,

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203. *Id.*

204. The Abortion Case of 1927, Mar. 11, 1927 RG, 61 RGSt 242; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun, 9, 1970, 29 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G).

205. Dawn Oliver, *The Underlying Values of Public and Private Law, in* THE PROVINCE OF ADMINISTRATIVE LAW 217 (Michael Taggart ed., 1997).

in this context, as the inalienable compass of rights and wrongs, of constitutional law and criminal law, and of liberties and penalties. In my view, for a crime to be constitutionally justified, it must meet three cumulative criteria, "balancing formula":[206] (1) the criminal prohibition must befit the values of a constitutional democracy; (2) the prohibition must be undertaken for a proper purpose; and (3) the criminalization must be done in proportionality, namely, the legislature must scrutinize and fine tune even the smallest details of its action, and consider the myriad of potential alternatives, to determine the least offensive means. Underlying this proportionality principle is the promise that rights may not be infringed to a degree that is greater than necessary.

1. The Values of a Constitutional Democracy

Criminal prohibition infringes rights otherwise constitutionally protected, so such an infringement must be highly justified by the fundamental values of constitutional democracy, which justify legal rules and are the reason for changing them.[207] I shall reiterate what I have already said on the nature of a constitutional democracy. In a constitutional democracy, the legislature is instructed by the will of the people, as a form of safeguard of the rule of the majority and the protector of the minority's human rights. Constitutional democracy must protect the liberties and autonomy of the individual and guarantee his ability to exercise his liberties in peaceful means, thus viewing the individual as the main concern of its existence, as a free person, capable of developing his character in accordance with his free will as well as his free choice. The rule of Law plays an important role in locating the "values of a constitutional democracy."[208] Correctly observed by Dworkin,[209] "we must not be satisfied with a 'rule-book conception' of the rule of law. . . . [rather] [i]t must be extended to the 'right conception' of the rule of Law. . . . [which] means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these

206. On the comparative theoretical and constitutional origins of the elements of the suggested balancing formula, including the proportionality test, *see* Mohammed Saif-Alden Wattad, *"Did God say, 'You shall not eat of any tree of the garden'?": Rethinking the "Fruits of the Poisonous Tree" in Israeli Constitutional Law*, (2005) OXFORD U. COMP. L. F. 4, *available at* http://ouclf.iuscomp.org/articles/wattad.shtml.

207. BARAK, *supra* note 45, at 57.

208. FLETCHER, *supra* note 31, at 11–42.

209. RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 11 (1990).

and the other needs of society."[210] Of course, every constitutional democracy has its own fundamental values; still there are some common ones, *inter alia* justice,[211] morality, human rights,[212] social values of the existence of the state and public safety within it, such as certainty and stability in interpersonal arrangements,[213] and values of proper conduct, e.g., reasonableness,[214] fairness,[215] and good faith.[216]

2. A Proper Purpose

The values of constitutional democracy require that the legislature may not limit rights except for a proper purpose, which fulfils the promise of these values, namely, enabling the individual to exercise his autonomy and liberties in peaceful means. The social protected interest—which I have discussed under the fundamental principles of criminal theory—reflects the proper purpose that may sufficiently justify the limitation imposed by criminal means on constitutional rights.

The proper purpose according to which the legislature may criminally prohibit certain conduct may not be articulated arbitrarily, but rather with due process and in an equal manner.

3. Proportionality

The rule of Law means the guaranteeing of fundamental values such as morality, justice, and human rights, with a proper balance between these and the other needs of society. It is the rule of proper Law, which balances the needs of society and the individual.[217] Proportionality consists of three sub-tests:[218] (1) rational connection, which requires a rational link between the means employed and the goal the legislature wishes to accomplish; namely, there must be reasonable grounds for expecting the legislation to be effective in achieving it objective; (2) less

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210. BARAK, *supra* note 45, at 55.

211. JOHN RAWLS, A THEORY OF JUSTICE (1971); IAN SHAPIRO, DEMOCRATIC JUSTICE (1999).

212. NORBERTO BOBBIO, THE AGE OF RIGHTS (Allan Cameron trans., 1996); LOUIS HENKIN, THE AGE OF RIGHTS (1990); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution*, 80 CAN. B. REV. 699 (2002).

213. DOUGLAS HODGSON, INDIVIDUAL DUTY WITHIN A HUMAN RIGHT DISCOURSE (2003).

214. Neil MacCormick, *On Reasonableness, in* LES NOTIONS A CONTENU VARIABLE EN DROIT (Chaïm Perelman & Raymond Vander Elst eds., 1984).

215. BARAK, *supra* note 45, at 58.

216. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

217. BARAK, *supra* note 45, at 55–56.

218. *Cf.* The Queen v. Oakes, [1986] 1 S.C.R. 103 (Can.).

coercive means, which requires that of the range of means that can be employed to accomplish the goal, the legislature must employ the least harmful means; namely, the legislation must limit the right no more than is necessary to achieve its objective; and (3) relativism, which demands that the damage caused to the individual by the means employed, must be in appropriate proportion to the benefit stemming from it; i.e., the costs of the limitation must not exceed the benefits to be gained from achieving the objective.

Let us now step back, to smoothly centralize the discussion and approach the flag enigma.

VI. *DE LEGE FERENDA*: UNCONSTITUTIONAL CRIME

> A wrong becomes a crime because we choose to make it so; and if we wish to know why we so choose we can but search our hearts and observe how men, at various stages of civilization, think and behave when frustrated by their neighbours.[219]

"A right is not simply a legally protected interest we value highly [but] . . . the respect paid to a capacity for freely forming and pursuing interests, a capacity that distinguishes humans from other beings and that is the basis of their claim to dignity."[220] While Robinson Crusoe does not need human rights, Kafka does.[221] Human rights are the rights of a person as part of society;[222] and as such they are limited by the rights of others and the needs of society. Both the scope and the limit of human rights are derived from the constitutional dialectic.[223] For this, rights can never be traded off whenever necessary to produce greater overall value. The right to liberty may not be limited by ordinary reasons except for the equal right of all other human agents to liberty, and "so it is forfeited when that equality is denied by the agent through a criminal act."[224]

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219. Seton Pollock, *The Distinguishing Mark of Crime*, 22 MOD. L. REV. 495, 498 (1959).

220. Alan Brudner, *Guilt Under the Charter: The Lure of Parliamentary Supremacy*, 40 CRIM. L. Q. 287, 291 (1998). *See also* FLETCHER, *supra* note 2, at 43–58; Otto Lagodny, *Human Dignity and Its Impact on German Substantive Criminal Law and Criminal Procedure*, 33 ISR. L. REV. 575, 586 (1999).

221. FRANZ KAFKA, THE TRIAL (1925).

222. BARAK, *supra* note 45, at 83.

223. The Queen v. Oakes [1986] 1 S.C.R. 103, 136 (Can.) (Dickson, J.); Lorraine E. Weinrib, *Canada's Charter of Rights: Paradigm Lost?*, 6 REV. CONST. STUD. 119, 127–128 (2002).

224. Brudner, *supra* note 220, at 292.

The flag enigma has been comprehensively addressed by the U.S. Supreme Court. The constitutionality of the Government's interest in preserving the integrity of the American flag, making it a crime to desecrate the flag, has only been challenged by the Court following the explicit language of the Flag Protection Act. In this article, it is not my goal to discuss cases where desecrating the flag constitutes a breach of the right to property of others, nor is it my desire to inquire into cases where desecrating the flag causes public disorder. These cases can be approached within the realm of crimes against property and crimes against the public order and public safety. Moreover, I am not challenging flag desecration associated with incitement and sedition; this might be prohibited under fundamental theories of criminal law. In addition, I am not targeting the flag desecration question under theories of victimless crimes, e.g., unlawful possession offenses, which might be treated under various theories of the harm principle. Instead, I shall narrow the discussion to the largest problematic issue, where the legislature decides to make it a crime to desecrate the flag as a matter of preserving the integrity of the flag as such, in private or in public (the core problem). This kind of question was raised in *Eichman*, and *Eichman* is the kind of analysis I seek to criticize.

A. A Critique of Logic

Addressing the core problem, the Court in *Eichman* offered the following reasoning: (1) flag desecration, if it is an expressive conduct, is protected by the First Amendment, and therefore may not be criminalized and punished; (2) the way to preserve the flag's special role is not to punish those who feel differently about these matters; it is to persuade them that they are wrong; and (3) government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact. I criticize the Court's analysis on several levels.

I find the Court's starting point problematic: "we consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment."[225] But what sense does it make to challenge the constitutionality of the prosecution of burning the flag, if it may not be a crime in the first place![226] The Court avoided launching an inquiry into substantive criminal

225. United States v. Eichman, 496 U.S. 310, 312 (1990).

226. *See also* German Aviation Security Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (F.R.G.).

law.[227] Moreover, underlying the Court's reasoning is the assumption that if an act is constitutionally protected, it follows that the act may not be criminalized. This cannot be true. Analyzing a constitutional right includes three levels of scrutiny: (1) the recognition of a constitutionally protected right; (2) the ambit of the right; and (3) the limits that a state may impose on the right.[228] To elaborate, consider the following example: The right to liberty, which is constitutionally recognized within (1) includes the right to nudity within (2). However, within (3), a state may prohibit public nudity, as well as administratively regulate nudity on beaches, but may not prohibit or regulate nudity in private.

In addition, the Court's reasoning ends where proper analysis of the issue should begin. The Court's holding is limited solely to expressive actions. That is, desecrating the flag would be considered a constitutional crime if committed in the absence of any expressive purpose to convey a message. This leaves the whole discussion open as to whether the legislature may preserve the physical integrity of the flag by adhering to the extremist intrusive means of criminal law. In my view, the issue here is not the act, being as expressive act as pure conduct, but rather the asserted social protected interest. Therefore the legal discussion should start by examining the compatibility of the "physical integrity of the flag" with the basic principles set forth above on the social protected interest. In *Eichman*, the Court found a short way to circumvent the complex problem. Ultimately, *Eichman* does not apply to cases where desecrating the flag does not amount to expressive conduct.

B. The Practicalities of the Metaphysics of Critique

Is desecrating the flag a punishable wrong? And if yes, is it a constitutional punishable wrong? I address these questions in turn.

227. In another place I argue that the U.S. Supreme Court has been reluctant to tangle with substantive criminal law, arguably because the Constitution includes no language of the substantive criminal law. Wattad, *supra* note 12.

228. BARAK, *supra* note 45, at 82. *See* ASHWORTH, *supra* note 45, at 2: "The contours of criminal liability may be considered under three headings: the range of the offences [in respect of]; the scope of criminal liability [circumstances]; and the conditions of criminal liability [the required degree of fault]."

1. Could "Desecrating the Flag" Be A Crime?

It is my view that in a constitutional democracy, the legislature enacts laws. Unlike the legislature, courts do justice (Law), by considering not only enacted laws, but, primarily, ascertaining that these laws are consistent with the Law. A constitutional democracy is expected to express that which is fair and just, even if it contradicts the rule of the majority as expressed by the legislature.

I have already expressed my view that if the legislature criminalizes a particular kind of conduct in contradiction to the fundamental principles of criminal law theory, this legislation must not remain valid.[229] The prohibition against flag desecration represents a kind of intrinsic wrong, namely, it is arguably perceived as wrong conduct in itself. Fletcher correctly contends that there is no longer a shared understanding of an intrinsic wrong in abusing the flag, but only a wrong that exists in causing offenses to observers, as is the case for idolatry and adultery.[230] Fundamental principles of criminal theory provide that the threat of criminal punishment is an official expression of how negatively different conduct is judged.[231] Imposing criminal prohibition requires consideration of three questions in turn: (1) What is the asserted social protected interest? (2) What is the concrete substance of this social protected interest? And, (3) does the asserted social protected interest deserve and require protection by criminal means?

The only reason to prevent, as a principle, flags from being defiled or defaced is that the flag, arguably, has symbolic importance for citizens as a mirror-image of the nation. The substance of this kind of asserted social protected interest, as expressly announced by the Government in *Eichman*, is to protect the physical integrity of the flag as such. This implies that the flag is not exactly a medium, but rather a speech, namely, the flag expresses one idea, i.e., national unity. However, no conduct should be defined as criminal unless it represents a serious threat to society. Immoral acts are indeed wrongs, but not all wrongs are punishable wrongs. There must be an intrinsic common quality by which to distinguish criminal from non-criminal. The prohibition against flag desecration contains no serious threat to society, and does not come close to any of the immoral conducts that might be plausibly regulated by criminal means; those which shock one's mind. Without certainty of the criminal nature of an immoral conduct, the criminalization may not

229. Hart, *supra* note 1.
230. FLETCHER, *supra* note 104, at 133.
231. ASHWORTH, *supra* note 45, at 20.

hold, because fundamental principles of criminal law require clarity, certainty, and stability of criminal norms. Only upon fair and just warning, must persons be treated as ends of their rational choices, with dignity as subjects.[232] The criminal nature of flag desecration is surrounded with heavy clouds of doubt, which leads one to think of such criminalization as treating the human being as an object, as well as a means of a doubtful national unity. Moreover, because of its coercive nature, the criminal law must not be invoked except as the last resort, especially when less coercive means are available. As I shall explain further in Part VII, the flag is an opinion but not a fact; as such, its meaning is disputable;[233] it is not a question of true and false opinions. Therefore, the market-place of ideas is the most compatible means of preserving the flag's special role.[234]

2. Should "Desecrating the Flag" Be A Crime?

I am ready to refrain from the discussion until the end, assuming that one may come up with a theory in which flag desecration is a punishable wrong. The question then becomes one of constitutional scrutiny, constitutional crime, which must be addressed because of the coercive nature of criminal law as a mechanism of limiting and infringing human rights.

Free speech regulation, under American law, if it is content-based, as it is for the purposes of our discussion, is subject to the highest level of constitutional scrutiny, thus requiring the government to provide a compelling state interest. However, this theory of constitutional scrutiny does not suggest any solution for cases where a pure act of flag desecration is at stake; such acts are punishable under statutes like the Federal Protection Act, but were not addressed by the Court in *Eichman*, even though a constitutional right to liberty was infringed. For this reason, a complete formula of constitutional balances must be drawn. I have already proposed what I call the balancing formula, and I will now examine its application to the core problem.

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232. Fletcher, *supra* note 180, at 569–73.

233. The Holocaust Denial Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 2004, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (F.R.G.).

234. United States v. Eichman, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting); HCJ 316/03 Bakri v. Israel Film Council, [2003] IsrSC 58(1) 249 (Isr.) (Procaccia, J.).

Free speech is a value peculiar to every constitutional democracy. It creates a market-place of ideas allowing a high degree of persuasion rather than suppression of ideas, thereby according citizens equal worth regardless of their status in society: in a free manner, with no threat of being punished, and with dignity as beings capable of making rational choices. Like the right to free expression, the right to liberty is among the most fundamental values of a constitutional democracy, derived directly from the inherent right to dignity, seeking to reflect the promise that persons are free agents with free will.

However, in this context, not all types of speech carry equal importance. The closer the speech is to the person's will and self, e.g., symbolic and political speech, the more expressive it is of the person's dignity and his equal worth as a human being. This has been said of the right to free speech, but it is also true with regard to the right to liberty. The question now becomes: Is "preserving the physical integrity of the flag as such" a proper purpose for limiting symbolic speech as well as the right to liberty?

The values of a democratic state recognize proper purposes that may justify limiting free speech and liberty of the person, e.g., the prohibition against pornography and hate speech. Examining the proper purpose of particular legislation does not require an examination of the means by which the right has been limited, but rather focuses on the purpose itself. I am not in a position to argue that preserving the physical integrity of the flag as means of preserving national unity is an illegitimate object that constitutional democracy may not seek to achieve. National unity is an important interest of every society, even more so in diverse societies.

However, important as it may be, a proper purpose may not sufficiently justify limiting constitutional rights except for a proportionate limitation. Imposing criminal restraints upon a person's liberty and their right to express themselves is a delicate exercise, and thus must be well justified. The stronger the nexus between the infringed right and the person's dignity, the higher the justification required to prohibit the speech or restrict the person's liberty to act as a human being with dignity and free will. Two examples illustrate this. The presumption of innocence illustrates the sensitivity that criminal law must demonstrate toward limiting man's liberty, holding the promise that a person is innocent until proven guilty. In the same vein, a finding of guilt is only acceptable if it is "beyond a reasonable doubt."

The proportionality test requires a rational connection between the means employed and the goal the legislature is aiming to accomplish. To constitutionally justify the prohibition against flag desecration, a rational connection must exist between the proper purpose of preserving national unity and the "criminal means." That is, the government must

explain that which suggests that criminal prohibition would guarantee a stop to desecration of the flag, and would, moreover, grant the flag special respect. To view my skepticism as to any possible argument for such asserted rational connection, consider a prohibition against insults to parents by their children. Is that what criminal law was promised to protect!? Respect towards others or towards ideas!? I doubt it. A criminal prohibition against desecrating the flag purports to impose on citizens a sense of respect towards the flag. This kind of criminal prohibition contradicts the fundamental purposes of criminal law theory, which I have already addressed in earlier parts of the Article.

However, I am ready to take seriously the argument that such a criminal prohibition would deter people from desecrating the flag, and accordingly the physical integrity of the flag would be preserved, an argument that, in my view, undermines the whole concept of respecting the flag for the sake of "national unity." The question remains of the existence of less intrusive means to achieve the asserted purpose of preserving the physical integrity of the flag. The "less coercive means" test requires the asserted means be the only means possible to achieve the concrete purpose as articulated by the government. To preserve the physical integrity of the flag as such it is plausible to suggest that educational means be invoked, those which concern the potential influential nature of the "word," of the market-place of ideas, and of the power of persuasion.

But again, I am ready to assume that words will fail to guarantee protection of the physical integrity of the flag, namely, people will not be persuaded to respect the flag, and therefore this concrete purpose can be achieved solely by criminal means. The last sub-test of the proportionality test deals with the "cost-benefit" analysis, namely, weighing the damages.

On the one hand, criminal punishment has a draconian and harsh nature, it puts persons in jail, deprives them of their dignity, liberty, and property in some cases. Criminal punishment causes huge damage to the human persona, to one's reputation, to one's social life, and to one's career. Punishing a person for their speech is a form of humiliating the person's dignity, suppressing their soul, depressing their will, and suffocating their brain. On the other hand, the damage that results from desecrating the flag is small; it does not even come close to the damage caused to the individual because of the criminal punishment. It is not the case that people wake up every morning willing to desecrate the flag, but rather such desecration occurs in very limited and concrete occasions. In

addition, it is not the argument that desecrating the flag directly or indirectly undermines national unity and solidarity, but rather that by such prohibition it would be possible to achieve national unity. However, criminal law by nature is a reactive system; it is not the law of shall do, but the law of shall not do. Finally, there is no proof that preserving the physical integrity of the flag will guarantee such arguable national unity. There are purposes that cannot be achieved even by the best means, because these are disproportionate means. It is thus my view: the damage caused to the person upon such criminal prohibition outweighs the damage that may occur in the absence of such prohibition, and therefore such crime, being disproportionate, may not be constitutional.

3. Bolts of Doubt

The meaning of the flag is doubtful: Does it really express the sense of national unity? The essence of the flag is doubtful: Is it a medium or speech? The nature of the flag is doubtful: Does it have its own? Or, does it represent that which is expressed by the government? The wrongful nature of desecrating the flag is doubtful: Is it an undesirable conduct? Or, is it an immoral wrong? The criminal nature of desecrating the flag is doubtful: Is it really the kind of conduct for which society is willing to punish persons? Or, is it the kind of conduct that should be treated by means of tolerance and education? The constitutionality of the flag is doubtful: Is it possible to grant the flag constitutional protection? Does such protection fulfill the purposes underlying the theory of constitutional protection? And finally, the constitutionality of the criminal prohibition against desecrating the flag is doubtful: Is there any compelling state interest that may justify limiting fundamental values of a constitutional democracy, free speech and liberty, by criminal means?

With so many doubts, I doubt if a criminal prohibition against desecrating the flag, aiming to preserve the physical integrity of the flag as such, thus achieving national unity, may fit criminal law theory and the constitutional scrutiny over substantive criminal law. Such prohibition stands in contrast to the most fundamental principles of every possible legal theory.

4. Postscript of Self-Contemplations

The discussion set out above begs the question of the constitutionality of the criminalization of the desecration of other symbols of a different nature. Fletcher once challenged me with several examples: (1) urinating on the Lincoln Memorial; (2) having lunch at the Kotel, the Wailing

Wall, on Yom Kippur, the Day of Atonement; (3) having sex in the street; and (4) tombstone desecration. Would these be considered constitutional crimes according to the theory I have sought to articulate in this Article?

It is my view that the state may constitutionally punish having sex in the street, which involves an exercise in balancing a person's right to liberty with public decency. While prohibiting nudity and sex in private places would be disproportionate criminalization, prohibiting such public activity expresses an exact proportionate balance between individual rights and other important public interests. This is also the case with having lunch at the Kotel on Yom Kippur, for in these circumstances the important interest of public disorder as well as the interest in preventing offense to the feelings of others must be balanced against the individual's liberty to act by his free will. Such criminalization prohibits eating at Yom Kippur in a place where only religious people go, especially on Yom Kippur. If the prohibition was against eating on Yom Kippur at all, it should then be considered unconstitutional for its disproportional nature.

However, I shall add this: having lunch at the Kotel on Yom Kippur is the kind of offense to others that I have addressed, in Part V(B)(3), in light of Feinberg's conceptual distinction between harm to others and offense to others.[235] According to that distinction, given the availability of other means less coercive in nature than criminal law such as administrative law—especially municipal regulations, which may successfully and effectively prevent such offense to the feeling of religious people who attend the Kotel on Yom Kippur—I believe criminal prohibition should be avoided in these circumstances. In any case, I am ready to assume, in light of the extreme religious nature of the Kotel, as well as the fact that the extreme majority of those who attend the Kotel on Yom Kippur are religious people, that such offense to feelings amounts to a serious and extreme offense that is equivalent to harm, and therefore may serve as a basis for penal legislation.

As for the example of urinating on the Lincoln Memorial, the Lincoln Memorial itself is not a sufficiently important social protected interest that deserves to be protected by criminal means. In addition, it is not the role of criminal law to accord a sense of respect towards others or things; for criminal law is the law of shall not do. However, it is indeed a constitutional crime to prohibit such act for the same reasons having

235. 2 FEINBERG, *supra* note 198.

sex in the street, public nudity and urinating in the street are constitutional crimes. Urinating on the Lincoln Memorial is an improper public behavior that may constitutionally be prohibited by criminal law as a matter of public decency. Again, it is not about the Lincoln Memorial, but the act of urinating in a public place itself.

The final example is that which concerns a prohibition against tombstone desecration, which I view as constitutional criminalization. Such criminalization is possible under any theory of crimes against property and crimes against public order. Such criminalization is not intended to preserve the memory of those for whom the tombstone was constructed, but rather to prevent damage to the property of others, as well as to prevent vandalism.

To conclude, I reiterate what I have already underlined: It has the ultimate purpose of this article to debate the situation where legislatures have decided to make it a crime to desecrate the flag as a matter of preserving the flag's integrity as such, in private or in public, as a means of preserving national unity. This is the question raised in *Eichman*, and this is what I sought to challenge.

VII. CONCLUSIONS

It is time now to conclude what has already been provided in length. Recent decades of legal study have demonstrated strong adherence amongst legal jurisdictions. It has been correctly believed that constitutional law must play a dominant role in protecting human rights, as well as in the twilight zone that is very often encountered by the powers of the three governmental branches. Constitutional law has the inherent mechanism required for drawing balances between conflicted interests, as well as between rights and duties. Given this, constitutional law has its influence over various spheres of legal studies, leading among them criminal law, where human rights are most likely to be violated. In the area of criminal law, constitutional law has been viewed as the safeguard for protecting human rights, thus forbidding violation of human rights but only when, and to the degree, the constitutional promise allows; with proportionality, reasonability, and in accordance with the demands of justice.

Of course, different legal jurisdictions have different implementations of the theory of constitutionalism. This is obvious, for each jurisdiction has its own constitutional tradition, history, and sociopolitical structure. Yet, neither jurisdiction would dispute the core components of constitutionalism. However, among other legal issues that have been in dispute is the extent to which constitutional law applies to criminal law. In particular, this has involved the question of the applicability of constitutional law,

including the power of judicial review as driven by the constitutional scrutiny theory, to substantive criminal law. On its face, the problem is not clear, for substantive criminal law is the classic mechanism under which human rights are infringed, and if constitutional law does not intervene here, then what role does constitutional law play at all?

The argument has been, for instance, that if we subject substantive criminal law to constitutional law it would provide for an absurd constitutional analysis, according to which e.g., a person has a constitutional right to liberty which includes the right to kill. However, it is not until the second level of analysis that we assert the limitation of constitutional protection to "liberty," thus excluding its extension to killing. In the context of the killing example, those who oppose such constitutionalization of substantive criminal law argue that the right to liberty does not include in the first place the right to kill others.

The story for American jurisprudence has been easier. Keeping faithful to textualism and the Framer's intent, the Americans argue that since the U.S. Constitution limits its protection to the law of criminal procedure, then the Constitution does not apply to substantive criminal law except in those instances where the Constitution applies explicitly, such as in the case of the death penalty. It has been my view in this article that the American approach demonstrates an extremely superficial understanding of substantive criminal law, as well as a considerable over-simplification of constitutional thought. Holding that the U.S. Constitution includes some cogent concepts of human dignity, which requires a finding of guilt in order for a criminal system to punish a person for committing a wrongdoing, taken together with a purposive understanding of the Sixth Amendment, I conclude that substantive criminal law is inherent into the U.S. Constitution. In the general context, constitutionalizing substantive criminal law means raising the fundamental principles of substantive criminal law to the constitutional level, thus granting the judiciary the power to declare a particular criminal provision, for example, void, if it stands in contradiction with a fundamental principle of substantive criminal law.

At the outset, the Article targets one of the long-standing American enigmas concerning the constitutionality of a criminal prohibition against desecrating the American flag, thus seeking to preserve so-called national unity. However, in substance, this Article has been coping with a different and more substantial problem. The flag enigma has been provided here as a classic example where substantive criminal law and

constitutional law intersect. However, the American jurisdiction, like comparative jurisdictions in these regards, has limited its analysis solely in accordance with the classic grounds of constitutionalism. Correctly, courts of such jurisdictions have declared such criminalization to be unconstitutional. However, this has been done merely on the premise that if desecrating the flag is protected by the constitution as a symbolic speech, it would only be unconstitutional to criminalize such action.

But what sense does it make to challenge the constitutionality of the criminal prohibition against flag desecration, if desecrating the flag cannot be a crime in the first place? The question whether conduct can be made a crime logically precedes the question whether commission of that crime is under certain circumstances protected as free speech. Furthermore, in the American context in particular, the Court fails to address the case of a person who physically destroys a flag without intending to communicate any message.

The Article suggests a genuine distinction between crime and constitutional crime. In any constitutional democracy, for the legislature to validly classify conduct as a crime, the fundamental principles of criminal law theory must be met, thus empowering courts to strike down criminal laws when they fail the following tests: (1) whether the particular criminal prohibition befits the values of constitutional democracy; (2) whether the prohibition serves a proper purpose; and (3) whether the criminalization is proportionate. As for the flag enigma, it has been the view in this Article that flag desecration may not be made a crime, for it stands in contrast with the fundamental principles of substantive criminal law. Even if it survives the serious obstacles posed by these fundamental principles, such criminalization still may not be constitutionally justified, for it fails to meet every step of the above-mentioned three tests, and therefore such criminalization may not prevail.

Eventually, what underlines this Article is an attempt to establish some order, logic, coherency, and methodology. "Criminalization" is not an open buffet of pick and choose; the legislature is not free to criminalize any conduct arbitrarily. Any criminalization ought to be examined, first and foremost, in light of the fundamental principles of criminal law, which hold a constitutional status.

VIII. EPILOGUE

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[236]

Democracy is not solely a system of rights, but also a system of wrongs. A constitution is a regime of rights and balances, but it is not a system of wrongs. It is for theory to draw the line between right and wrong, and it is for the constitution to draw the line between undesirable behavior and punishable wrong. The U.S. Supreme Court can be proud of a constitutional legacy on the theory of free expression, but not so as to substantive criminal law. The Court has consistently shown reluctance to tangle with substantive criminal law.

A glimpse into comparative studies, among them Germany, Canada, Israel, and the European Court of Human Rights, leaves no doubt as to the great influence of American constitutional theory on free speech. American law is one of the rare legal systems in which the flag enigma has received intensive constitutional legal treatment; in other jurisdictions, this issue has been almost untouched. When the time comes, I believe that comparative jurisdictions will follow the American ultimate approach, thereby letting the free expression theory prevail. However, I doubt that comparative jurisdictions will adopt the same methodology. Comparative studies provide a wealth of developed theories of criminal law, especially in Germany, where substantive criminal law is a genuine cell of the constitutional body of scrutiny. I have found comparative law to be of great assistance in realizing the role that constitutional law plays in scrutinizing substantive criminal law, which represents a mechanism of limiting and infringing rights. Comparative studies, especially of Canada and Israel, were of great help in understanding the non-absolute nature of constitutional rights, as well as in realizing the sensitive balance

236. John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT 14 (1946); *see also* 4 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1847 (Bernard Auerbach & Melvin J. Sykes trans., 1994): "There is probably no more apt and incisive formulation of the principle of freedom of expression and the value of opinion . . . than the formulation used by the Sages with regard to the differences of opinion between the schools of Shammai and Hillel, namely that 'both are the words of the living God' TB Eruvin 13b; TJ Berakhot 1; 4, 9b (1:7, 3b); TJ Yevamot 1:6, 9a (1:6, 3b)."

that constitutional law may strike between fundamental constitutional rights and other important social interests.

I am aware of the large dispute, in the American context, over the legitimacy of discussing comparative law. However, the recent decade has proved that different legal systems have encountered similar legal problems, e.g., the fight against terrorism, the meaning of self-defense, the meaning of crime, the applicability of constitutional rights to non-citizens, hate speech, and political speech. In this context, comparative studies become of great importance, especially because many of the fundamental constitutional principles of democracy are common to democratic states. Of course, comparative law should be approached cautiously, at least because of the unique sensitivity of every legal system, and therefore it is patently obvious that the final decision must always be local. Nonetheless, "[t]he benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decision-making structure available."[237]

In this article, I sought to address one of the long-standing legal problems of American legal thought. I do not believe that *Eichman* was the end of the story, but only the end of the beginning. I do see a constitutional amendment that protects the physical integrity of the flag in the future, and consequently petitions against the constitutionality of such amendment. It will then be interesting to see how the U.S. Supreme Court reacts. For this possible challenge facing the core problem, I was not willing to limit my discussion to the specific issue of flag desecration. Rather, I sought to delineate a whole theory on the constitutional meaning of criminal wrongdoing. My theory has a universal appeal, and does not limit itself to a specific jurisdiction.

Criminal law punishes wrongful actions but not wrongful opinions. Punishing flag desecration because of the arguably national status of the flag is nothing but punishing opinions; it is not about the act of desecration but rather about the flag, namely, about the opinion. It might be true that the flag has its own self. Nevertheless, the flag is not solely a medium; there are occasions, and this was the case for the Flag Protection Act, where the flag is a speech. To understand the content of this speech, the distinction between statehood and nationhood can be of great help. I have addressed this distinction elsewhere, suggesting that nationhood refers to ordinary people who may or may not have a state; something stronger than a state binds the people together.[238] The nation bears the factors that constitute each individual, the language, the history, the culture, and the bond between geography and self, and it is

237. BARAK, *supra* note 45, at 198.
238. Wattad, *supra* note 144, at 208–09.

what people feel part of, rather than merely belong to.[239] The nation acts in history, achieving greatness and committing crimes, for its glory as well as its shame. Getting a grip on this distinction has brought me to understand that though all states as entities have flags, the flag is still a concept of nationhood. This is the Shakespearian notion of brotherhood.[240] Unlike the nation, the state is what people belong to, but not necessarily what they feel part of. If the people are part of the nation, it follows that the nation comes first, and thus legitimizes the establishment of the state. Unlike "nation," the state is timeless; it does not exist in time. State is about organization of power; it is a political entity.

A state is not a synonym for a nation. A person may belong to the state yet not the nation. Being part of the state means being a citizen of the state, but not necessarily a national. Of course, one may belong, at the same time, both to the nation and to the state, such as being a Jew and an Israeli. The government represents the state, which includes citizens who are part of the nation and citizens who are not part of the nation. If the flag is a mirror-image of the "national unity," it follows that the flag and the government represent one common side of the state, namely, those citizens who are part of the nation as well. However, the government also represents those who are citizens but not part of the nation. In preserving the physical integrity of the flag, the integrity of the nation is preserved, not the integrity of those who do not belong to the nation, but the citizens of the state.

The existence of the flag is a fact, but the flag itself is an opinion. Facts shall not be denied, but opinions per se are disputable. This is what Voltaire viewed as: "I may not agree with what you say, but I will defend to the death your right to say it."[241] There are many things we, as a community, may not like, but not everything we do not like shall be criminalized and punished. Constitutional democracy bears some unique features. Constitutional democracy is not merely a representative system, it is not only the voice of the majority, and it is not solely the voice of the legislature. Constitutional democracy is a balancing system, it is the voice of the majority but also the guard for minorities and their human

239. GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM xiii (2002).

240. WILLIAM SHAKESPEARE, HENRY V (1999), Act IV.3, lines 60–63.

241. *See* DAVID SHRAGER, & ELIZABETH FROST, THE QUOTABLE LAWYER 285 (1988). It is commonly attributed to Voltaire, but actually it was written by his biographer, Evelyn Beatrice Hall, writing as S. G. Tallentyre in 1906.

rights, and it is the voice of the legislature only when it enacts laws in accordance with the fundamental highest principles of the Law, namely, justice, reasonableness, and proportionality. Constitutional democracy is not a melting democracy, so-called defensive democracy, but still it is not a suicide pact.[242] Constitutional democracy is not a total system of deprivation, suppression, and criminal punishment, but a system of tolerance as once patiently stated by Aharon Barak:

> Democracy is based on tolerance . . . Indeed, tolerance constitutes both an end and a means. It constitutes a social goal in itself, which every democratic society should aspire to realize. It serves as a means and a tool for balancing between other social goals and reconciling them, in cases where they conflict with one another.[243]

242. Terminiello v. Chicago, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).
243. BARAK, *supra* note 45, at 63–64.