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ORIGINAL PAPER

Vice Crimes and Preventive Justice

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Abstract This symposium contribution offers a reconsideration of a range of "vice crime" legislation from late nineteenth and early twentieth century American law, criminalizing matters such as prostitution, the use of opiates, illegal gambling, and polygamy. According to the standard account, the original justification for these offenses was purely moralistic (in the sense that they criminalize conduct solely or primarily because it is intrinsically wrong or sinful and not because of its negative effect on anyone) and paternalistic (in the sense that they limit persons' liberty or autonomy supposedly for their own good); and it was only later, in the late twentieth century, that those who supported such legislative initiatives sought to justify them in terms of their ability to prevent harms. This piece argues that the rationale for these vice crimes laws was much more complicated than has traditionally been thought, encompassing not just moralistic justifications but also a wide range of harm-based rationales—similar to those that underlie modern, technocratic, "preventive justice" legislation involving matters such as anti-social behavior orders, sex offender registration, stop-and-frisk policing, and the fight against terrorism.

Keywords Vice crimes · Preventive justice · Legal moralism · Harm principle · Drug crimes · Prostitution · Mann Act · Harrison Act

Vice crime statutes, such as those that make it illegal to use certain drugs, engage in certain types of gambling, sell or buy sexual services, engage in adult incest, or be part of a plural marriage, have often been characterized as applying to conduct that is harmless, or is

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harmful only to the actor himself; or, if it is harmful to others, is performed consensually.[1] Such laws are regarded as objectionable (at least by liberals) because they are moralistic (in the sense that they criminalize conduct solely or primarily because it is intrinsically wrong or sinful and not because of its negative effect on anyone) and paternalistic (in the sense that they limit persons' liberty or autonomy, supposedly, for their own good). In the United States, the Golden Age of vice crime statutes was the late nineteenth and early twentieth centuries; the enactment of such laws was the product of large-scale efforts at social reform, often, though not always, associated with religious or sectarian movements. In today's secular, pluralistic society, the vice offenses are seen as something of an anachronism.

The kinds of offense that are the focus of this colloquium seem, at least at first glance, to reflect a quite different profile. Offenses that are said to be preventive (or anticipatory or prophylactic) are those for which the preventive (rather than retributive) rationale is the primary justification. Such offenses extend criminal liability to merely preparatory acts, and often employ hybrid procedures that blur the traditional borders between the civil and criminal. The purest examples of preventive justice measures involve devices such as anti-social behavior orders, control orders, and sex offender registration laws. The criticism of preventive justice offenses has tended to focus on the fact that they: (1) criminalize conduct that is purely inchoate or preparatory in nature, and is therefore too remote from the substantive harm to justify retributive sanctions; (2) overuse the criminal sanction for a preventive task that is more appropriately performed by means of a civil or regulatory response; and (3) allow the civil law to be used for criminal law purposes but without the normal procedural protections. Preventive justice offenses are generally thought of as a product of the late twentieth and early twenty-first centuries; they purport to reflect technocratic, non-moralistic, and nonsectarian lawmaking. Although it is certainly possible to find precursors of preventive justice in an earlier time,[2] preventive justice is typically thought of as a modern phenomenon, carried forward most prominently in the fight against terrorism and pedophilia, and in the implementation of "broken windows" and stop-and-frisk policing.

So what do these two species of criminal offense have to do with each other? Well, as Bernard Harcourt recognized in an influential 1999 article, the rhetoric and rationale surrounding what had traditionally been understood as victimless vice crimes has in recent years shifted.[3] Statutes criminalizing drugs, prostitution, pornography, loitering, polygamy, and the like are now rarely justified in terms of mere immorality; instead, those who support such legislative initiatives seek to justify them in terms of their ability to prevent harms—harms that may be less substantial than, and more attenuated from, the kinds of harm traditionally associated with the criminal law, but harms nonetheless. In a strange and unexpected turn of events, the vice crimes have ended up looking quite a lot like preventive justice offenses.

[1] For a recent discussion, see Stuart P. Green, Foreword: Symposium on Vice and the Criminal Law, 7 *Criminal Law and Philosophy* 213 (2013).

[2] For example, Ashworth and Zedner cite the 1872 Mail Fraud statute as one early example of a preventive-type offense. See Andrew Ashworth and Lucia Zedner, Just Prevention: Preventive Rationales and the Limits of the Criminal Law, in *Philosophical Foundations of Criminal Law* (R.A. Duff and Stuart P. Green, eds.) (Oxford: OUP, 2011), 284 n. 9; see also Frederick Schauer, The Ubiquity of Prevention, in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: OUP, 2013), 10, 19 (citing Jeremy Bentham, Principles of the Penal Code, book 4, chapter 15, in *The Theory of Legislation* (Richard Hildreth & Etienne Dumont, eds.) (London: Routledge, 1931 edition), 425–27)).

[3] Bernard E. Harcourt, The Collapse of the Harm Principle, 90 *J. Criminal Law & Criminology* 148 (1999).

At least that is the hypothesis I intend to explore in this essay. In the years since Harcourt's article appeared, we have seen an outpouring of literature on preventive justice.[4] I want to see what this enhanced understanding can tell us about the vice crimes, and what, in turn, a focus on the vice crimes can add to our understanding of preventive justice. My interest here is primarily historical and conceptual, rather than normative: I am less interested in trying to justify, or critique, the vice crimes or the preventive offenses than in showing how they relate to each other. On the historical side, I shall argue that the vice crimes represent a kind of prototype for more modern preventive justice offenses. On the conceptual side, my argument is that the vice crimes constitute an important addition to the taxonomy of preventive justice offenses that has been developed.

Early Twentieth Century American Vice Crimes Legislation

Laws regulating and often criminalizing vice-related conduct have existed in American law since the early colonial period, but they proliferated and gained particular prominence in the late 19th and early 20th centuries, in the wake of large-scale movements for social reform and a newly expansive assertion of federal criminal jurisdiction. For purposes of this discussion, I shall focus on two early 20th century pieces of vice crimes legislation that offer a particularly good illustration of the blurred lines between legal moralism and preventive justice: the Harrison Act of 1914 (prohibiting trafficking in opiates) and the Mann (White-Slave Traffic) Act of 1910 (banning the interstate transportation of females for "immoral purposes"). But these statutes are by no means unusual. They are representative of a larger collection of reformist-inspired statutes that also includes the Morrill Act of 1862 (banning plural marriage), Edmunds Act of 1882 (prohibiting unlawful cohabitation), Anti-Lottery Act of 1890 (banning the use of the mails to transport lottery tickets), Immigration Act of 1907 (prohibiting importation of women into the United States for prostitution and other "immoral purposes"), and Volstead Act of 1919 (banning the production, sale, and transportation of "intoxicating liquors").[5]

The Harrison Act

In the 1800s, opiates and cocaine were mostly unregulated drugs in the United States. Opium was commonly used for a variety of medicinal purposes, including dysentery, rheumatism, cholera, and lockjaw.[6] Morphine, first derived from opium in 1803, was regularly used as a stronger palliative with fewer direct side effects. Heroin, another opium derivative, first synthesized in 1874, was used in relieving numerous illnesses, especially

[4] E.g., Ashworth and Zedner, Just Prevention, above; G.R. Sullivan and Ian Dennis, *Seeking Security* (Oxford: Hart, 2012); Andrew Ashworth and Lucia Zedner, Prevention and Criminalization: Justification and Limits, 15 *New Criminal Law Review* 542 (2012); Ashworth, Zedner, and Tomlin, above.

[5] Harrison Narcotics Act of 1914, Public Law No. 223, 63rd Cong.; White-Slave Traffic (Mann) Act of 1910, ch. 395, 36 Stat. 825; *codified as amended at* 18 U.S.C. §§ 2421–2424; Morrill Anti-Bigamy Act of 1862, Sess. 2., ch. 126, 12 Stat. 501; Edmunds Act of 1882,22 Stat. 30 (1882), codified at 48 U.S.C. § 1461 (repealed 1983); Anti-Lottery Act of 1890, 28 Stat. 963; Immigration Act of 1907, ch. 1134, 34 Stat. 898; Volstead Act of 1919, Stat. ch. 83, 41 Stat. 305–323 (rendered unconstitutional by 21st Amendment). Most of these statutes are discussed in William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: HUP, 2011), which originally stimulated my interest in them.

[6] The description of opium, morphine, heroin, and cocaine use contained in this paragraph is derived from Margaret P. Battin, et al., *Drugs and Justice* (New York: OUP, 2008), 31–32.

those related to the upper respiratory system: coughs, congestion, asthma, bronchitis, and the like. Cocaine, first synthesized in 1858 as a stimulant and anesthetic, was used in the treatment of depression, anxiety, sexual disorders, headaches, and other ailments. Until the end of nineteenth century, these drugs were offered for sale without a prescription through retail stores and mail order companies.[7]

The American Progressive Movement of the late nineteenth and early twentieth centuries, led by a league of social reformers and ministers, initiated a campaign to change all this. The arguments used in favor of drug prohibitions focused on both the supposed immorality of drug use itself and the supposed harms that followed from such immorality. Drugs were deplored as the "creator of criminals and unusual forms of violence."[8] Drug culture was described as one of "[l]ate hours, dance halls, and unwholesome cabarets."[9] The harms were not just the direct physiological effect of the drugs themselves, but the more remote harms that drug use and addiction were believed to cause.

The harms that were said to result from drug use were often characterized in overtly racist and discriminatory terms. Opium consumption by Chinese railroad workers was blamed for violence, lascivious behavior, and other social ills.[10] Marijuana use by Mexicans residing in the U.S. was believed to lead to sexual abuse of white women. The effect of cocaine use on blacks was said to be particularly harmful. In 1914, as the Harrison Act was working its way through Congress, *The New York Times* published a hysterical article titled, "Negro Cocaine 'Fiends' Are New Southern Menace: Murder and Insanity Increasing among Lower-Class Blacks Because They Have Taken to 'Sniffing' Since Deprived of Whisky by Prohibition."[11]

The Harrison Act, Congress' first major piece of drug legislation, was passed in response to this litany of supposed harms and threats. One of its most striking features was the way it blurred the line between civil and criminal law regulation. The legislative history of the Act makes clear that its purpose was to criminalize the manufacture, sale, and possession of opium and its derivatives (like morphine and heroin) and the derivatives of the coca leaf (like cocaine).[12] But in 1914 there were doubts about the extent to which Congress had the power to criminalize behavior that was essentially local in nature. So, instead of criminalizing the non-medical use of these drugs directly, Congress enacted what, on its face, was a scheme of taxation, which Congress uncontroversially had the power to impose.

The law had two major provisions. The first imposed a *de minimis* tax of one dollar to be paid by doctors who wished to prescribe drugs for their patients.[13] This provision was subsequently interpreted to mean that a doctor could not prescribe opiates to an addict, since addiction was not considered to be a disease.[14] Doctors who did prescribe the drugs

[7] The Sears Roebuck catalogue, for example, distributed to millions of Americans homes, famously offered a syringe and a small amount of cocaine for $1.50.

[8] Battin, above, 32.

[9] Battin, id. (quoting Troy Duster, *The Legislation of Morality: Law, Drugs, and Moral Judgment* (New York: Free Press, 1970), 11).

[10] Battin, id.

[11] Edward Huntington Williams, *The New York Times* (Feb. 8, 1914).

[12] See, e.g,, statement of Rep. Thomas Sisson ("The purpose of this bill—and we are all in sympathy with it—is to prevent the use of opium in the United States, destructive as it is to human happiness and human life"), quoted in Thomas C. Rowe, *Federal Narcotics Laws and the War on Drugs: Money Down a Rat Hole* (Binghamton, NY: Haworth Press, 2006) 15.

[13] Harrison Narcotics Act of 1914, Public Law No. 223, 63rd Cong.

[14] *Webb v. United States*, 249 U.S. 96, 99 (1919).

to addicts were prosecuted and convicted. The second provision specified that only doctors acting "in the course of [their] professional practice" could prescribe such drugs, and pharmacies could sell them only pursuant to such prescriptions. The effect of the law was to criminalize most possession of the listed drugs. As Bill Stuntz put it, "[t]he tax was a fig leaf—not a means of raising money but a cover for a bill that barred drug dealers, sellers of patent medicine, and most pharmacies from distributing opium and cocaine, and forbade doctors to do so absent medical necessity."[15]

Although the legislative history of the Harrison Act suggests a mix of moralistic and preventive purposes, the Act's subsequent history shows a decided shift to a more exclusively preventive rationale. In the 1922 case of *United States v. Balint*, for example, the defendant had challenged his prosecution under the Act on the grounds that the indictment failed to require a showing of scienter.[16] The Supreme Court held that no such showing was necessary: the statute was construed as imposing strict liability. Where the government seeks to punish morally heinous conduct, the Court said, a showing of intent would be required. As interpreted by Chief Justice Taft, the Harrison Act was less a piece of ordinary criminal law than a species of public health regulation. As he put it, "the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the [relevant] crimes."[17]

The Harrison Act remained the cornerstone of American narcotics regulation until the second half of the 20th century. Later laws, like the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 and the Rockefeller Drug Laws in New York (first enacted in 1973, repealed in 2009), would add amphetamines, barbiturates, marijuana, hashish, and hallucinogens to the list of prohibited drugs. But the time for moralizing about drug use had mostly passed; the legislative history surrounding this later legislation included virtually no discussion of the underlying moral content of such laws; the rhetoric was almost invariably couched in terms of preventing harms to the user and society at large.[18]

Typical is the argument made by Justice Kennedy in his concurrence in the 1991 case of *Harmelin v. Michigan*, upholding a mandatory term of life in prison without possibility of parole for possessing 672 grams (about 1.5 pounds) of cocaine.[19] According to Kennedy:

> Possession, use, and distribution of illegal drugs represents "one of the greatest problems affecting the health and welfare of our population."… Petitioner's suggestion that his crime was nonviolent and victimless … is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
>
> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear

[15] Stuntz, above, 175–76.

[16] 258 U.S. 250 (1922).

[17] Id., 252.

[18] See Richard Nixon, Remarks on Signing the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Oct. 27, 1970), http://www.presidency.ucsb.edu/ws/?pid=2767 (Accessed: Sept. 20, 2013); Michael Javen Fortner, The Carceral State and the Crucible of Black Politics: An Urban History of the Rockefeller Drug Laws, 27 *Studies in American Political Development* 14 (2013).

[19] 501 U.S. 957, 996 (1991) (Kennedy, J., concurring).

> out these possibilities, and demonstrate a direct nexus between illegal drugs and crimes of violence. To mention but a few examples, 57 percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively. In Detroit, Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. And last year, an estimated 60 percent of the homicides in Detroit were drug-related, primarily cocaine-related.[20]

As we will see below, there are serious problems with Justice Kennedy's argument. For example, the fact that some people commit crimes in order to obtain money to buy drugs is no better a rationale for criminalizing drug possession than the fact that some people commit crimes in order to obtain money to buy cars or jewelry is a rationale for criminalizing "car possession" or "jewelry possession." And the fact that people commit crimes "as part of" the illegal business of drugs is no argument at all for criminalizing drugs; if anything, it is an argument for decriminalizing them. The real question, which will be discussed further below, is whether "drug-induced changes in physiological functions, cognitive ability, [or] mood" cause drug users to commit crimes they otherwise would not commit.

A few commentators, such as James Q. Wilson, making the case in 1990 for criminalizing the use of cocaine but not nicotine, have continued to speak of drug use in moralistic terms: "Tobacco shortens one's life," he wrote, "cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul. The heavy use of crack, unlike the heavy use of tobacco, corrodes those natural sentiments of sympathy and duty that constitute our human nature and make possible our social life."[21] But even Wilson ultimately resorted to the language of prevention. As he put it in the same essay:

> The notion that abusing drugs such as cocaine is a "victimless crime" is not only absurd but dangerous. Even ignoring the fetal drug syndrome, crack-dependent people are, like heroin addicts, individuals who regularly victimize their children by neglect, their spouses by improvidence, their employers by lethargy, and their co-workers by carelessness.[22]

At this point in the history of drug crimes regulation, it is fair to say that the rhetoric of "harm" and "prevention" has almost completely superseded that of moralism.

The Mann Act

While the history of narcotics legislation in the U.S. illustrates a shift from a largely moralistic rationale to an almost exclusively preventive one, the history of federal prostitution legislation reflects a more complex set of changes: first, from prevention to moralism; and then from moralism back to prevention.

In the late 19th century, the practice of prostitution, like drug use, was widely tolerated in much of the United States. Although there were laws against prostitution on the books in

[20] Id., 1002–03 (citations omitted).

[21] James Q. Wilson, "Against the Legalization of Drugs," *Commentary* (Feb. 1990), http://www.commentarymagazine.com/article/against-the-legalization-of-drugs/ (Accessed: Sept. 20, 2013).

[22] Id.

most jurisdictions, they were only rarely enforced. Police officers were often on bordello payrolls; in some parts of the country, especially in the West, brothels were counted on to fund public schools and other government services.[23] The most commonly used regulatory approach to prostitution was zoning, with prostitution restricted to designated areas of various cities (including New Orleans' infamous Storyville).[24]

By the beginning of the 20th century, this tolerance of prostitution had begun to wane. The economy was becoming increasingly industrialized, and young, single women were moving to the cities and entering the workforce. Social reformers like Jane Addams warned about the degrading effects of tenement living and factory work.[25] Hysteria about the dangers faced by these young women was fueled by muckraking journalists who ran sensationalized stories of innocent girls kidnapped off the streets, drugged, smuggled across the country, and forced to work in brothels.[26] The influential 1911 report of the Vice Commission of Chicago spoke of the "sad life of prostitution," the "ghastly life story of fallen women," and the "morally and physically debasing and degrading" effects of the practice.[27] The evils of prostitution were regularly compared to the evils of slavery.[28] Prostitution was expressly and damningly labeled as the "white slave trade."

Reformers like Theodore Roosevelt, while serving as president of the New York City Police Commission, looked for more aggressive ways than simple zoning to limit the practice.[29] The Mann Act of 1910 (officially known as the White-Slave Traffic Act) was the most prominent legislative product of this new mindset.[30] The stated purpose of the Act was to punish international and interstate trafficking in women coerced into prostitution.[31]

[23] Stuntz, above, 169.

[24] The history of prostitution legislation in England reflects a very different path. The mid-nineteenth century saw epidemic levels in the incidence of venereal diseases among members of the British armed services, owing largely to the use of prostitutes. In response, Parliament enacted a harsh series of civil statutes known as the Contagious Diseases Acts (of 1864, 1866, and 1869), which allowed police officers to arrest prostitutes in certain ports and garrison towns, and subject them to compulsory checks for venereal disease. Women who were found to be infected were confined in lock hospitals for up to 3 months, until "cured." The acts were widely criticized as demonstrating the double standard that applied to men and women in Victorian society: the heavy burdens they entailed were imposed solely on prostitutes; no provision was made for the examination of their clientele. In response to pressure from early feminists, moralists, and civil libertarians, the acts were repealed in 1886. For an account, see Jeremy Waldron, Mill on Liberty and on the Contagious Diseases Acts, in Nadia Urbinati and Alex Zakaras (eds.), *J.S. Mill's Political Thought: A Bicentennial Reassessment* (Cambridge: CUP (2007), 11. Cf. David Dixon, *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law* (New York: OUP, 2006) (late nineteenth and early twentieth century advocates for English betting regulation used moralist rhetoric, but were equally concerned with the harmful effects of gambling on working-class communities.

[25] David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* (Chicago: University of Chicago Press, 1994), 17–19.

[26] Id., 33–34, 65–66.

[27] Peter de Marneffe, *Liberalism and Prostitution* (New York: OUP, 2010), 60 (quoting 1911 Chicago Report).

[28] As the social reformer Maude Miner put it in her 1916 book, *Slavery of Prostitution: A Plea for Emancipation*, a slavery even worse than that which existed in the antebellum South "exists in our midst today. Women are held in moral and spiritual bondage which deadens and destroys their highest powers," (quoted in de Marneffe, above, 59).

[29] See Richard Zacks, *Island of Vice: Theodore Roosevelt's Doomed Quest to Clean Up Sin-Loving New York* (New York: Doubleday, 2012).

[30] White Slave Traffic (Mann) Act, Pub. L. No. 61-277, §2, 36 Stat. 825 (1910), *codified as amended at* 18 U.S.C. §§ 2421–2424. For a detailed history of the Act, see Langum, above.

[31] See White Slave Traffic, H.R. Rep. No. 61-47 (1909); White Slave Traffic, S. Rep. No. 61-886 (1910).

But, for reasons that are hard to reconstruct, the Act's language went much further, authorizing punishment not just for all commercial sex but for "any person who shall knowingly transport or cause to be transported … in interstate or foreign commerce … any woman or girl for the purpose of prostitution *or debauchery, or for any other immoral purpose*."[32] Progressive Era social reformers, it seems, were unable, or unwilling, to distinguish between women who were sexually liberated and prostitutes.

The Act was interpreted no less broadly than its language would suggest. Between 1917 and 1928, about 70 percent of Mann Act prosecutions were for non-coerced, non-commercial sexual conduct.[33] Wealthy married men who were having affairs or who could be tempted into having affairs became targets for extortionists, and jilted spouses of adulterers could use the threat of Mann Act prosecution to obtain more favorable divorce settlements.[34] Most famous was the 1917 Supreme Court case of *Caminetti v. United States*, which upheld the use of the Mann Act to prosecute two adulterous men who did nothing more harmful than take a train across state lines in the company of their mistresses. Rejecting the defendants' argument that the phrase, "any other immoral purpose," should be read in light of the statute's legislative goal of suppressing coerced prostitution, the majority construed the statute in light of its plain language.[35] In these cases, the Mann Act was used to prosecute conduct that was not in any recognizable sense of the term harmful. In short, the early history of the Mann Act reveals a transformation from a statute that was largely (if not exclusively) preventive in its orientation to one that was overtly moralistic and thereby much broader in its scope.

But the Mann Act would eventually return to its preventive roots. By 1930, the Act was seldom applied to non-prostitution cases. Prosecutors in many federal districts reported that juries would no longer convict in noncommercial cases unless there were significant special circumstances.[36] It wasn't until 1986, however, that the broad "any other immoral purpose" language was replaced with the phrase "any sexual activity for which any person can be charged with a criminal offense."

Prostitution remains a crime in most American jurisdictions today, though there are occasional attempts to legalize, or at least decriminalize, it. When that happens, many defenders of prostitution legislation tend to base their arguments primarily on a rationale of preventing harms—whether it is the spread of sexually transmitted diseases, the degradation of women, psychological harms to sex workers, or "broken windows"-type criminality.[37] But a residual moralistic or punitive strain, more prominent than that seen in the case of drug prohibition, can nevertheless be seen running through a number of arguments offered in support of prostitution laws. One argument, offered by Lord Devlin in the 1960s,

[32] 18 U.S.C. § 2421. The "immoral purposes" language was borrowed from the 1907 amendments to the 1875 Immigration Act, ch. 1134, §39, 34 Stat. 898. The two laws are discussed in Ariela R. Dubler, Immoral Purposes: Marriage and the Genus of Illicit Sex, 115 *Yale L.J.* 756 (2006).

[33] Jim Leitzel, *Regulating Vice*, 133 (New York: Cambridge U. Press, 2008).

[34] Id.

[35] 242 U.S. 470, 485 (1917). See also Dubler, above, 793–94.

[36] *Gale's Major Acts of Congress*: Mann Act, http://www.answers.com/topic/mann-act (Accessed: Sept. 20, 2013).

[37] For a helpful summary of the literature, see Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 *The Journal of Legal Studies* 693, 710–23 (1998); see also Michelle Madden Dempsey, Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm, *Criminal Law Review* 444 (2005). The idea that moralistic reasons could not justify laws against prohibition was expressed most famously in the Wolfenden Committee *Report on Homosexual Offences and Prostitution* (HMSO, 1957).

is that "[a]ll sexual immorality involves the exploitation of human weakness. The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute."[38] A second, "essentialist" argument holds that "there is some intrinsic property of sex which makes its commodification wrong."[39] Third, there is a view, articulated by Andrea Dworkin and other feminist scholars, that focuses on the inherently sexist dynamic of prostitution. As she puts it, "[p]rostitution in and of itself is an abuse of a woman's body…. When men use women in prostitution, they are expressing a pure hatred for the female body."[40]

Analysis

What can this examination of two leading pieces of century-old vice crimes legislation and their progeny tell us about the phenomenon of preventive justice in our own time? And what can the analysis of preventive justice tell us, in turn, about the vice crimes? I would like to suggest five lines of inquiry that seem to me worth pursuing:

1. It has been claimed that modern, forward-looking, preventive offenses like those that authorize anti-social behavior orders and control orders reflect a departure from the traditional, reactive, post hoc, punitive paradigm of criminal law. How, if at all, does a consideration of the vice crimes bear on this historical understanding?
2. Modern preventive offenses are said to reflect a poor fit between the conduct they prohibit and the harms they seek to prevent; the offenses are essentially overbroad. To what extent do the vice crimes suffer from a similar defect?
3. Various attempts have been made to categorize and classify the preventive offenses within the corpus of criminal law. How do the vice crime offenses fit into this classificatory scheme? Is there an overlap? Are they a wholly contained subset of the preventive offenses?
4. Modern preventive justice offenses are sometimes said to be the result of moral panics—disproportionate legislative responses to populist perceptions of societal threat. Enforcement is often carried out in a discriminatory manner. To what extent do the vice crimes reflect a similar set of social origins and pattern of enforcement?
5. The preventive justice offenses are often said to blur the boundaries between the criminal and civil law. To what extent do the vice crimes do something similar?

Departure from Punitive Paradigm

According to a familiar account, criminal law has historically been oriented around reactive policing and post hoc punishment.[41] The late twentieth and early twenty-first century introduction of "broken windows" policing and anti-terror legislation has been said to reflect a shift away from the traditional paradigm and toward a preventive rationale

[38] Patrick Devlin, *The Enforcement of Morals* (Oxford: OUP, 1965), 12.

[39] Debra Satz, Markets in Women's Sexual Labor, 106 *Ethics* 63, 70 (1995) (subjecting such "essentialist" arguments to critique).

[40] Andrea Dworkin, Prostitution and Male Dominance, in *Life and Death* (New York: Free Press, 1997), 139, 141, 145.

[41] See, e.g., Ashworth and Zedner, Prevention and Criminalization, above, 542–43.

that seeks to avert harms before they occur.[42] The question is whether the existence of early twentieth century vice crime statutes like the Harrison and Mann Acts supports or undermines this account.

Liberal theorists have often characterized the vice crimes as punishing harmless immoralities. According to Harcourt, the vice crimes were originally conceived of as such; it was only later, in the middle of the twentieth century, that defenders of such legislation began to back away from the moralistic rationale formerly relied upon and ascribe a (watered-down) harm rationale.[43]

The history offered above suggests that this account is not entirely accurate. Even in an age in which moralistic rhetoric was a far more common element in political and legal discourse than it is today, it is hard to find much evidence of a desire on the part of even the most perfectionist legal moralists to impose punishments *merely* for immoral behavior. No legal moralist, to my knowledge, has ever called for the criminalization of morally bad acts, such as lying, promise-breaking, or exploitation per se.[44] Almost since the beginning, supporters of vice crime legislation have stressed its preventive functions. The Harrison Act, for example, was obviously enacted, at least in part, as a means to avert the supposed dangers of drug addiction and its associated social pathologies. The Mann Act, likewise, clearly had among its goals the prevention of harms that prostitution was believed to be inflicting on young women caught up in a changing social order.[45]

Fit Between Conduct Prohibited and Harm Sought to be Prevented

One of the major criticisms of modern preventive offenses is that the harms they are supposedly intended to prevent often lie at a considerable distance from the conduct they prohibit.[46] Consider the case of laws that prohibit the possession, rather than use, of explosives and firearms, even though it is obvious that people can and frequently do possess such things without using them to do any actual harm. Similarly, a person can attend a place used for terrorist training or trespass on a nuclear site (both acts prohibited by the Terrorism Act 2006) without engaging in any conduct that causes anyone harm. In such offenses, the conduct identified in the *actus reus* of such offenses is said to be a poor proxy for the actual harm the offense is meant to prevent.[47]

In the case of the Harrison and Mann Acts, the relationship between the conduct prohibited and the harms sought to be prevented is at least as problematic, though each in somewhat different ways. Let us look first at the Harrison Act, and let us assume that the kinds of harm the Act was ostensibly intended to prevent—drug-related "violence," "lascivious behavior," "sexual abuse," and "murder and insanity"—are genuine harms of the kind that are a proper concern of the law, and that the direct

[42] Id.

[43] Harcourt, above, 113–16.

[44] Although Robert George may come close. See Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (New York: OUP, 1993) (arguing for law as a way to maintain a moral environment conducive to virtue and inhospitable to at least some forms of vice).

[45] Whether the connection between conduct prohibited and harms caused was sufficiently strong to justify criminalization is, of course, a different question, one which is dealt with below.

[46] I am particularly grateful to Antony Duff for his help with the formulation of the discussion in this section.

[47] See, e.g., the critique by A.P. Simester, Prophylactic Crimes, in *Seeking Security*, 59–78.

knowing or intentional causation of such harms to others would, in principle, be appropriate for criminalization.

So how close was the connection between the harms identified and the conduct actually prohibited under the Act? The answer is: not close at all. As previously noted, the Harrison Act criminalized neither drug possession nor drug use. Instead, it criminalized the failure to pay taxes owed for the production and sale of listed drugs. And the connection between the failure to pay taxes owed and the prevention of violent behavior said to justify the Act seems, at best, remote. Even as a tax measure, the Act was ineffectual, since the law never was intended to raise revenue.

But what if the Act *had* criminalized drug possession or use, as so many later drug statutes have done? Even this formulation, I would argue, would involve an overly attenuated connection between conduct and harm. Neither possession, nor use, *by itself*, causes harm to others: The drug user has to perform (or, in the case of omission liability, fail to perform) some additional act before his conduct can potentially harm others.[48]

The real question, as noted above, is whether there is a demonstrable causal connection between drug use and various downstream, follow-on crimes; and, if so, whether such connection constitutes a valid basis for criminalization. Not surprisingly, finding a reliable answer to the causation question has proved to be extraordinarily difficult. While it is true that most individuals who use illegal drugs do not engage in serious crime (other than possession and use itself), it is also the case that rates of drug use and addiction are higher among individuals convicted of crimes than among the general population. This is presumably the point Justice Kennedy was getting at in his concurrence in *Harmelin*. But it is far from clear what such data—even if they were not cherry-picked and overgeneralized—would actually prove. That *X* percent of people arrested for one or another offense tested positive for use of one or another illegal drug tells us virtually nothing about whether such use *causes* crime. Without more analysis, such data tell us nothing more than that the population of persons who are most likely to use at least certain types of illegal drugs overlaps with the population of persons most likely to commit at least certain types of crime. And the explanation for such overlap might not involve any causal connection at all between drug use and the commission of violent crime. For example, it might simply be the case that both kinds of activity—drug use and violence—attract the same or similar groups of actors: say, persons with less self-control, less education, less wealth, fewer occupational opportunities, or less access to legal forms of recreational drug.[49]

[48] As Doug Husak puts it, "[d]rug use per se is almost never harmful to others in the absence of further acts the drug user performs or fails to perform." Douglas N. Husak, *Drugs and Rights* (Cambridge: CUP, 1992), 178.

[49] The social science literature on the connection between drug use and crime commission is immense. For a sampling, see Center for Substance Abuse Research, Marijuana Most Commonly Detected Drug Among Male Arrestees Tested by ADAM II in Five U.S. Sites (July 2013), http://www.cesar.umd.edu/cesar/cesarfax/vol22/22-30.pdf (Accessed: Sept. 20, 2013); Christopher J. Mumola and Jennifer C. Karberg, U.S. Department of Justice, Office of Justice Programs, Drug Use and Dependence, State and Federal Prisoners, 2004 (October 2006); Bradley T. Conner, et al, Examining Self-Control as a Multidimensional Predictor of Crime and Drug Use in Adolescents with Criminal Histories, 36 *Journal of Behavioral Health Services and Research* 137 (2009); Shane Darke, et al., Comparative Rates of Violent Crime Among Regular Methamphetamine and Opioid Users: Offending and Victimization, 105 *Addiction* 916 (2010); Avelardo Valdez, et al., Aggressive Crime, Alcohol and Drug Abuse, and Concentrated Poverty in 24 U.S. Urban Areas, 33 *American Journal of Drug and Alcohol Abuse* 595 (2007); J. Matthew Webster, et al, Substance Use, Criminal Activity, and Mental Health Among Violent and Nonviolent Rural Probationers, 30 *Journal of Addictions & Offender Counseling* 99 (2010).

Moreover, even if it could be shown that the use of at least certain drugs did cause people to be more violent, drug possession and use laws would still arguably be too broad. In a society that takes the liberal harm principle seriously, we should only criminalize conduct when doing so will efficiently prevent harm. The fact that some types of drug use might cause physiological states that could, in some cases, for some actors, in ways we don't really understand, be associated with anti-social behavior, does not seem to satisfy that requirement.[50]

The Mann Act presents a different set of problems concerning the fit between prohibited acts and harms. Although intended to target forced prostitution, the Act employed language that applied far more broadly, to the interstate shipment of females for any "immoral purpose," and led to the prosecution of men engaged in nothing more harmful than having extramarital affairs.

That was in the Mann Act's early years of enforcement, however. By the 1930 s, the Act was being limited in application to the sale and purchase of sex, and the transportation of women for that purpose. Here the link between the conduct prohibited and the relevant harms seems generally less problematic than in the case of the Harrison Act. Studies show that a great deal of the sex trade is indeed rife with various kinds of exploitation, oppression, and coercion.[51] One need not go so far as Dworkin in believing that *every* commercial sexual transaction (or at least every transaction in which the person paid for sex is a woman) is coercive to think that criminalization might be appropriate in this area.

Assuming that the main rationale for criminalizing prostitution is that the seller of sex is in danger of being exploited or coerced,[52] then it would seem to follow that only the acts of buying and procuring sex should be criminalized, and not the act of selling it. (This is essentially the approach to prostitution legislation used in Sweden, Norway, and Iceland—under the so-called Nordic model.[53])

Beyond that, matters are less clear. For example, we would need to decide whether to criminalize only those sex consumers who knowingly engage in sexual coercion or exploitation, or all those who purchase sex unless they can show that they took reasonable care to ensure that they were not making themselves complicit in coercive exploitation.[54] Or perhaps we should simply criminalize all those who purchase sex, on the grounds that such conduct always involves a risk that the seller has been victimized, or always encourages the sex trade and thus makes the buyer complicit in its criminally coercive exploitation. One could not in this way justify the full scope of the original Mann Act: but the problem here is not so much the positing of dubious causal connections (as it was in the Harrison Act); instead, it is the overbroad definition of the type of conduct which does

[50] For a review of the neuroscientific literature on the connection between drug use, violence, and other social pathologies, see Carl Hart and Charles Ksir, *Drugs, Society, and Human Behavior* (New York: McGraw-Hill, 15th ed. 2012).

[51] See, e.g., Michelle Dempsey, Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism, 158 *University of Pennsylvania Law Review* 1729 (2010).

[52] Another important purpose is the prevention of disease, though this may be exactly the sort of harm most effectively dealt with through civil regulations requiring health checks, as is done, for example, in Amsterdam and some counties in Nevada.

[53] Gunilla Ekberg, The Swedish Law that Prohibits the Purchase of Sexual Services, 10 *Violence Against Women* 1187 (2004).

[54] Cf. Policing and Crime Act 2009, s.14 (offender commits offense of paying for sexual services of a prostitute subjected to force if the person makes or promises payment for sexual services and a third person has engaged in exploitative conduct of the prostitute likely to induce or encourage the provision of sexual services).

involve a genuine risk of the relevant kind of harm. (It is also true that in the case of prostitution the causal connections are less straightforward: sometimes the criminalized conduct is not so much a direct source of harm to another individual, but rather a matter of taking advantage of an exploitative and coercive practice, and thus encouraging its continuance.)

Classification of Offenses

Ashworth and Zedner, in recent work, have offered a taxonomy of criminal offenses intended to show how the preventive rationale has led to the enactment of offenses that diverge from the paradigm of traditional "harm-plus-culpability" offenses like murder, rape, and robbery.[55] While not necessarily canonical, their taxonomy offers a useful starting point for analysis. Among the kinds of offenses that depart from the traditional paradigm and presumably should be regarded as preventive in their orientation, Ashworth and Zedner say, are inchoate offenses (such as attempt and conspiracy), substantive offenses defined in the inchoate mode (such as fraud and burglary), preparatory and pre-inchoate offenses (e.g., publishing a statement that is likely to be understood as an encouragement of terrorism), crimes of possession (like possessing explosives, drugs, or indecent images), crimes of membership (such as being a member of a terrorist organization), and crimes of endangerment (e.g., drunk driving and speeding). So, the question arises, which vice crimes would fit into this taxonomy and how? Do vice crimes represent a fully contained subcategory of preventive offenses, or do they merely overlap with the preventive offenses? And how should we categorize those offenses that fall outside the existing taxonomy?

One kind of offense that obviously has a place in Ashworth and Zedner's taxonomy involves possession: Possession of drugs is presumably prohibited in an effort to prevent the supposed effects of drug use; possession of child pornography is presumably prohibited as a means of preventing the exploitation of children that accompanies the production of such material (though the viewing of such material may be viewed as inherently immoral as well). But, beyond that, classification of vice-related behavior becomes more complicated. Neither prostitution, polygamy, nor illegal gambling seems to fit comfortably into the inchoate, pre-inchoate, possession, or membership categories. One possible candidate here is crimes of endangerment.[56] Under this classification, the argument would be that, as in the case of drunk driving and speeding, prostitution (at least in cases in which the offender is buying or procuring sex), polygamy (in cases where a single offender marries multiple spouses), and perhaps illegal gambling (in cases where the offender runs an illegal gambling operation) create an unacceptable risk of harm, whether of coercion, exploitation, or oppression—of the prostitute, polygamous wives, or compulsive gambler, as the case may be.

Moral Panics and Selective Enforcement

Paradigmatic late twentieth and early twenty-first century preventive offenses, such as Megan's Law (requiring sex offender registration) and the Terrorism Act 2006 are often said to be the result of moral panics—uneven and ill-fitting legislative responses to

[55] See Ashworth and Zedner, Just Prevention, above; Ashworth and Zedner, Prevention and Criminalization, above.

[56] Cf. Antony Duff, Criminalizing Endangerment, in Antony Duff and Stuart P. Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford U. Press, 2005), 43.

widespread and volatile perceptions of societal threat.[57] Such laws are frequently enforced in a manner that has a disproportionate and discriminatory impact on disfavored groups within society—whether it is Muslims, in the case of anti-terror laws; inner city minority youths, in the case of drug laws; or sex offenders (including, typically, sex offenders whose convictions have nothing to do with children), in the case of Megan's Law.

The early twentieth century vice crime statutes discussed above seem to fit this pattern to a T. The Harrison Act, as we saw above, was the product of widespread hysteria concerning drug use specifically among minority U.S. populations—Chinese immigrants, blacks, and Mexicans. And enforcement of drug laws, including the Harrison Act, has always tended to focus on street sales and use, typically in poor, minority neighborhoods.[58] The Mann Act, for its part, was enacted in response to sensationalistic accounts of the threat to single, young women, newly arrived in American cities. Enforcement of the Act was highly selective: For example, among the earliest defendants to be prosecuted was Jack Johnson, the first African-American heavyweight boxing champion, whose public persona was threatening to many whites. In 1913, he was charged, convicted, and sentenced to prison for transporting his white girlfriend (whom he later married) across state lines.

Other vice laws fit a similar pattern. The broader a statute is drawn, and the more innocent or harmless the conduct within its scope, the more often police and prosecutors are called upon to use their enforcement discretion. Thus, enforcement of prostitution laws typically focuses on street prostitutes, many of whom are women of color. A major federal law against polygamy, the Morrill Act of 1862, was enacted and enforced almost exclusively with members of the Mormon Church in mind. Gambling laws tend to focus on the kind of "numbers" games favored by the poor. The vice crimes, especially the drug offenses, have contributed hugely to our epidemic of overcriminalization and over-incarceration. At times, it can seem as if the main purpose of such legislation is not to punish or prevent harmful or risky behavior, but simply to provide police with an opportunity to stop or arrest individuals whom society deems to be dangerous or threatening.[59]

Blurring of Boundaries Between Civil and Criminal Law

A final set of problems said to plague modern preventive offenses is that they blur the boundaries between civil and criminal law by applying criminal sanctions for what should properly be a matter of (at most) civil law and impose such penalties without the procedural protections normally provided to defendants in criminal cases. For example, under the English anti-social behavior order provision, a civil order may be imposed where the defendant is found to have acted in an anti-social manner. The court may then impose an order prohibiting the defendant from doing acts which are described in the order. Breach of this civil order is considered a criminal offense, imposing a maximum penalty of 5 years in prison.[60]

[57] Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale U. Press, 1998); Martha C. Nussbaum, *Hiding from Humanity: Disgust and Shame in the Law* (Princeton: Princeton U. Press, 2004); Wayne A. Logan, Megan's Law as a Case Study in Political Stasis, 61 *Syracuse L. Rev.* 371 (2011).

[58] See generally Charles Whitebread, "Us" and "Them" and the Nature of Moral Regulation, 74 *California L. Rev.* 361 (2000).

[59] As Stuntz put it, during the Progressive Era, "American criminal law ceased to define the conduct and intent that prosecutors sought to punish, and instead treated crime definition as a means of facilitating arrests, prosecutions, and convictions." Stuntz, above, 159.

[60] Crime and Disorder Act 1998. For an unusual, and qualified, defense of such two-step prohibitions, see Andrew Cornford, Criminalising Anti-Social Behaviour, 6 *Criminal Law and Philosophy* 1 (2012).

The early vice crimes suffered, to some degree, from similar problems. The Harrison Act used a transparently tortuous device to get around what was perceived as a constitutional barrier to more direct enforcement. Rather than straightforwardly criminalizing the use or possession of listed drugs, the statute imposed a civil requirement to pay a tax and register with the government, and then made it a crime to fail to comply with those requirements. The Mann Act, for its part, though not employing such civil law work-arounds, nevertheless encroached on an area that is arguably more appropriately dealt with by civil law—whether through licensing, zoning and advertising restrictions, health inspections, or tax regulations. The same can presumably be said of other vice crimes laws, involving matters such as gambling, alcohol use, plural marriage, and pornography.

Conclusion

What exactly does this collection of now-century-old vice offenses tell us about the phenomenon of preventive justice, and how in turn do the preventive offenses inform our understanding of the vice crimes? Let me offer two concluding thoughts: First, the notion that preventive justice is largely a modern development in the criminal law needs to be reconsidered. At least in the American context, departures from what Ashworth and Zedner have called the paradigm of "harm plus culpability" have been a staple of federal criminal law since at least the end of the nineteenth century. Second, the claim, put forward by Harcourt, that the reconceptualization of vice crimes as harm—or prevention-focused offenses occurred mainly during the second half of the twentieth century—needs to be reevaluated as well. In fact, what we think of as vice crimes were hardly ever a matter of mere immorality, even among those most sympathetic to the idea of legal moralism. Right from the start, those who have advocated for such offenses have sought to justify them in terms that strikingly anticipate the latter day preventive offenses.

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References

Ashworth, Andrew, and Lucia Zedner (2012), Prevention and Criminalization: Justification and Limits, 15 *New Criminal Law Review* 542.

Ashworth, Andrew, and Lucia Zedner (2011). Just Prevention: Preventive Rationales and the Limits of the Criminal Law, in R.A. Duff and Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law*. Oxford: OUP.

Battin, Margaret P., et al. (2008). *Drugs and Justice*. New York: OUP.

Cornford, Andrew (2012). Criminalising Anti-Social Behaviour, 6 *Criminal Law and Philosophy* 1.

de Marneffe, Peter (2010). *Liberalism and Prostitution*. New York; OUP.

Dempsey, Michelle Madden (2005). Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm, *Criminal Law Review* 444.

Dempsey, Michelle (2010). Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism, 158 *University of Pennsylvania Law Review* 1729.

Devlin, Patrick (1965). *The Enforcement of Morals*. Oxford: OUP.

Dixon, David (2006). *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law*. New York: OUP.

Dubler, Ariela R. (2006). Immoral Purposes: Marriage and the Genus of Illicit Sex, 115 *Yale L.J.* 75.

Duff, Antony (2005). Criminalizing Endangerment, in Antony Duff and Stuart P. Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law*. Oxford: OUP.

Dworkin, Andrea (1997). Prostitution and Male Dominance, in *Life and Death*. New York: Free Press.
Ekberg, Gunilla (2004). The Swedish Law that Prohibits the Purchase of Sexual Services, 10 *Violence Against Women* 1187.
Fortner, Michael Javen (2013). The Carceral State and the Crucible of Black Politics: An Urban History of the Rockefeller Drug Laws, 27 *Studies in American Political Development* 14.
George, Robert P. (1993). *Making Men Moral: Civil Liberties and Public Morality*. New York: OUP.
Green, Stuart P. (2013). Foreword: Symposium on Vice and the Criminal Law, 7 *Criminal Law and Philosophy* 213.
Harcourt, Bernard E. (1999). The Collapse of the Harm Principle, 90 *J. Criminal Law & Criminology* 148.
Hart, Carl and Charles Ksir (2012). *Drugs, Society, and Human Behavior*. New York: McGraw-Hill, 15th ed.
Husak, Douglas N. (1992). *Drugs and Rights*. Cambridge: CUP.
Jenkins, Philip (1998). *Moral Panic: Changing Concepts of the Child Molester in Modern America*. New Haven: Yale U. Press.
Langum, David J. (1994). *Crossing Over the Line: Legislating Morality and the Mann Act*. Chicago: University of Chicago Press.
Leitzel, Jim (2008). *Regulating Vice*. New York: CUP.
Logan, Wayne A. (2011). Megan's Law as a Case Study in Political Stasis, 61 *Syracuse L. Rev.* 371.
Nussbaum, Martha C. (2004). *Hiding from Humanity: Disgust and Shame in the Law*. Princeton; Princeton U. Press.
Nussbaum, Martha C. (1998). "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 *Legal Studies* 693.
Rowe, Thomas C. (2006). *Federal Narcotics Laws and the War on Drugs: Money Down a Rat Hole* (Binghamton, NY: Haworth Press).
Satz, Debra (1995). Markets in Women's Sexual Labor, 106 *Ethics* 63.
Schauer, Frederic (2013). The Ubiquity of Prevention, in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds.), *Prevention and the Limits of the Criminal Law*. Oxford: OUP.
Simester, A.P (2012). Prophylactic Crimes, in G.R. Sullivan and Ian Dennis, *Seeking Security: Pre-Empting the Commission of Criminal Harms*, at 61. Oxford: Hart.
Stuntz, William J. (2011). *The Collapse of American Criminal Justice*. Cambridge, MA: HUP.
Sullivan, G.R. and Ian Dennis (eds.) (2012). *Seeking Security*. Oxford: Hart.
Waldron, Jeremy (2007). Mill on Liberty and on the Contagious Diseases Acts, in Nadia Urbinati and Alex Zakaras (eds.), *J.S. Mill's Political Thought: A Bicentennial Reassessment*, at 11. Cambridge: CUP.
Whitebread, Charles (2000). "Us" and "Them" and the Nature of Moral Regulation, 74 *California L. Rev.* 361.
Wilson, James Q. (1990). Against the Legalization of Drugs, *Commentary* (Feb. 1990), http://www.commentarymagazine.com/article/against-the-legalization-of-drugs/ (Accessed: Sept. 20, 2013).
Zacks, Richard (2012). *Island of Vice: Theodore Roosevelt's Doomed Quest to Clean Up Sin-Loving New York*. New York: Doubleday.