

**ALBIN ESER**

**The Principle of „Harm“ in the Concept of Crime**

A Comparative Analysis of the Criminally Protected Legal Interests

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#### IV. THE FINAL DETERMINATION OF HARM: THE CONSEQUENCES

##### *The Definition of the "Legal Interest" and of "Harm"*

After having analyzed the nature and structure of harm from its different aspects, an attempt can be made to achieve a compact but comprehensive definition of the concept and its component parts. Remembering

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the various misunderstandings and misconceptions to which the notion of penal harm has been exposed, we must keep in mind some *caveats*.

On the one hand, the definition of harm must be made broad enough to comprise all types of criminal harms, the harms of larceny and murder as well as the harms of tax crimes or welfare offenses. Although the gravity and significance of various harms may be different, they are similar as far as their nature and structure are concerned. This is also true with regard to crimes *mala in se* and crimes *mala prohibita*. Though the degree of their social impact may be essentially different, the nature of their harm is alike: all contain an element of danger to or destruction of some legal interest.

On the other hand, harm must not be defined too generally. As we have demonstrated, harm is more than the mere formal breach of the law; likewise, it is more than the subjective ethical disvalue of the actor. Harm, as such, has only a negative meaning. It expresses the risk of destruction or the destruction itself of something valuable. It must, therefore, be related to the material objects which are impaired by the unlawful conduct. Only if considered in connection with the material objects it injures can harm be described in a more positive way.

The material objects against which penal harm is directed are found in legally protected interests. Hence, criminal harm can be characterized as the negation, endangering, or destruction of the legal interests of the respective criminal provisions. Because of this close interdependence of the notion of harm and the legal interest, the definition of harm finally depends on the determination of the legal interest.

At this point the main problems are clear. There is always the danger that legal interests, through over-abstraction, become comprehended as fundamental values or ideals. In particular, Jerome Hall, by emphasizing the intangible nature of penal harm, neared the point at which legal interests are nothing more than general values of purely idealistic subsistence. By overemphasizing the incorporeality of penal harm, one overlooks the realistic, sociological fundament of legal interests. It is also important to note the fact that interests and values of a more general nature, such as that of the government in the functioning of its administrative machinery, often can be broken down into many smaller interests: the incorruptibility of the civil servants, the obedience to administrative measures, the inviolability of public institutions, etc. This necessary process of reconciliation by which a more fundamental interest is reconciled by and protected through more specific interests<sup>329</sup> is only one of many signs that the concept of legal interests is rooted in the sociological basis of the values to be protected. If the concept of legal interest is, however, oriented

strictly to the intangibility of generally conceived universal values, the weapons of criminal law are in danger of overlooking the real needs of the society.

However, the other extreme, that of overstressing the sociological side of legal interests, is equally incorrect. This mistake was made by Beutel in that he failed to recognize the normative, selective function of the law, with the result that any social demand, desire, or need would have to be legally protected.

In our opinion, the correct approach to a determination of the nature of legal interests is the integrative combination of both the sociological basis and the normative constitutional value. The requirement of a sociological basis demands that a certain sociologically grounded interest of an individual, a social group, or the state must exist before the legislature may provide any criminal measures.

Such interests need not necessarily be physically tangible elements or goods of an external nature such as the body, a house, money, or water. Goods, conditions, and relationships of more psychic or intellectual character may also be the substrata of protectable interests, *e.g.*, the confidence between trustee and beneficiary, cultural and religious institutions, or interests such as the advancement of the aesthetic architectural standards of a city, the citizens' rest on Sundays, or other valuable fact situations and combinations such as the preservation of free competition or the reputation of certain professions. However, as expressed by the value aspect of legal interests, mere sociological existence alone does not justify criminal protection. It must also be evaluated in terms of the order of values established by the Constitution. Only those interests in harmony with the spirit and the principles of the Constitution can be legally recognized, or, negatively phrased, all interests that do not have a normative relationship to a certain constitutional value or that lie outside the constitutional order of values cannot achieve criminal protection, however firm their sociological basis may be.

In this rather schematic summary, we have neglected one aspect of the legal interests which divides their factual foundation and their legal evaluation, namely, the state of social recognition. That is to say that factual interests do not immediately advance to legal evaluation; rather, they must pass through the filter of social recognition. The consequence demands that only those interests which are so valuable and so significant as to deserve social cognizance can finally obtain legal recognition and criminal protection.<sup>880</sup>

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### *Consequences for Criminal Legislation*

Although the theoretical analysis of harm as one of the fundamental elements of crime was the primary objective of this study, it was not the only purpose. We also intended to discover the principles according to which the legislature may declare certain conduct unlawful and, therefore, punishable.

Since harm is the objective, material substance of the crime as distinct from the subjective requirement of *mens rea*, the starting point for our inquiry must be that certain conduct cannot truly be called criminal unless it causes certain criminal harm. This means that the legislature, before it may outlaw certain acts or omissions by establishing criminal sanctions, must first prove the likelihood of the harm potentially resulting from the conduct to be outlawed. Since penal harm is the impairment of some legal interest, conduct is only harmful if it is prejudicial to a legal interest. Therefore, legislators must examine whether the objective they wish to protect is in fact a legally protectable interest.

According to the dualistic nature of legal interests and with respect to the three-step process of their recognition, legislators must establish proof of these three points. First, they must determine that the objective to be protected is a real interest and not merely an asserted, imagined, or pretended one. At a time when everyone is inclined to call for the strong arm of government to protect his purely private wants, it is more important than ever to examine whether there really is a need for criminal sanctions. Too often the power of punishment is nothing more than a means of self-assertion without serving any real public or private need. In these cases, the legislature should abstain from criminal measures for lack of a sociologically factual need or want. Equally important is the examination of the social recognition of an asserted interest. That an interest must be socially recognized as valuable to society as a whole or to some of its members does not necessarily mean that only the interests of the whole society or the state deserve protection. On the contrary, completely individual rights, such as property interests, can well merit criminal concern. However, any interests (those the state as well as those of its subjects) may be protected only if they are of social relevance. Sanctions equal in social impact to criminal punishments are justified only if the interests in favor of which punishment is created can be deemed socially valuable and significant.<sup>381</sup> Therefore, individual interests must also gain social attention and recognition before they are worthy of criminal protection. Still a third step must be taken: the claimed interest, though found to be socially protectable, must finally be measured against the Constitution. This is the normative step of constitutional evaluation. Needs or desires of the highest social concern may not be criminally sanctioned if they are not in accord with a value of the constitutional order. Concordance with the constitutional spirit gives the interest its legal-constitutional value.

It is our understanding that the legislature may not penalize acts unless the object against which these acts are directed is a legal interest. What practical effects does this have on the applicability of the criminal provision if the object to be protected fails to meet these three criteria of a legal interest? As to the factual-sociological side, if a criminal provision does not serve a socially recognized and protectable interest, a criminal sanction is unjustifiable. It must be held void since it deprives the "perpetrator" of life, liberty or property without due process or just cause. As to the value aspect of the legal interest, *i.e.*, its legal-constitutional evaluation, the legislature must examine the protection of the claimed socially recognized interest in harmony with the Constitution. If they are not in harmony, the criminal sanction is unconstitutional.